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## The Great Gun Control War of the Twentieth Century—and its Lessons for Gun Laws Today

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# THE GREAT GUN CONTROL WAR OF THE TWENTIETH CENTURY – AND ITS LESSONS FOR GUN LAWS TODAY

*David B. Kopel\**

Introduction .....	1528
I. From the Roaring Twenties to the Calm Fifties .....	1529
A. The 1920s.....	1529
B. The New Deal and World War II.....	1532
C. The 1950s.....	1535
II. Things Fall Apart .....	1537
A. 1966 .....	1539
B. 1967 .....	1540
C. 1968.....	1542
III. The 1970s .....	1550
A. The Rise of the Handgun Prohibition Lobbies and the Revolt at the NRA .....	1551
B. Handgun Prohibition Efforts in the District of Columbia and Massachusetts.....	1557
C. The NRA Counteroffensive, and the Growing Sophistication of the Gun Control Lobby.....	1565
IV. The Age of Reagan.....	1566
V. George H.W. Bush.....	1578
VI. The Clinton Era .....	1582
VII. The Re-emergence of the Second Amendment .....	1590
VIII. Columbine and the 2000 Election.....	1597
IX. The Great American Gun War Winds Down .....	1601

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X. Gun Control in the Twenty-First Century .....1607

    A. No Systems Designed to Impede Responsible Gun  
    Ownership and Use.....1607

    B. No Bans on Common Types of Firearms .....1608

    C. Protection of the Right of Self-Defense .....1610

    D. Judicial Protection of the Right to Licensed Carry, but  
    Not to Unlicensed Concealed Carry .....1611

**INTRODUCTION**

A movement to ban handguns began in the 1920s in the Northeast, led by the conservative business establishment. In response, the National Rifle Association (NRA) began to get involved in politics and was able to defeat handgun prohibition. Gun control and gun rights became the subjects of intense political, social, and cultural battles for much of the rest of the twentieth century and into the twenty-first.

Often, the battles were a clash of absolutes: One side contended that there was absolutely no right to arms, that defensive gun ownership must be prohibited, and that gun ownership for sporting purposes could be, at most, allowed as a very limited privilege. The other side asserted that the right to arms was absolute, and that any gun control laws infringed that right.

By the time that *Heller* and *McDonald* came to the Supreme Court, the battles had mostly been resolved. The Supreme Court did not break new ground, but instead reinforced what had become the American consensus: the Second Amendment right to keep and bear arms, especially for self-defense, is a fundamental individual right. That right, however, is not absolute. There are some gun control laws that do not violate the right, particularly laws which aim to keep guns out of the hands of people who have proven themselves to be dangerous.

In the post-*Heller* world, as in the post-*Brown v. Board of Education* world, a key role of the courts will be to enforce federal constitutional rights against some local or state jurisdictions whose extreme laws make them outliers from the national consensus.

## I. FROM THE ROARING TWENTIES TO THE CALM FIFTIES

### A. The 1920s

During the nineteenth century, gun control was almost exclusively a Southern phenomenon.<sup>1</sup> It was concerned with keeping guns out of the hands of slaves or free blacks before the Civil War, curbing dueling, and suppressing the freedmen after the Civil War.<sup>2</sup> The only gun control that found favor outside the region was restricting the concealed carrying of handguns.<sup>3</sup> While openly carrying weapons (“open carry”) was considered legitimate and constitutionally protected, concealed carrying of weapons (“concealed carry”) was viewed as something that would be done only by a person who was up to no good.<sup>4</sup>

Towards the end of the century, fears of labor unrest led some states to enact bans on mass armed parades without a permit.<sup>5</sup> Early in the twentieth century, concerns about organized labor, the huge number of immigrants, and race riots in which some blacks defended themselves with firearms led non-Southern states, such as California and Michigan, to enact licensing systems or short waiting periods for handgun purchases.<sup>6</sup> The most famous of these early Northern controls was New York State’s Sullivan Law, enacted in 1911, which required permits to own or carry handguns.<sup>7</sup>

During the same period, communist and anarchist groups often attempted to provoke violence. In November 1917, the Bolsheviks (a communist sect) overthrew the democratic Russian government, which itself had overthrown the czar a half-year earlier.<sup>8</sup> The Bolsheviks moved quickly to seize the moment in history and

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1. See NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O’ SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 252, 274–83 (2012).

2. *Id.*

3. See, e.g., *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (upholding prohibitions on concealed carry).

4. See JOHNSON ET AL., *supra* note 1, at 260.

5. *Id.* at 305–14.

6. Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 15–22 (Don B. Kates, Jr. ed., 1979).

7. David Jensen, *The Sullivan Law at 100: A Century of “Proper Cause” Handgun Licensing in New York State*, N.Y. ST. B.A. GOV’T, L., & POL’Y J., Summer 2012, at 6.

8. See RICHARD PIPES, *A CONCISE HISTORY OF THE RUSSIAN REVOLUTION* 75–97, 113–50 (1996).

promote a global communist revolution.<sup>9</sup> Frightened governments in the United Kingdom, Canada, and New Zealand, among others, responded by enacting gun-licensing laws.<sup>10</sup> Fear of Bolshevism and similar revolutionary movements also led to more state and local gun controls.<sup>11</sup> Gun control was no longer peculiar to the South.

While gun control spread north, the NRA had nothing to say on the subject. Ever since 1871, the NRA had been political only in the narrow sense that it pressed for governmental support of rifle marksmanship training among the American public.<sup>12</sup> In the early twentieth century, NRA lobbying led to the establishment of a federal program to promote civilian marksmanship and to sell surplus military rifles to the public, with the NRA as the designated intermediary between the U.S. military and the civilian population.<sup>13</sup>

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9. *Id.* at 166–91.

10. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 73–74, 141, 237 (1992).

11. See Kates, *supra* note 6, at 18–20; see also RUSSELL S. GILMORE, CRACK SHOTS AND PATRIOTS: THE NATIONAL RIFLE ASSOCIATION AND AMERICA'S MILITARY-SPORTING TRADITION, 1871–1929, at 237 (1974).

12. The NRA was created by former Union officers and New York National Guardsmen who were appalled by the poor marksmanship of Union soldiers during the Civil War. See GILMORE, *supra* note 11, at 53. Aiming to restore the historically-revered status of the American citizen-marksman, the NRA rejected the then-common idea that in modern warfare the soldier was simply cannon fodder and did not need individual skill at arms. The NRA's corporate charter from New York State included the purpose "to promote the introduction of a system of aiming drill and target firing among the National Guard of New York and the militia of other states." JAMES B. TREFETHEN, AMERICANS AND THEIR GUNS 10 (James E. Serven ed., 1967). Seven of the first eight NRA Presidents were leading Union officers, including retired United States President Ulysses S. Grant, and General Winfield Scott Hancock, "the hero of Gettysburg," *id.* at 82, who had been the 1880 Democratic presidential nominee, *id.* at 82, 99. Emulating the National Rifle Association of Great Britain, the American NRA introduced long-range rifle shooting as an American sport, and soon became the standard-setter for many of the shooting sports. *Id.* at 103. The NRA targets and marksmanship training manuals were adopted by the Army and Navy. *Id.* The National Guard Association, an organization dedicated to promoting the interests of the National Guard, held its first convention in 1879, and elected NRA co-founder George Wingate as its first President. See JERRY M. COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 85–88 (2002). The NRA and the National Guard were intertwined, and during the first two decades of the twentieth century, the leadership of the two organizations closely overlapped. See GILMORE, *supra* note 11, at 155–60.

13. In 1903, the same year that Congress established the modern organized militia as the National Guard, Congress also acted to bolster training for the unorganized militia—defined by statute as all able-bodied males aged eighteen to forty-five, with a few exceptions. See 10 U.S.C. § 311 (2006). Congress created the National Board for

National alcohol prohibition under the Eighteenth Amendment in 1919 spurred an increase in murders and other firearms crimes.<sup>14</sup> Particularly notorious and fearsome was the use of machine guns by gangsters to fight turf battles with their rivals.<sup>15</sup> One such incident, the St. Valentine's Day massacre in Chicago, horrified the nation to nearly the same degree that the Columbine High School murders did in 1999. The general increase in crime resulting from Prohibition led to the first national calls for handgun prohibition.<sup>16</sup> Nationally, the

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the Promotion of Rifle Practice (NBPRP), to set up and oversee official National Matches in riflery. By statute, the twenty-one member board included all eight trustees of the NRA. In 1905, Congress authorized the sale of surplus military rifles to gun clubs; and the NBPRP selected the NRA as its agent for the distribution of arms. *See* Act of Mar. 3, 1905, Pub. L. No. 149, 33 Stat. 986; GILMORE, *supra* note 11, at 155–57.

During the late nineteenth and early twentieth centuries, the promotion of citizen rifle practice was very popular in many quarters. Many public schools and churches built indoor rifle ranges on their premises. GILMORE, *supra* note 11, at 81. President Theodore Roosevelt called for firearms training in his December 6, 1906 Annual Message to Congress (“We should establish shooting galleries in all the large public and military schools, should maintain national target ranges in different parts of the country, and should in every way encourage the formation of rifle clubs throughout all parts of the land.”) and his December 3, 1907 Annual Message (“[W]e should encourage rifle practice among schoolboys, and indeed among all classes . . .”). Roosevelt was a life member of the NRA, as were Secretary of War Elihu Root; Gifford Pinchot, the first head of United States Forest Service, and later the Governor of Pennsylvania; and William Howard Taft, who succeeded Root as Secretary of War, succeeded Roosevelt as President, and later served as Chief Justice of the Supreme Court. As President, Taft wrote in 1909, “I approve the teaching under proper regulations of rifle shooting to the boys in the advanced grades,” thus providing the impetus for the Washington School Rifle Tournament. GILMORE, *supra* note 11, at 160; TREFETHEN, *supra* note 12, at 156.

In 1916 (the same year that Congress took over the National Guard, via the National Defense Act), the Office of the Director of Civilian Marksmanship (DCM) was created by Congress to administer the civilian marksmanship program, and the NRA was named by statute as the liaison between the Army and civilians. *See* TREFETHEN, *supra* note 12, at 307. A 1924 statute required membership in a NRA-affiliated gun club as a condition of purchasing a DCM rifle. 10 U.S.C. § 4308(a)(5) (repealed 1996). The requirement of NRA membership was later invalidated as a violation of the equal protection principles implicit in the Fifth Amendment. *See* Gavett v. Alexander, 477 F. Supp. 1035, 1044–49 (D.D.C. 1979).

The DCM was privatized in 1996, and turned into the federally-chartered, yet private, Corporation for the Promotion of Rifle Practice & Firearms Safety (CPRPFS). 36 U.S.C. § 40701 et seq. There is no longer any federal funding for the program, other than providing it with surplus .22 and .30 caliber rifles. *See* *Civilian Marksmanship Sales*, ODCMP.COM, <http://www.odcmp.com/sales.htm> (last visited Nov. 29, 2012).

14. *See* DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 267–88 (2010).

15. *Id.*

16. *See* GILMORE, *supra* note 11, at 238–44.

leading voices for handgun prohibition were conservative, Northeastern, urban, upper-class businessmen and attorneys.<sup>17</sup> Pacifists who wanted to end war by getting rid of all weapons, including firearms, also played a role, but they were much less powerful than the business élite, which was used to getting its way.<sup>18</sup> The handgun prohibition movement, however, did not have a wide public following.<sup>19</sup>

The NRA did nothing in 1901 when South Carolina banned handgun sales,<sup>20</sup> but the nationwide push for handgun prohibition helped spur a new generation of NRA leaders into action.<sup>21</sup> The NRA used its member magazine, *The American Rifleman*, to inform members about handgun prohibition proposals and urged them to contact legislators.<sup>22</sup> The NRA thus stopped handgun prohibition in every jurisdiction, sometimes by promoting, as an alternative, a model law known as the Uniform Pistol and Revolver Act.<sup>23</sup> The Act prohibited carrying concealed handguns without a license, which was issued only after the applicant was determined to have good character and a legitimate reason for carrying a concealed weapon.<sup>24</sup>

On the federal level, a 1927 statute prohibited concealable firearms from being shipped through the mail.<sup>25</sup> However, the statute's effect was limited because it did not apply to delivery by package carriers.<sup>26</sup>

## B. The New Deal and World War II

The repeal of Prohibition by the Twenty-first Amendment in 1933 removed gangsters from the alcohol business and corresponded with a precipitous drop in gun crimes.<sup>27</sup> By this time, however, President Roosevelt's Attorney General, Homer Cummings, was already spearheading a drive for major national gun control.

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17. *See id.* at 245.

18. *See id.* at 245, 250.

19. *See id.* at 245.

20. Act of Feb. 20, 1901, ch. 435, §1, 1901 S.C. Acts 748 (taking effect in 1902).

21. *See* GILMORE, *supra* note 11, at 246.

22. *See id.* at 236–58. The magazine adopted its present title in 1923. *See* David T. Hardy, *American Rifleman*, in 1 GUNS IN AMERICAN SOCIETY 29 (2d ed. 2012).

23. Sometimes known as the Uniform Firearms Act.

24. *See* GILMORE, *supra* note 11, at 256.

25. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059–60 (codified at 18 U.S.C. § 1715(o)); *see also* GILMORE, *supra* note 11, at 244–45.

26. *See* GILMORE, *supra* note 11, at 244–45.

27. *See* OKRENT, *supra* note 14, at 355–71.

Cummings was not a particularly effective Attorney General. Some historians assign him a considerable share of the blame for the Supreme Court holding some aspects of the First New Deal (e.g., the National Recovery Administration and the Agriculture Adjustment Act) unconstitutional.<sup>28</sup> They argue that the statutes were hastily and ineptly drafted, and that the Justice Department's defense of those statutes in court bordered on incompetent.<sup>29</sup> Cummings was, however, highly interested in gun control. His objective was national registration for all firearms, and the *de facto* prohibition of handguns.<sup>30</sup>

The first move was the introduction of the National Firearms Act (NFA). As introduced, the NFA would have imposed a \$200 tax (in inflation-adjusted dollars, equivalent to \$3,255 in 2010) for possessing any machine gun and short-barreled shotgun, plus a \$5 tax on handguns.<sup>31</sup> Cummings explained to a House Committee that the tax approach was being used because an outright ban might violate the Second Amendment.<sup>32</sup> Ostensibly to ensure tax compliance, the NFA also required registration of all covered firearms.<sup>33</sup>

The NRA mobilized. Soon, the NFA's application to handguns was removed from the bill, and with handguns removed, the NRA dropped its opposition. The NFA became law in 1934.<sup>34</sup>

Once President Roosevelt was re-elected in 1936, Attorney General Cummings came back for his second objective—promoting a national gun registration law. As he put it: “Show me the man who does not want his gun registered, and I will show you a man who should not have a gun.”<sup>35</sup> The NRA did not agree.<sup>36</sup> Again, the NRA informed its members through *The American Rifleman* magazine, and NRA members in turn carried the gun rights message to their

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28. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 36–37, 39 (1998).

29. See *id.*

30. HOMER S. CUMMINGS, *Firearms and the Crime Problem, Address Before the International Association of Chiefs of Police* (Oct. 5, 1937), in *SELECTED PAPERS OF HOMER CUMMINGS* 83, 83–89 (Carl Brent Swisher ed., 1939).

31. See *The National Firearms Act of 1934: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 11, 13, 19 (1934).

32. *Id.* at 13.

33. 26 U.S.C. § 5841 (2006).

34. Later codified as Title II of the Gun Control Act, 26 U.S.C. §§ 5801 et seq (2006).

35. See CUMMINGS, *supra* note 30, at 89.

36. See TREFETHEN, *supra* note 12, at 293–94.



representatives in Congress through letters, calls, and personal appeals.<sup>37</sup> The Cummings registration bill went nowhere.<sup>38</sup>

The NRA enthusiastically supported a different gun control law, the Federal Firearms Act of 1938 (FFA). The FFA required persons engaged in the interstate business of selling or repairing firearms to obtain a one-dollar license before shipping or receiving any firearm in interstate or foreign commerce.<sup>39</sup> Licensed dealers were required to keep a record of firearms sales and were prohibited from shipping guns in interstate commerce to anyone indicted for or convicted of a violent crime or otherwise prohibited from owning firearms under state law.<sup>40</sup>

Although the NRA's relationship with Cummings was contentious, the group got along well enough with Roosevelt himself, who sent laudatory messages to the NRA at its annual meetings.<sup>41</sup>

With World War II already raging in Europe and China, Congress in 1941 took steps to improve America's defense posture. One such step was the Property Requisition Act, which gave the President sweeping powers to requisition privately owned "machinery, tools, or materials" that were immediately needed for the national defense, in return for compensation to be paid to the former owners of the property.<sup>42</sup> The NRA feared that the proposed Act could be used to confiscate or register firearms.<sup>43</sup> After some struggle in Congress, the NRA got the language it wanted: the Act stated that it would not "impair or infringe in any manner the right of any individual to keep and bear arms."<sup>44</sup> It specifically prohibited the President from "requisitioning or requir[ing] the registration of any firearms [otherwise lawfully] possessed by any individual for his personal protection or sport."<sup>45</sup>

The accompanying legislative committee report of the U.S. House of Representatives stated that these exceptions to the President's

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37. *See id.*

38. *See id.*

39. Federal Firearms Act of 1938, § 3(a), 52 Stat. 1250.

40. *Id.* at §§ 2(d), 3(d); *see* Alfred M. Ascione, *The Federal Firearms Act*, 13 ST. JOHN'S L. REV. 437, 440 (1939).

41. *See, e.g.*, TREFETHEN, *supra* note 12, at 294.

42. *See* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 623-24 (1995).

43. *Id.* at 624-25.

44. *Id.* at 630.

45. *Id.* at 624.

authority were included “[i]n view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties.”<sup>46</sup> Accordingly, the Committee “deem[ed] it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms.”<sup>47</sup> The Nazi and Communist gun confiscations had become central to American resistance against gun registration, as they remain to this day.<sup>48</sup>

After Pearl Harbor, the NRA helped with wartime mobilization and training.<sup>49</sup> After the war was over, President Truman sent the NRA a thank-you letter, because the NRA’s “small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to Government civilian agencies . . . materially aided [America’s] war effort.”<sup>50</sup>

### C. The 1950s

With few exceptions, the rest of the 1940s and 1950s presented little for the NRA to contest politically. Back in the 1920s, the NRA attempted to repeal New York’s Sullivan Act (requiring licensing for handguns, and, as later implemented, very restrictive licensing for handgun carry)<sup>51</sup> but failed.<sup>52</sup> Generally speaking, the NRA found federal firearms policy unobjectionable and enjoyed good relations with federal officials. General Dwight Eisenhower, former Supreme Commander of the Allied Forces in Europe during World War II, was

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46. *Id.*

47. *Id.*

48. See, e.g., *id.*; Don B. Kates, *Genocide, Self Defense and the Right to Arms*, 29 *HAMLIN L. REV.* 501 (2006). See also Neal Knox’s story of the “Belgian Corporal.” See *infra* notes 192–96 and accompanying text.

49. See Harry S. Truman, Letter to National Rifle Association (Nov. 14, 1945), reprinted in *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency, S. Comm. on the Judiciary*, 90th Cong. 484 (1967).

50. *Id.*

51. The text of the Sullivan Act simply requires that a person have “proper cause” to possess a carry permit. In New York City, lawful self-defense is not a “proper cause” unless a person has a “special need” that is different from the rest of the community. a standard that was first upheld in a 1980 decision. See *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 256 (N.Y. App. Div. 1980), *aff’d*, 421 N.E.2d 503 (N.Y. 1981); Jensen, *supra* note 7.

52. The law remains on the books today. See N.Y. Penal Law § 400.00 (McKinney 2012).

the keynote speaker at the NRA 1946 Annual Meeting, and, as President, he sent the NRA letters of praise from time to time.<sup>53</sup>

But during President Eisenhower's second term in 1957, the Alcohol and Tobacco Tax Division of the Internal Revenue Service proposed new regulations under the NFA and FFA which would create a national dealer-based system of gun registration.<sup>54</sup> Led by Representative John Dingell (D.-Mich.), many congressmen objected, and the final regulations contained no provisions objectionable to the NRA.<sup>55</sup>

From here, gun regulation returned to its somnolent state. Nobody was proposing or objecting to gun control. Absent controversy, legal scholars paid little attention to the Second Amendment. The Supreme Court upheld the constitutionality of the NFA in *United States v. Miller*,<sup>56</sup> and even gun enthusiasts did not question the NFA and FFA's constitutionality.

During the 1960 presidential election, the two leading Democratic candidates—Massachusetts Senator John F. Kennedy and Minnesota Senator Hubert H. Humphrey—each affirmed their support of the Second Amendment, with Humphrey (the embodiment of post-war liberalism) specifically invoking the importance of civilian firearms ownership for resistance to tyranny.<sup>57</sup>

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53. See TREFETHEN, *supra* note 12, at 251.

54. Interstate Traffic in Firearms and Ammunition, 22 Fed. Reg. 3153, 3155-56 (May 3, 1957). The proposal for a system of registration of dealer sales, with records retained by the dealer, rather than centralized, was later adopted in the Gun Control Act of 1968, 18 U.S.C. 923(g). The ATTD is an ancestor of the Bureau of Alcohol, Tobacco, Firearms and Explosives, which was upgraded to a Bureau in 1969 and became part of the Department of Justice in 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

55. See Interstate Traffic in Firearms and Ammunition, 23 Fed. Reg. 343 (Jan. 18, 1958); TREFETHEN, *supra* note 12, at 295. Dingell was first elected in 1954 and is still a U.S. Representative. He was a long-time member of the NRA Board of Directors. See *After Crime Bill Vote, NRA Also Loses a Board Member*, CHI. TRIB., Aug. 23, 1994.

56. 307 U.S. 174 (1939).

57. *Guns* magazine asked each of them their views on the Second Amendment. See *Know Your Lawmakers*, GUNS, Feb. 1960 at 4; *Know Your Lawmakers*, GUNS, Apr. 1960 at 4. Humphrey wrote:

Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against a tyranny which now

The Republican nominee, Vice-President Richard M. Nixon, was secretly a firearms prohibitionist, although he kept his feelings secret until his retirement.<sup>58</sup> In any case, Kennedy's narrow victory in November 1960 made him the fifth President of the United States who was a member of the NRA.<sup>59</sup> The horizon looked sunny indeed, from the perspective of gun rights supporters.

## II. THINGS FALL APART

In the early 1960s, the only significant gun control proposal in Congress was being pushed by Connecticut Senator Thomas Dodd, a protectionist measure to shield U.S. gun manufacturers from foreign competition.<sup>60</sup> Of particular concern was the surplus of WWII bolt-action rifles coming in from Western Europe, where armies were upgrading their rifles and selling old ones to an eager American market.<sup>61</sup> The "Gun Valley" along New England's Connecticut River had been the heart of the American firearms industry since 1777 when the Springfield Armory manufactured arms and ammunition for

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appears remote in America, but which historically has proved to be always possible.

*Know Your Lawmakers*, GUNS, Feb. 1960, at 4. Kennedy wrote:

By calling attention to "a well regulated militia," the "security" of the nation, and the right of each citizen "to keep and bear arms", our founding fathers recognized the essentially civilian nature of our economy. Although it is extremely unlikely that the fears of governmental tyranny which gave rise to the Second Amendment will ever be a major danger to our nation, the Amendment still remains an important declaration of our basic civilian-military relationships, in which every citizen must be ready to participate in the defense of his country. For that reason, I believe the Second Amendment will always be important.

*Know Your Lawmakers*, GUNS, Apr. 1960, at 4.

58. William Safire, a former speechwriter for President Nixon, met with Nixon in 1979. See William Safire, Op-Ed., *An Appeal for Repeal*, N.Y. TIMES, June 10, 1999, <http://www.nytimes.com/1999/06/10/opinion/essay-an-appeal-for-repeal.html>. Safire recounts: "Twenty years ago, I asked Richard Nixon what he thought of gun control. His on-the-record reply: 'Guns are an abomination.' Free from fear of gun owners' retaliation at the polls, he favored making handguns illegal and requiring licenses for hunting rifles." *Id.*

59. Kennedy followed Grant, Theodore Roosevelt, Taft, and Eisenhower, and preceded Reagan, Nixon, and George H.W. Bush. See *Did You Know?*, NRA-ILA, <http://www.nraila.org/gun-laws/did-you-know.aspx> (last visited Sept. 25, 2012).

60. David T. Hardy, *Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 595-96 (1986).

61. *Id.*

the Patriots.<sup>62</sup> New firearms companies, such as Colt in Connecticut and Smith & Wesson in Massachusetts, set up nearby in the nineteenth century.<sup>63</sup> His friendly relations with New England's firearms industry likely explain why Massachusetts Senator Kennedy joined the NRA.

Kennedy's assassination in November 1963 by Lee Harvey Oswald had little immediate effect on the gun issue, although Oswald had used an imported Italian rifle—precisely the type of gun Dodd was trying to block from import.<sup>64</sup>

Although the murder of President Kennedy in 1963 may have seemed like an isolated act of violence, from 1965 onward American violence appeared out of control. In 1965, Blacks in the Watts neighborhood of Los Angeles rioted in response to allegations of police brutality.<sup>65</sup> In 1966, for six days in May, there were massive—and sometimes violent—Vietnam War protests on college campuses.<sup>66</sup> On June 7, civil rights leader James Meredith was shot and wounded while leading a march for voter registration.<sup>67</sup> In July and August, city after city suffered race riots, as the contagion of rioting that appeared in the 1965 Watts riot spread nationwide.<sup>68</sup>

The media gave enormous coverage to self-proclaimed militant, extremist, and pro-violence “Black power” leaders such as Stokely Carmichael and H. Rap Brown.<sup>69</sup> Whether they ever had much of a real following is debatable, but they terrified many Americans with their high-powered rhetoric about violent revolution, encouraging blacks to arm themselves against “whitey.”<sup>70</sup>

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62. See FELICIA J. DEYRUP, *ARMS MAKING IN THE CONNECTICUT VALLEY* (1970); JAMES A. HUDSON, *THE SINEWS OF WAR: ARMY LOGISTICS 1775–1953*, 33 (1966).

63. See, e.g., JACK ROHAN, *YANKEE ARMS MAKER: THE STORY OF SAMUEL COLT AND HIS SIX-SHOT PEACEMAKER* 169 (1948).

64. See Hardy, *supra* note 60, at 599.

65. ROBERT E. CONOT, *RIVERS OF BLOOD, YEARS OF DARKNESS: THE UNFORGETTABLE CLASSIC ACCOUNT OF THE WATTS RIOT* (1968).

66. See generally MARC J. GILBERT, *THE VIETNAM WAR ON CAMPUS: OTHER VOICES, MORE DISTANT DRUMS* (1968).

67. See CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 434 (2009).

68. See *THE COLUMBIA GUIDE TO AMERICA IN THE 1960s* (David Farber & Beth Bailey eds., 2001).

69. See, e.g., STOKELY CARMICHAEL, *READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL* (KWAME TURE) 542 (2005).

70. *Id.* at 175.

2012]            *THE GREAT GUN CONTROL WAR*            1539

At the same time, violent crime was rising sharply.<sup>71</sup> Crime and riots led many whites (and blacks) to arm for self-defense, which was derided as “white backlash” by some of the media.<sup>72</sup>

#### A. 1966

On August 1, 1966, an ex-marine and current agricultural student named Charles Whitman climbed to the top of a tower at the University of Texas in Austin. Using a high-powered hunting rifle, he murdered fourteen people and wounded thirty-one more before being killed by the police.<sup>73</sup> The event drew speculation as to whether this act reflected a propensity for violence that was personal to Whitman or, instead, a broader problem in American society:

Media coverage tended to portray Whitman as an All-American former Eagle Scout who had gone suddenly insane; the subtext was that the American character itself contained a barely-repressed streak of violent insanity. Further investigation, however, revealed that Whitman was an abused child, a problem gambler, severely depressed, and an abuser of amphetamine Dexedrine.<sup>74</sup>

The United States seemed to be falling apart, and so Washington, D.C. looked for a solution. Although there was no formal anti-gun lobby, the talk in Washington was of gun control.<sup>75</sup> Connecticut Senator Thomas Dodd led the charge.<sup>76</sup> His relations with the gun manufacturers had been worsening for several years as his proposed gun control bills (while still protectionist) became tougher and tougher on domestic gun owners and sellers.<sup>77</sup> Senator Edward Kennedy worked with Dodd on this legislation.

Senator Kennedy called for a ban on mail order sales of rifles made to military specifications.<sup>78</sup> Gun control advocates were particularly disturbed by the sale of low-priced foreign rifles. The rifles, mostly

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71. See *State-by-State and National Crime Estimates by Year(s)*, BUREAU JUST. STAT., <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (select “United States-Total” in box a.; “Number of violent crimes” in box b.; and the years 1960 to 2010 in c.; then click “Get Table”) (last visited Sept. 24, 2012).

72. MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD 361 (2004).

73. Carol Oyster, *Texas Tower Shooting*, in GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA 581 (1st ed. 2002).

74. *Id.* at 582.

75. See ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

76. See Hardy, *supra* note 60, at 595.

77. See *id.* at 597.

78. See *id.* at 602.

bolt actions, were available at low prices and were the weapon of choice for urban rioters.<sup>79</sup>

While Senator Kennedy wanted to give the Secretary of the Treasury the discretion to ban importing firearms not “recognized as particularly suitable” for sporting purposes,<sup>80</sup> Senator Roman Hruska (R-Neb.) rejected giving the Secretary of the Treasury the power to ban guns.<sup>81</sup> Hruska railed against “the unlikely assumption without evidence that substantial markets for imported products are composed of irresponsible or criminal citizens.”<sup>82</sup> Hruska said there was “no justifiable criteria” to discriminate among various categories of imported firearms and warned that giving the Treasury Department broad discretion would subject gun owners to the vicissitudes of “domestic politics.”<sup>83</sup>

The witnesses who appeared before Congress in 1966 to support gun control included President Johnson’s attorney general Nicholas B. Katzenbach, the attorney general of New Jersey, the chief of police of St. Louis, the chief of police of Atlanta, the New York City police administration, the American Bar Association, and the International Association of Chiefs of Police.<sup>84</sup>

Senator Kennedy promised that his gun control plan would “substantially alleviate[]” the problem of juveniles acquiring guns.<sup>85</sup>

### B. 1967

The next year, chaos increased. There were more than 100 riots in the summer, in cities including Boston, Chicago, Cincinnati, Hartford, Minneapolis, New Haven, New York, Philadelphia, Pittsburgh, Tampa, and Washington.<sup>86</sup> The worst riots took place in Detroit and Newark, which resulted in seventy-two deaths.<sup>87</sup> Following the

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79. *Id.* at 596 n.59.

80. *Id.* at 600.

81. David Kopel, *Gun Control Act of 1968*, in *GUNS IN AMERICAN SOCIETY* 238 (1st ed. 2002).

82. *See id.*

83. *See id.*

84. *Id.*

85. *Id.*

86. *See* WIL MARA, *CIVIL UNREST IN THE 1960S: RIOTS AND THEIR AFTERMATH* 62–65 (2009).

87. SIDNEY FINE, *VIOLENCE IN THE MODEL CITY: THE CAVANAGH ADMINISTRATION, RACE RELATIONS, AND THE DETROIT RIOT OF 1967* 1 (2007); KEVIN J. MUMFORD, *NEWARK: A HISTORY OF RACE, RIGHTS, AND RIOTS IN AMERICA* 98 (2008).

2012]            *THE GREAT GUN CONTROL WAR*            1541

Newark riots, the National Guard conducted house-to-house searches for guns in black neighborhoods.

Senator Dodd had less time to spend on gun control in the summer of 1967, though, as he unsuccessfully fought off the Senate's move to censure him (by a vote of ninety-two to five) for his using tax-exempt campaign funds for personal purposes.<sup>88</sup>

Having controlled handguns since the 1911 Sullivan Act, New York City imposed long-gun registration in 1967.<sup>89</sup> Three decades later, the registration data would be used to confiscate the rifles and shotguns that the New York City Council then declared to be "assault weapons."<sup>90</sup> Illinois passed a major new state gun control law in 1967,<sup>91</sup> which still requires a license from the state police (the Firearms Identification Card) for gun ownership.<sup>92</sup>

Significantly adding to public disquiet were the Black Panthers, who called themselves a social justice organization but would more accurately be described as an organized crime entity, that killed many police and non-police in factional fighting among the extreme left.<sup>93</sup> The Panthers discovered that California had no law against openly carrying loaded rifles and shotguns in public and they started to do so, including carrying loaded guns into the state capitol in Sacramento.<sup>94</sup> Within days, the California legislature speedily passed, and Governor Ronald Reagan signed, a bill to outlaw loaded open carry in most circumstances.<sup>95</sup> Many cities and states followed suit, also in response to the Panthers' program of armed intimidation.<sup>96</sup>

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88. See Elisabeth Bumiller, *Christopher Dodd Campaigns to Win—and to Recast a Legacy*, N.Y. TIMES, Sep. 24, 2007; see also DAVID E. KOSKOFF, *THE SENATOR FROM CENTRAL CASTING: THE RISE, FALL, AND RESURRECTION OF THOMAS J. DODD* 207-22 (2011).

89. ADMIN. CODE OF THE CITY OF N.Y. § 10-303.

90. *Firearms Registration: New York City's Lesson*, NRA-ILA (Jan. 27, 2000), <http://www.nraila.org/news-issues/fact-sheets/2000/firearms-registration-new-york-city%60s.aspx>.

91. See generally 430 ILL. COMP. STAT. 65 / 1.1 (2012).

92. *Id.*

93. See, e.g., DAVID HOROWITZ, *HATING WHITEY AND OTHER PROGRESSIVE CAUSES* 108 (1999).

94. See Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 S.D. L. REV. 947, 969 (1999).

95. See *id.* at 976.

96. See WINKLER, *supra* note 75.



## C. 1968

Riots occurred long before the “long hot summer”<sup>97</sup> of 1968 began. The Rev. Martin Luther King, Jr., was assassinated with a rifle on April 4, and for the next three days riots raged in over one hundred cities.<sup>98</sup>

Race and labor riots had not been unknown in the United States in the late nineteenth and early twentieth centuries, but the 1965-68 riots were unprecedented. Never before 1966 had there been so many riots within a few weeks of each other, and never before 1968 had so many riots erupted all at once. The riots’ impact was magnified by television, which brought the riots into every American living room, making events in one city terrifyingly immediate to the whole nation. Gun sales zoomed as homeowners and store owners prepared to protect themselves in the event of civil disorder. When the 1960s began, violent crime rates were at historical lows, but then surged mid-decade, and every year following got worse and worse.<sup>99</sup>

On June 5, 1968, a young Palestinian man named Sirhan Sirhan murdered Presidential candidate and New York Senator Robert F. Kennedy in the kitchen of the Ambassador Hotel in Los Angeles.<sup>100</sup> Kennedy had just delivered his victory speech after winning the California Democratic presidential primary. The Palestinian assassin, angered by Kennedy’s strong support for Israel, used a small, cheap, imported pistol.<sup>101</sup>

Although Vice President Humphrey (who had not entered a single primary) had an insurmountable lead in delegates for the Democratic nomination,<sup>102</sup> Kennedy’s idealistic supporters did not realize this. What they did realize was that starting in 1963 with the assassination of President John F. Kennedy, one hero of theirs after another had been killed by gunfire.

To many Americans, the national mood was well-expressed by William Butler Yeats’s 1920 poem “The Second Coming”:

The falcon cannot hear the falconer;

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97. See WILLARD M. OLIVER & JAMES F. HILGENBERG, JR., *A HISTORY OF CRIME AND CRIMINAL JUSTICE IN AMERICA* 288 (2010).

98. See CLAY RISEN, *A NATION ON FIRE: AMERICA IN THE WAKE OF THE KING ASSASSINATION* 2-3 (2009).

99. BUREAU JUST. STAT., *supra* note 71.

100. ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* xvi (2002).

101. JULES WITCOVER, *85 DAYS: THE LAST CAMPAIGN OF ROBERT KENNEDY* 266 (1969).

102. THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1968*, at 316 (1969).

2012]            *THE GREAT GUN CONTROL WAR*            1543

Things fall apart; the centre cannot hold;  
 Mere anarchy is loosed upon the world,  
 The blood-dimmed tide is loosed, and everywhere  
 The ceremony of innocence is drowned;  
 The best lack all conviction, while the worst  
 Are full of passionate intensity . . .  
 And what rough beast, its hour come round at last,  
 Slouches towards Bethlehem to be born?<sup>103</sup>

Senator Kennedy's assassination galvanized gun prohibition activists even more intensely than the assassination of President McKinley in 1901.<sup>104</sup> Immediately after Robert Kennedy's assassination, the Emergency Committee for Effective Gun Control was formed, with former astronaut and future Senator John Glenn as chairman.<sup>105</sup> Members included the AFL-CIO, the National Council of Churches, New York Mayor John Lindsay, *Tonight Show* host Johnny Carson, Mississippi newspaper editor (and future Carter administration staffer)<sup>106</sup> Hodding Carter, III, Joe DiMaggio, syndicated advice columnist Ann Landers, Green Bay Packers coach Vince Lombardi, and singer Frank Sinatra.<sup>107</sup>

The National Committee demanded national gun registration, national gun licensing, a ban on interstate gun sales, and a ban on mail order sales of long guns (mail order handgun sales had been banned since 1927).<sup>108</sup> Many other gun control advocates urged a ban on all small, inexpensive handguns, so-called "Saturday Night Specials."<sup>109</sup>

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103. WILLIAM BUTLER YEATS, *The Second Coming*, reprinted in *LATER POEMS* 289 (1922) (first published in *THE DIAL* (Chicago), Nov. 1920, and *THE NATION* (London), Nov. 6, 1920).

104. See generally SCOTT MILLER, *THE PRESIDENT AND THE ASSASSIN: MCKINLEY, TERROR, AND EMPIRE AT THE DAWN OF THE AMERICAN CENTURY* (2011).

105. *Gun Legislation: Hearing Before the S. Judiciary Comm., Subcomm. on Juvenile Delinquency*, 90th Cong. 1 (1968) (Statement of John Glenn, Jr., Chairman, Emergency Comm. for Gun Control).

106. Hodding Carter served as President Jimmy Carter's Assistant Secretary of State for Public Affairs, and later as his State Department spokesman.

107. See Press Release, Emergency Committee For Gun Control (July 11, 1968) (on file with author).

108. Act of Feb. 8, 1927, 44 Stat. 1059–60 (codified at 18 U.S.C. § 1715(o)). For the Committee's demands, see *Gun Legislation: Hearing Before the S. Judiciary Comm., Subcomm. on Juvenile Delinquency*, 90th Cong. 1 (1968) (Statement of John Glenn, Jr., Chairman, Emergency Comm. for Gun Control).

109. WINKLER, *supra* note 75, at 252.

The idea that civilian gun ownership should be entirely prohibited moved from the fringe into the mainstream of public debate. Gun advocates, now on the defensive, tended to emphasize innocent sporting uses of guns, rather than justify gun ownership for self-defense or resistance to tyranny. A few days after Kennedy's assassination, the U.S. Senate Judiciary Committee—traditionally the bulwark against federal gun control—reported out a gun control bill.

On June 24, President Johnson, himself a hunter, addressed the nation and called for national gun registration.<sup>110</sup> He promised that registration would involve no more inconvenience than dog tags or automobile license plates.<sup>111</sup> “In other countries which have sensible laws, the hunter and the sportsmen thrive,” he said, urging hunters and target shooters not to oppose the new restrictions.<sup>112</sup>

On June 16, 1968, several of the major American long gun manufacturers, desperate to stave off gun prohibition, announced their own gun control plan. A joint statement from Remington, Savage, Olin, Winchester, Mossberg, and Ithaca called for a national ban on mail order gun sales.<sup>113</sup> Further, the manufacturers suggested that states wanting additional controls should enact gun owner licensing, like the system which Illinois had created in 1967.<sup>114</sup> The Illinois system, with some increases in severity, remains in effect today in that state.<sup>115</sup>

Three weeks later, in testimony before the U.S. Senate Judiciary Committee, the gun manufacturers demanded that every state adopt the manufacturers' Model Firearms Owner's License Bill.<sup>116</sup> Manufacturers stressed that Congress should force the states that did not adopt the Model Bill to do so. The NRA, however, continued to oppose any new federal gun controls, and said that if gun owner

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110. 114 CONG. REC. 18,330 (June 24, 1968).

111. *See id.* at 18,331.

112. *See id.*

113. *Gun Legislation: Hearing Before the S. Judiciary Comm., Subcomm. on Juvenile Delinquency*, 90th Cong. 1 (1968) (statement of Remington Arms Co., Winchester-Western Division of Olin Mathieson Chemical Corp., Savage Arms Division of Emhart Corp., Ithaca Gun Co., and O.F. Mossberg & Sons, Inc.).

114. *See* Press Release, Hill & Knowlton (June 16, 1968) (on file with author).

115. *See* 430 ILL. COMP. STAT. 65 / 1.1 (2012).

116. *Gun Legislation: Hearing Before the S. Judiciary Comm., Subcomm. on Juvenile Delinquency*, 90th Cong. 1 (1968) (statement of Remington Arms Co., Winchester-Western Division of Olin Mathieson Chemical Corp., Savage Arms Division of Emhart Corp., Ithaca Gun Co., and O.F. Mossberg & Sons, Inc.).

2012]            *THE GREAT GUN CONTROL WAR*            1545

licensing were to be done at all, it should be by the states, not the the federal government.<sup>117</sup>

On August 20, Second Amendment advocates saw what they considered to be a stark reminder of the dangers of disarmament. The Soviet Union invaded Czechoslovakia, crushing the “Prague Spring” of liberalization that had been progressing under Czech President Alexander Dub ek.<sup>118</sup> Czech students protested and even rioted, but their efforts were futile against Warsaw Pact tanks and soldiers.<sup>119</sup>

Riots broke out in Chicago the next week, where the Democratic Convention assembled to nominate Hubert Humphrey.<sup>120</sup> This time, riots were led by radical leftists such as Abbie Hoffman and Jerry Rubin of the “Chicago Seven,” who were intent on sparking revolution and who succeeded in hijacking planned peaceful protests against the Vietnam War.<sup>121</sup> The Chicago Seven were perversely aided in their objectives by Chicago Mayor Richard Daley.<sup>122</sup> Daley authorized what a federal commission later called “a police riot,” breaking heads and engaging in indiscriminate violence against rioters, innocent bystanders, and even the media.<sup>123</sup>

Back in Washington, D.C., negotiations continued on the gun control bills. Finally, Senator Dodd and other congressional backers of President Johnson’s plan arrived at a compromise with the NRA, leading to the enactment of the Gun Control Act (GCA) of 1968.<sup>124</sup> There would be no federal licensing of gun owners. Gun sales would be registered, but only by the dealer, not the government.

The Act required gun dealers to keep a federal form (now known as Form 4473) detailing information for each sale (such as the gun’s model and serial number, the buyer’s name, address, age, race, and so on).<sup>125</sup> The forms would be available for government inspection and for criminal investigations, but the forms would not be collected in a

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117. *Id.* (statement of Franklin L. Orth, Exec. V.P., NRA); *id.* (statement of Harold W. Glassen, President, NRA).

118. THE PRAGUE SPRING AND THE WARSAW PACT INVASION OF CZECHOSLOVAKIA IN 1968 (Günter Bischof et al. eds., 2010).

119. *See generally id.*

120. White, *supra* note 101, at 301.

121. FRANK KUSCH, BATTLEGROUND CHICAGO: THE POLICE AND THE 1968 DEMOCRATIC NATIONAL CONVENTION 47 (2008).

122. *Id.* at 121.

123. *Id.*

124. 18 U.S.C. § 923 (2006).

125. 18 U.S.C. § 923(g).

central registration list.<sup>126</sup> In addition, mail-order sales of long guns were effectively banned, as were all interstate gun sales to consumers (except where states enacted legislation allowing the purchase of long guns in contiguous states).<sup>127</sup>

The GCA also banned all gun possession by prohibited persons, such as convicted felons, illegal aliens, and illegal drug users.<sup>128</sup> Buyers had to certify in writing that they were not in a prohibited category.<sup>129</sup>

Gun imports were banned, except for the guns determined by the Treasury Secretary to be “particularly suitable for sporting purposes.”<sup>130</sup> As initially implemented, this prohibited small, inexpensive foreign handguns, and surplus WWII rifles, but allowed almost all other gun imports.<sup>131</sup> While the relationship between American gun manufacturers and Dodd had soured several years earlier as successive versions of the Dodd bill focused more and more on domestic gun control, the manufacturers still tended to support the new import restrictions.<sup>132</sup>

The 1968 Act also made some changes to the NFA, such as adding the amorphous category “any other weapon,” which by ATF interpretation would expand unpredictably over time.<sup>133</sup> While the “any other weapon” category’s boundaries are very clouded, it clearly includes disguised firearms, such as cane and belt buckle guns.<sup>134</sup> The GCA preamble disclaimed any intention to interfere with sporting gun use, gun collecting, or self-protection.<sup>135</sup>

President Johnson picked up conservative votes for the GCA by agreeing to legislation authorizing federal wiretapping, which he had previously opposed.<sup>136</sup> As part of the compromise, the NRA agreed that, while it could not support the GCA, it would not consider GCA

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126. *See id.*

127. *See id.*

128. *See id.*

129. ATF Form 4473, Bureau of Alcohol, Tobacco, Firearms, and Explosives, <http://www.atf.gov/forms/download/atf-f-4473-1.pdf> (last visited Oct. 30, 2012).

130. 18 U.S.C. §925(d)(3) (2006).

131. *See* ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 301-03 (1973).

132. *See* Hardy, *supra* note 60, at 596–604.

133. *See* STEPHEN HALBROOK, FIREARMS LAW DESKBOOK § 6:14 (2011).

134. *See* 26 U.S.C. § 5845(a)(5) (2006); HALBROOK, *supra* note 132, at 631-35.

135. *See* Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, 1213–14(1968).

136. David B. Kopel, *Gun Control Act of 1968*, in 2 GUNS IN AMERICAN SOCIETY 333-40 (2d ed. 2012).

votes on the legislative report card when grading members of Congress A through F on their support of gun rights.<sup>137</sup> This grading was and is one of the NRA's most efficient tools for enabling political action by the membership. The Gun Control Act was signed into law by President Johnson on October 22.<sup>138</sup>

Although the NRA had not opposed the GCA, many congressmen voted "no" anyway, out of deference to their constituents.<sup>139</sup> Among the Texas House delegation, the only "yes" vote came from a young Representative named George H. W. Bush, III, who said that the GCA was good, but "much more" needed to be done.<sup>140</sup>

Many gun control advocates were disappointed that Congress had not done more, but they were cheered by the progress they made at the state and local level in the past few years. Like Illinois,<sup>141</sup> New Jersey had enacted a licensing system for gun owners and required prior police permission for every handgun acquisition.<sup>142</sup>

Perhaps even more importantly, when the New Jersey law was challenged in a Second Amendment lawsuit, the New Jersey Supreme Court became the first in American history to declare the Second Amendment was a "collective right."<sup>143</sup> Quoting a 1966 article from the *Northwestern Law Review*,<sup>144</sup> the New Jersey court stated that the Second Amendment "was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.'"<sup>145</sup>

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137. *Id.*; NEAL KNOX, *THE GUN RIGHTS WAR* 297-98 (Chris Knox ed., 2009).

138. *See* Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 102, 82 Stat. 1214, 1236 (1968).

139. Kopel, *supra* note 136.

140. *Id.*

141. *See supra* note 91 and accompanying text.

142. *See* N.J. STAT. ANN. § 8A: 151-1 (West 1968) (repealed 1979); *see also* *Burton v. Sills*, 53 N.J. 86, 89 (1986).

143. *Burton*, 53 N.J. at 97.

144. Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 64 (1966).

145. *Burton*, 53 N.J. at 97. The best precedent for the *Burton* court's theory was the 1935 case *United States v. Adams*, which involved a challenge to the National Firearms Act. 11 F. Supp. 216 (S.D. Fla. 1935). Judge Halsted Ritter wrote that the Second Amendment "refers to the militia, a protective force of government; to the collective body and not individual rights." *Id.* at 219. Judge Ritter had trouble finding legal authority to support his claim. He cited the 1896 U.S. Supreme Court case *Robertson v. Baldwin*, 165 U.S. 275 (1897). But that case, involving the Thirteenth Amendment, simply said that all constitutional rights had implicit exceptions. As examples, the Court said that the First Amendment had an implicit exception that allowed the government to punish libel, and the Second Amendment

As a legal term of art, the idea of collective rights had long been recognized in the United States. For example, Article I of the Constitution specifies that the House of Representatives shall be elected by “the People” of each state.<sup>146</sup> While state legislatures have some discretion in setting qualifications for eligible voters, every November in even-numbered years, the People of a state exercise their collective right to elect their United States Representatives. The collective right of voting is, obviously, one that must be exercised individually. That voting is a collective right does not mean that a state legislature could abolish popular elections for the U.S. House and mandate that U.S. Representatives be appointed by the Governor, rather than elected by the People. If a state legislature did so, then individuals could file suit in federal court, and as individual plaintiffs, could successfully assert the “collective right” of “the People” to directly elect U.S. Representatives.

The New Jersey Supreme Court, however, did not mean “collective right” in the normal sense in which it had been used in American constitutional law. To the contrary, the New Jersey court’s version of the “collective right” in the Second Amendment was akin to “collective property” in a Communist dictatorship. The “collective right” to arms supposedly belonged to everybody at once, but could never be asserted by an individual. Thus, the “right” actually belonged to nobody and nothing, and had no practical existence.

Because the Federal GCA vastly expanded the scope of federal gun laws, the federal courts were soon hearing plenty of cases about “prohibited persons” (usually, convicted felons) who had violated

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had an implicit exception that allowed the government to ban the carrying of concealed weapons. *Id.* at 281-82.

Ritter was not exactly a judicial luminary. The next year, he would be impeached by the U.S. House of Representatives and removed from office following conviction by the U.S. Senate.

In 1936, the Colorado Attorney General faced the difficult task of defending a state statute that forbade legal aliens from possessing arms. Ostensibly, the statute’s purpose was to prevent aliens from hunting and thereby preserve Colorado’s wild game for the citizenry. Perhaps taking a leaf from *Adams*, the Attorney General argued that Colorado’s constitutional right to arms “is not a personal right, but one of collective enjoyment for common defense.” *People v. Nakamura*, 62 P.2d 246 (Colo. 1936). The Colorado Supreme Court unanimously rejected the collective enjoyment theory and ruled the statute unconstitutional by a 5-2 vote. *Id.* at 246. The dissent would have found it unconstitutional as applied to someone who was not actually hunting, but Nakamura had been caught red-handed in possession of game. *Id.* at 247-48 (Bouck, J., dissenting).

146. U.S. CONST. art. I, § 2, cl. 1.

federal law by possessing a firearm.<sup>147</sup> The factual guilt of these defendants was indisputable, so their attorneys sometimes resorted to the desperate argument that the gun ban violated the felons' Second Amendment rights. From 1968 through the remainder of the twentieth century, the federal district courts and courts of appeal unanimously rejected such arguments.<sup>148</sup> As Justice Scalia's majority opinion in *District of Columbia v. Heller* affirmed, recognizing the right of law-abiding Americans to possess guns does not require allowing convicted felons, or the insane, to have guns.<sup>149</sup>

However, some federal courts went much further. Some followed *Burton v. Sills* in declaring the Second Amendment to be a "collective right."<sup>150</sup> Others, following a 1942 case from the Third Circuit, said that the Second Amendment was a "state's right."<sup>151</sup>

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147. *See, e.g.*, *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971).

148. *E.g.*, *Witherspoon v. United States*, 633 F.2d 1247, 1251 (6th Cir. 1980) (plea of guilt as felon in possession "was entered after the District Judge had heard argument from both counsel on appellant's contention that the Second Amendment afforded him protection from the federal firearms statute because he was on his own business premises. There is, of course, no such specific proviso in the Second Amendment nor is there any Supreme Court interpretation to that effect . . ."); *United States v. Pruner*, 606 F.2d 871, 873-74 (9th Cir. 1979) ("[T]he purchase of a firearm, is itself an innocent act . . . . It may be true that the purchase of handguns in itself is an innocent act and that because of the innocence of the act there exists the possibility of injustice to one who purchases a gun, unaware that he had committed a crime that was punishable by a term of imprisonment exceeding one year. However, we believe that the potential for such injustice is outweighed by the danger created if guns are allowed to fall into the hands of dangerous persons such as felons."); *see also id.* ("Someday there will undoubtedly be a clear cut opinion from the Supreme Court on the Second Amendment. Without more at this time, however, the Court chooses to follow the majority path and here holds that the Second Amendment does not prohibit the federal government from imposing some restrictions on private gun ownership."); *cf.* *Adams v. Williams*, 407 U.S. 143, 149-51 (1972) (Douglas, J. concurring in part and dissenting in part) (discussing the proposition that the purchase of guns is a constitutional right protected by the Second Amendment); *United States v. Spruill*, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999) (upholding ban on gun possession by persons under domestic violence restraining order).

149. 554 U.S. 570, 626 (2008).

150. *See, e.g.*, *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

151. The Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

The State's right, if taken seriously, would mean that the Second Amendment had somehow taken back some of the federal powers over the state militias that had been granted by Article I of the U.S. Constitution. A state's rights Second Amendment would mean that state governments would have the power to negate federal gun control laws which applied to members of the state's militia. For example, a state government could declare that the state's militia consisted of all adults, and those



The lower federal courts always said that they were following the Supreme Court's 1939 decision in *United States v. Miller*,<sup>152</sup> but they were plainly wrong—at least according to all nine of the *Heller* Justices in 2008. The Scalia majority and the Stevens dissent in *Heller* both agreed that *Miller* had plainly and correctly recognized the Second Amendment as an individual right.<sup>153</sup> Justices Scalia and Stevens disagreed about whether the right was for all individuals or only for individuals in a militia.<sup>154</sup> But whatever the scope of the Second Amendment right, it was, unanimously, an individual one. The “collective right” and “state’s right” lower court decisions of the late twentieth century were brusque and consisted of virtually no analysis, other than chain citations to equally sparse opinions from other courts, plus the obligatory, and always-wrong, citation to *Miller*.<sup>155</sup>

### III. THE 1970S

The 1970 election turned out to be a good one for the gun lobby. The NRA claimed that reaction against the GCA helped to defeat Dodd, liberal New York Republican Charles Goodell, Tennessee’s Albert Gore, Sr. (father of the future Vice President), and Maryland’s Joseph Tydings.<sup>156</sup> The claim was least plausible for Senator Dodd, a widely rumored alcoholic, who was likely headed for defeat after being censured for corruption in 1967.<sup>157</sup> Gore lost by 4%, within the margin where NRA votes could swing the result.<sup>158</sup> Goodell had the misfortune of splitting the liberal New York vote with Democrat

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militiamen (and militiawomen) should be able to own machine guns (or even grenades, bazookas, and so on) without any federal taxation, registration, or licensing. See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

152. 307 U.S. 174 (1939).

153. *Heller*, 554 U.S. at 579-80 (Scalia, J., majority opinion); *id.* at 636 (Stevens, J., dissenting) (“Surely it protects a right that can be enforced by individuals.”).

154. *Miller* is poorly-written and opaque, and thus susceptible to either the Scalia reading or the Stevens reading. Part of the problem is that it was written by the notoriously indolent Justice James Clark McReynolds. For McReynolds’s sloth, see Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721 (2003).

155. See generally Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

156. See Kopel, *supra* note 136.

157. See DAVID E. KOSKOFF, *supra* note 88.

158. See *TN US Senate*, OUR CAMPAIGNS, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=6539> (last visited Nov. 5, 2012).

2012]            *THE GREAT GUN CONTROL WAR*            1551

Richard Ottinger and lost to James Buckley (brother of *National Review* publisher William F. Buckley).<sup>159</sup> Buckley ran as the Conservative party nominee, garnering 39% of the vote, and his 2% margin of victory was partly thanks to the gun vote.<sup>160</sup>

The biggest political impact, however, came from the narrow defeat of Maryland Democrat Tydings. He had sponsored legislation for national gun licensing and gun control, and had also alienated civil libertarians by shepherding federal wiretap legislation into law.<sup>161</sup> His loss was widely attributed to backlash from gun owners and civil libertarians.<sup>162</sup> Partly because Maryland is adjacent to the District of Columbia, Tydings's loss had a large effect in Congress, convincing many congressmen that voting for gun control was electorally dangerous.

This was certainly the case in Texas. In 1970, Rep. Bush won the Republican nomination for U.S. Senate but was defeated by Democrat Lloyd Bentsen, who exploited Bush's very unpopular (in Texas) support for gun control.<sup>163</sup>

With comprehensive gun control now part of federal law, the Alcohol, Tobacco, and Firearms Division of the Treasury Department was upgraded into a Bureau and given primary responsibility for the enforcement of the GCA.<sup>164</sup> The new bureau was known as BATF, although in the late 1980s, the Bureau would adopt the moniker "ATF," to emulate the more-respected FBI and DEA.

#### **A. The Rise of the Handgun Prohibition Lobbies and the Revolt at the NRA**

Gun control advocates in Congress saw a domestic ban on "Saturday Night Specials" (SNSs) as the logical next step. Several times in the 1970s they passed bills out of committee or through one

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159. See WILLIAM POUNDSTONE, *GAMING THE VOTE: WHY ELECTIONS AREN'T FAIR (AND WHAT WE CAN DO ABOUT IT)* 189 (2009).

160. See *id.* at 189-90.

161. See Kopel, *supra* note 136.

162. For the political and social history of this period, see SHERRILL, *supra* note 131, at 197, and Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 *BROOK. L. REV.* 715 (2005).

163. See Kopel, *supra* note 128.

164. *History of ATF from Oxford University Press, Inc. 1798-1998*, excerpted from A HISTORICAL GUIDE TO THE U.S. GOVERNMENT (George T. Kurian ed., 1998), available at <http://www.atf.gov/about/history/atf-from-1789-1998.html>.

house of Congress.<sup>165</sup> The high-water mark was a 1972 Senate vote, by 68-25, to ban about one-third of all handguns by labeling them “Saturday Night Specials.”<sup>166</sup> But neither the SNS ban nor any other significant gun control was passed.<sup>167</sup> The Nixon White House repeatedly warned the NRA that it had better cut the best deal it could on an SNS ban, and many in the American gun industry were ready to accept some sort of ban.<sup>168</sup>

The relatively new trade association for the firearms industry, the National Shooting Sports Foundation (NSSF) (founded in 1961) was dominated by long-gun manufacturers.<sup>169</sup> The NSSF reflected the long-gun companies’ discomfort with making handguns and self-defense the dominant themes of gun ownership in America. If an SNS ban was going to be stopped in Congress, the resistance would not come from the industry. The battle would be fought, if at all, by grassroots activists under the banner of the NRA.

NRA Executive Vice-President (the day-to-day Chief Operating Officer of the Association) Franklin Orth supported a narrowly-written SNS ban, as long as it was not a cover for a more sweeping ban on other handguns.<sup>170</sup> A 1968 issue of *The American Rifleman* contained Orth’s scathing denunciation of the poor-quality, dirt cheap, unreliable, “Saturday Night Special.”<sup>171</sup> Orth also judged the 1968 GCA as pretty good overall.<sup>172</sup>

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165. See, e.g., Marjorie Hunter, *Senate Unit Asks Ban on Handguns*, N.Y. TIMES, June 28, 1972 (“The Senate Judiciary Committee voted, 12 to 2, today to ban the manufacture and sale of most snub-nosed handguns.”); Nancy Hicks, *Gun Control Bill is Losing Support*, N.Y. TIMES, Apr. 18, 1976 (“The House Judiciary Committee revived and sent to the floor a gun control measure this week . . .”).

166. When S. 2507 came to the House, it lacked the support to get out of the Judiciary Committee. “We’re a gun nation,” explained Judiciary Chairman Emmanuel Celler, who supported the bill. *Bayh Bill Stopped Cold*, AM. RIFLEMAN, Nov. 1972.

167. See, e.g., Marjorie Hunter, *Senate Rejects Strong Gun Curbs by 78-11 Margin*, N.Y. TIMES, Aug. 8, 1972; Nancy Hicks, *Gun Control Bill Put on the Shelf*, N.Y. TIMES, Mar 3, 1976 (“Two attempts to assassinate President Ford last September created new interest in handgun control in the current Congress, but that interest soon waned . . .”).

168. KNOX, *supra* note 137, at 257-58.

169. See *NSSF History*, NAT’L SHOOTING SPORTS FOUND., <http://www.nssf.org/industry/historyNSSF.cfm> (last visited Nov. 17, 2012).

170. David T. Hardy, *Orth, Franklin L.*, in 1 GUNS IN AMERICAN SOCIETY 665 (2d ed. 2012) (quoting Orth’s testimony at the *Senate Hearings on Saturday Night Special Ban* (D.C.: Gov’t Printing Office, 1971)); *Congress Threshes Out Gun Law Issue*, AM. RIFLEMAN, Nov. 1968, at 22-25.

171. See WINKLER, *supra* note 75, at 253-54, 256.

172. *Id.*

2012]            *THE GREAT GUN CONTROL WAR*            1553

Other voices within the NRA strongly disagreed. Led by former U.S. Border Patrol head Harlon Carter, they insisted that there was no such thing as a bad gun, only bad gun owners. In the internal battles at the NRA's Washington headquarters, the hard-liners gained control of the lobbying operation and the magazine, while the "Old Guard" held on to general operations.<sup>173</sup> The two sides waged fierce internecine battles.

When Congress created the Consumer Product Safety Commission (CPSC) in 1972 and gave it extremely broad powers to outlaw any consumer product it deemed to be too risky, the NRA defeated an amendment giving the CPSC authority to ban firearms.<sup>174</sup> After the new Commission claimed that it nonetheless had authority to ban *ammunition*, freshman Republican Senator James McClure of Idaho secured a large majority to add a specific prohibition on CPSC action against firearms or ammunition.<sup>175</sup> Still, the impulse for gun control was growing, and gun rights victories consisted mostly of defense against proposed new laws.

During the 1960s and 1970s, a tremendous cultural shift took place among American élites. In 1960, it was unexceptional that a liberal Northeastern Democrat, such as John F. Kennedy, would join the NRA. But by the early 1970s, gun ownership itself was reviled by much of the urban intelligentsia.<sup>176</sup> The prominent historian Richard Hofstadter spoke for many when he complained that "Americans cling with pathetic stubbornness" to "the supposed 'right' to bear

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173. *Id.* at 65-67.

174. 118 Cong. Rec. 31,406-08 (1972).

175. Act of May 11, 1976, Pub. L. No. 94-284, 90 Stat. 504; Dennis B. Wilson, *What You Can't Have Won't Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act*, 53 CLEV. ST. L. REV. 225, 234-35 (2006).

176. For example, among the members of the Emergency Committee for Effective Gun Control, many of whom would continue to be public supporters of stringent anti-gun laws in future years, were Leonard Bernstein (the most famous orchestra conductor in America), Truman Capote, Archibald Cox, Harold Cunningham (Dean of University of North Dakota Law School), Leonard Goldenson (President of ABC Television), James A. Linen (President of Time Magazine), David Maxwell (former President of the American Bar Association), Benjamin Maye (President emeritus of Morehouse College), Ralph E. McGill (Publisher of the Atlanta Constitution), George Plimpton (Editor of *The Paris Review*), Louis H. Pollak (Dean of Yale Law School), Leon Sulzman (President of the Academy of Psychoanalysis), and Edward Bennett Williams (founding partner of Williams & Connolly LLP). See *Gun Legislation: Hearing Before the S. Judiciary Comm., Subcomm. on Juvenile Delinquency*, 90th Cong. 1 (1968) (statement of John Glenn, Jr., Chairman, Emergency Comm. for Gun Control).

arms,” and refuse to adopt European-style gun control laws.<sup>177</sup> While some of the intelligentsia might concede a limited place for sporting guns, guns for self-defense came to represent an insult to a well-ordered society.<sup>178</sup>

As for the Second Amendment, the winning entry in the 1965 American Bar Association student paper competition is instructive. Written by Robert Sprecher and published in the *ABA Journal*, it was titled “The Lost Amendment.”<sup>179</sup> Sprecher’s historical analysis endorsed the individual rights view that would later be known as the Standard Model.<sup>180</sup> But in his view, the Amendment was “lost” in the sense that few people paid attention to it, and it was neglected by courts and scholars.<sup>181</sup>

The as-yet-unnamed “Standard Model” (which views the Second Amendment as a normal individual right, but bounded by permissible controls) remained the dominant view among the general public.<sup>182</sup> But elite opinion mostly considered the Second Amendment as purely a “collective right” or a “state’s right.”<sup>183</sup> This meant that whatever the Amendment’s positive content, it was no barrier to gun prohibition. This conclusion was further supported by the gun control task force of President Johnson’s Commission on Violence.<sup>184</sup> The task force was led by the energetic young scholar Franklin

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177. Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, available at <http://www.americanheritage.com/content/america-gun-culture>.

178. See Barry Bruce-Briggs, *The Great American Gun War*, PUB. INT., 1976, at 37-62.

179. Robert Sprecher, *The Lost Amendment* (pts. 1 & 2), 51 A.B.A. J. 554, 664 (June 1965).

180. See *id.* at 667.

181. See *id.* at 669.

182. A 1975 national poll asked whether the Second Amendment “applies to each individual citizen or only to the National Guard.” Seventy percent chose the individual right, and another 3% said the Amendment protects citizens *and* the National Guard. 121 CONG. REC. 42,109, 42,112 (Dec. 9, 1975).

In a 1978 national poll, 87% answered “yes” to the question, “Do you believe the Constitution of the United States gives you the right to keep and bear arms?” Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 135 n.79 (1982) (quoting Decision Making Information, *Attitudes of the American Electorate Toward Gun Control* (1978)).

183. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637, 640, 645 (1989).

184. GEORGE P. NEWTON & FRANKLIN ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE, TASK FORCE REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 640, 645 (1969).

2012]            *THE GREAT GUN CONTROL WAR*            1555

Zimring, whose work would influence the gun debate for years to come.<sup>185</sup>

While supported by much of the media and endorsed by numerous prestigious and powerful individuals and organizations, gun control advocates lacked their own version of the NRA—an organization whose primary purpose was to advance the cause. That changed in 1974 with the founding of the National Coalition to Control Handguns (NCCH).<sup>186</sup> (The group would later change its name to Handgun Control, Inc., and later still to the Brady Campaign.<sup>187</sup>) The NCCH soon found a chairman to build it into an institution. Business executive Nelson “Pete” Shields’s son had been murdered in San Francisco by the Zebra killers, a Black Muslim cult that over several years perpetrated random torture murders of non-blacks in the Bay Area.<sup>188</sup> Shields explained his long-term plan:

The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of *all* handguns and *all* handgun ammunition—except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.<sup>189</sup>

At the time, the NCCH was a member organization of another new gun control group, the National Coalition to Ban Handguns (NCBH). (That group later changed its name to the Coalition to Stop Gun Violence.) For both the NCCH and the NCBH, the initial focus was solely on handguns. As Shields put it in his book, “our organization, Handgun Control, Inc., does not propose further controls on rifles and shotguns. Rifles and shotguns are not the problem; they are not *concealable*.”<sup>190</sup> Later, both groups would broaden their focus to include restrictions or prohibitions on all types of firearms.<sup>191</sup>

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185. *Id.*

186. WINKLER, *supra* note 75.

187. *History of the Brady Campaign*, BRADY CAMPAIGN, <http://www.bradycampaign.org/about/history> (last visited Nov. 11, 2012).

188. *See generally* PRENTICE EARL SANDERS & BENNETT COHEN, *THE ZEBRA MURDERS: A SEASON OF KILLING, RACIAL MADNESS AND CIVIL RIGHTS* (2011); PETE SHIELDS, *GUNS DON’T DIE, PEOPLE DO* 37 (1981).

189. Richard Harris, *A Reporter at Large: Handguns*, *NEW YORKER*, July 26, 1976, at 58.

190. *See* SHIELDS, *supra* note 188, at 47-48.

191. For example, the current websites of the groups ([www.bradycenter.org](http://www.bradycenter.org); [www.csgv.org](http://www.csgv.org)) include numerous policy agenda items aimed at long guns, or at guns in general.

Meanwhile, the battles within the NRA continued. The legislative office was upgraded to the Institute for Legislative Action (ILA) in 1974, but ILA was often under siege by the NRA's Old Guard, who still ran general operations and who opposed the ILA's Second Amendment zealotry. Meanwhile, NRA membership had changed significantly. By the early 1970s, a remarkable 25% of NRA members were what the NRA calls "non-shooting constitutionalists"—that is, persons who do not even own a gun, and only joined the NRA to defend gun rights.<sup>192</sup>

Things came to a head in 1977 when the NRA leadership announced plans to abandon politics, sell the D.C. headquarters building, move the Association to Colorado Springs, and transform the NRA into a purely outdoors association.<sup>193</sup> Harlon Carter resigned from the NRA staff and began organizing a faction of members determined to keep the NRA in the political fight.<sup>194</sup> They feared that political compromise by the NRA would unleash a wave of stringent gun controls and prohibitions.<sup>195</sup> The showdown came at the Annual Meeting of the Members, which took place that year in Cincinnati.<sup>196</sup> Armed with walkie-talkies and skilled in parliamentary procedure, Carter and the "Federation for NRA" won vote after vote and changed the NRA's by-laws.<sup>197</sup>

This triumph became known as the "Revolt at Cincinnati." At about 3:30 A.M., Harlon Carter was elected Executive Vice-President.<sup>198</sup> The next year, Carter appointed Neal Knox as head of the NRA's ILA.<sup>199</sup>

Knox was a gun periodical editor, and had been national shotgun champion a decade before.<sup>200</sup> Knox's fervor for gun issues stemmed from his early experience serving in the Texas National Guard, where he met a Belgian-American Guardsman named Charley Duer.<sup>201</sup> In gun rights lore, Duer became known as "the Belgian Corporal."<sup>202</sup> He

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192. See SHERRILL, *supra* note 131, at 188.

193. See JOSEPH P. TARTARO, REVOLT AT CINCINNATI 17-23 (1981).

194. See *id.* at 16-19.

195. See *id.* at 18-19.

196. See *id.* at 30-36.

197. See *id.* at 37-40.

198. *Id.* at 11.

199. See *id.* KNOX, *supra* note 137, at 300 (Chris Knox ed., 2009).

200. See *id.* at 22.

201. See *id.* at 16.

202. *Id.*

2012]      *THE GREAT GUN CONTROL WAR*      1557

told Knox how the conquering Nazis had seized the Belgian government's gun registration lists and demanded the immediate surrender of all registered firearms.<sup>203</sup> One family in town was ordered to produce an old handgun that had been a relic from World War I, a quarter-century before:

The officer told the father that he had exactly fifteen minutes to produce the weapon. The family turned their home upside down. No pistol. They returned to the SS officer empty-handed.

The officer gave an order and soldiers herded the family outside while other troops called the entire town out into the square. There on the town square the SS machine-gunned the entire family—father, mother, Charley's two friends, their older brother and a baby sister.

I will never forget the moment. We were sitting on the bunk on a Saturday afternoon and Charley was crying, huge tears rolling down his cheeks, making silver dollar size splotches on the dusty barracks floor.<sup>204</sup>

Carter, Knox, and their allies began formulating a detailed political agenda. One of their first priorities was the reform of the 1968 GCA, which they argued was being abusively enforced by BATF.<sup>205</sup> The new approach seemed popular; NRA membership, which was about a million just before the Revolt, grew to 2.6 million by 1983 (and would eventually pass the 4 million mark in the early twenty-first century).

The impulse for this growth in membership was also sufficient to fuel the birth of two new gun rights organizations, the Second Amendment Foundation in 1974 and Gun Owners of America in 1975.<sup>206</sup> Both organizations continue to play an influential role in firearms policy.

### **B. Handgun Prohibition Efforts in the District of Columbia and Massachusetts**

The mid-1970s witnessed important advances for gun prohibition. Having just been granted home rule by Congress, the newly empowered District of Columbia city government enacted a ban on

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203. *Id.*

204. *Id.* at 17.

205. See generally DAVID T. HARDY, SECOND AMENDMENT FOUNDATION, THE BATF'S WAR ON CIVIL LIBERTIES: THE ASSAULT ON GUN OWNERS (1979).

206. David T. Hardy, *Gun Owners of America*, in 1 GUNS IN AMERICAN SOCIETY, *supra* note 73, at 252; Marcia L. Godwin, *Second Amendment Foundation*, in 1 GUNS IN AMERICAN SOCIETY, *supra* note 73, at 527.



handguns, which became effective in early 1976.<sup>207</sup> (It would be overturned in *District of Columbia v. Heller*, thirty-two years later.) The law also prohibited the use of any firearm for self-defense in the home. The ban passed the City Council 12-1, with some supporters stating that the law probably would have no effect in the District, but hopefully would spur movement toward a national handgun ban.<sup>208</sup>

The NRA sued to overturn the D.C. ban on numerous grounds, but most notably, the challenges did not assert that the D.C. law violated the Second Amendment. The NRA won in district court, but lost in the District of Columbia Court of Appeals, the city's equivalent to a state supreme court.<sup>209</sup>

The idea of a national handgun ban was gaining momentum. President Ford endorsed a ban on the sale of SNSs.<sup>210</sup> His Attorney General Edward Levi proposed a national handgun ban, applicable only to large cities with crime rates above a certain threshold.<sup>211</sup> The proposal stalled, partly because of the obvious impracticality of preventing guns from nearby areas from being brought into the particular cities.<sup>212</sup>

The first serious chance for the D.C. ban to spread nationally came in a 1976 Massachusetts election. A ballot initiative proposed that authorities confiscate all handguns in the state, including BB guns.<sup>213</sup>

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207. The District of Columbia had for almost all of its history been ruled by the House and Senate Committees on the District of Columbia, until the District of Columbia Home Rule Act was enacted in 1973. Pub. L. No. 93-198, 87 Stat. 777 (1973).

208. *See Has DC's Handgun Ban Prevented Bloodshed*, CBS NEWS (Feb. 11, 2009, 3:15 PM), [http://www.cbsnews.com/2100-280\\_162-3941010.html](http://www.cbsnews.com/2100-280_162-3941010.html).

209. *See McIntosh v. Washington*, 395 A.2d 744, 747 (D.C. Cir. 1978).

210. Gerald R. Ford, Remarks for Crime Message Briefing, Washington, June 19, 1975 ("I am unalterably opposed to federal registration of guns or gun owners. I do propose that the Congress enact legislation to deal with handguns for criminal purposes. I also propose further federal restrictions on so-called Saturday night specials."); *see also* GERALD FORD, *A TIME TO HEAL* 292 (1979) ("I had always opposed federal registration of guns or the licensing of gun owners, and as President, I hadn't changed my views. At the same time, I recognized that handguns had played a key role in the increase of violent crime. Not all handguns—just those that hadn't been designed for sporting purposes. I asked Congress to ban the manufacture and sale of these 'Saturday night specials.'").

211. *See* John M. Crewdson, *Levi Says U.S. Is Studying Ways to Curb Pistols in Urban Areas*, N.Y. TIMES, Apr. 7, 1975.

212. *See* Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37 (1976).

213. *See* Initiative Petition of John J. Buckley and Other, H.R. Doc. No. 4202 (Mass. 1976); Joint Legislative Comm. on Pub. Safety, Report of the Committee on

2012]            *THE GREAT GUN CONTROL WAR*            1559

Gun owners would have six months to surrender their firearms, after which they would face a mandatory year in prison for owning a handgun.<sup>214</sup>

The confiscation law seemed poised to pass. The most liberal state in the nation, Massachusetts—along with the District of Columbia—was the only place that had given its electoral votes to Democratic presidential candidate George McGovern in 1972.<sup>215</sup> (McGovern had run on a platform calling for a national ban on all handguns considered “unsuitable for sporting purposes.”<sup>216</sup>)

Most of the Massachusetts media strongly supported a handgun ban.<sup>217</sup> *The Boston Globe*, whose reach extends throughout the relatively small state, vehemently opposed handgun ownership.<sup>218</sup> Early polling suggested that a handgun ban would pass handily.<sup>219</sup> Further, in the 1974 election, voters in several state legislative districts had overwhelmingly supported measures instructing their state legislators to vote for strict anti-gun legislation.<sup>220</sup>

Since 1968, Massachusetts gun laws had already been among the most severe in the nation, requiring permission from local law enforcement officials before the purchase of any firearm; allowing local law enforcement agencies to set conditions on the possession or use of that firearm (e.g., the gun must be stored unloaded and may not be used for self-defense); and demanding all guns be registered.<sup>221</sup>

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Public Safety on the Initiative Petition of John J. Buckley and Others, H.R. Doc. No. 4752, at 3 (Mass. 1976).

214. See Initiative Petition of John J. Buckley and Other, House No. 4202 (Jan. 1976).

215. See THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1972*, at 373 (1973).

216. See *Democratic Party Platform of 1972*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29605> (last visited Sept. 23, 2012) (“There must be laws to control the improper use of hand guns. . . . Effective legislation must include a ban on sale of hand guns known as Saturday night specials which are unsuitable for sporting purposes.”).

217. See, e.g., *Bets, Bottles and Bullets*, TIME, Nov. 15, 1976.

218. See JUDITH VANDELL HOLMBERG, *PEOPLE VS HANDGUNS: THE CAMPAIGN TO BAN HANDGUNS IN MASSACHUSETTS* 1, 63 (1977); *Mass. Ballot Issues . . . 5 Banning Private Handguns*, BOS. GLOBE, Oct. 25, 1976; Carol Surkin, *Handgun Ban Drive Pushed*, BOS. GLOBE, Oct. 21, 1976.

219. See HOLMBERG, *supra* note 218, at 1-2.

220. See *id.* at 1, 3.

221. See MASS. GEN. LAWS ANN. ch. 269, § 10 (West 2012) (mandatory one-year sentence for possession of any firearm or ammunition in a public place without a permit); MASS. GEN. LAWS ANN. ch. 140, § 121 (West 2012) (carry permits may be denied based on unlimited discretion of local police chief or sheriff; no firearms or

The leader of the “People vs. Handguns” organization was the popular Republican John Buckley, the sheriff of Middlesex County. Buckley was fresh off a 1974 win against a pro-gun Democratic challenger.<sup>222</sup> Alongside Buckley was Robert DiGrazia, the Police Commissioner of Boston, appointed by the staunchly anti-gun Boston Mayor Kevin White.<sup>223</sup>

At the insistence of Buckley and DiGrazia, the Massachusetts handgun prohibition lobby did not think small. Confiscation would be total, with no exemption for licensed security guards or target shooting clubs.<sup>224</sup> Even transporting a handgun through Massachusetts (e.g., while traveling from one’s home in Rhode Island to a vacation spot in Maine or a target competition in New Hampshire) would be illegal, except for people with handgun carry permits (which, as of 1976, were rarely issued by most states).<sup>225</sup>

Everyone understood the national importance of the Massachusetts vote. If handgun confiscation could win in Massachusetts, then it could be pushed in city after city and state after state. The U.S. Conference of Mayors (a collection of big-city mayors) was already making plans for handgun confiscation elections in Michigan, Ohio, and California.<sup>226</sup> Eventually, it was hoped, the mass of state and local bans would provide the foundation for a national ban.

The National Council to Control Handguns (which would soon rename itself Handgun Control, Inc.) knew how high the stakes were; after all, Robert DiGrazia was a member of their Board of Directors. They sent out a fundraising letter touting what they called “THE SINGLE MOST IMPORTANT EVENT IN THE HISTORY OF

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ammunition possession without a licensing; licensing system is highly discretionary; firearms must be locked up). For the bills creating these laws, see H.R. 113, 1975 Leg. (Mass. 1975); H.R. 737, 1968 Leg. (Mass. 1968); H.R. 799, 1969 Leg. (Mass. 1969); H.R. 892, 1973 Leg. (Mass. 1973).

222. See HOLMBERG, *supra* note 218, at 34.

223. See Carol Surkin, *Handgun Ban Drive Pushed*, BOS. GLOBE, Oct. 21, 1976; Letter from Robert DiGrazia, Police Comm’r, Bos., Mass. (fundraising letter for National Council to Control Handguns, for Mass. initiative).

224. See Surkin, *supra* note 223.

225. See H.R. 4202, 1976 Leg. (Mass. 1976).

226. MATTHEW G. YEAGER, DO MANDATORY PRISON SENTENCES FOR HANDGUN OFFENDERS CURB VIOLENT CRIME, TECHNICAL REPORT FOR CONFERENCE OF MAYORS (1976).

2012]            *THE GREAT GUN CONTROL WAR*            1561

HANDGUN CONTROL.”<sup>227</sup> They promised that “[a] victory in Massachusetts will be the first step toward the day when there will be . . . no more handguns.”<sup>228</sup>

Governor Michael Dukakis strongly endorsed the confiscation plan.<sup>229</sup> He was a rising star in the Democratic Party, having ousted an incumbent Republican governor in 1974 by a ten-point margin.<sup>230</sup> He would win the Democratic presidential nomination in 1988.<sup>231</sup> “We must disarm society,” Dukakis explained.<sup>232</sup> “We must realize that violence only begets violence. Only when we ban handguns will we reduce violence.”<sup>233</sup>

Even the state’s highest court, the Massachusetts Supreme Judicial Court, helped out. A man named Hubert Davis was caught with an unlicensed sawed-off shotgun.<sup>234</sup> In the trial court, his attorney asserted that the licensing law on short shotguns violated his right to arms under the Massachusetts State Constitution.<sup>235</sup>

Davis’s motion was denied by the trial court.<sup>236</sup> While Davis was appealing to the intermediate court of appeals, the Supreme Judicial Court “took the matter on our own initiative.”<sup>237</sup> The Supreme Judicial Court, having reached out to take the case, did more than just uphold the statute on short shotguns; the court also ruled that there was *no* right to arms under the Massachusetts State Constitution.<sup>238</sup>

The 1780 Massachusetts Constitution had guaranteed that “[t]he people have a right to keep and to bear arms for the common

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227. Letter from Nelson T. Shields, III, Exec. Dir., Nat’l Council to Control Handguns (1976) (fundraising letter for campaign to support the initiative) (on file with author).

228. *Id.*

229. See Robert J. Rosenthal, *Dukakis Supports Handgun Ban*, BOS. GLOBE, Oct. 7, 1976; Edward T. McHugh, *Handgun Ban Being Pushed by Governor*, WORCESTER TELEGRAM, Oct. 19, 1976.

230. *MA Governor, OUR CAMPAIGNS*, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=51797> (last visited Nov. 5, 2012).

231. See Michael S. Dukakis, “*A New Era of Greatness for America*”: *Address Accepting the Presidential Nomination at the Democratic National Convention in Atlanta July 21, 1988*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25961> (last visited Jan. 18, 2013).

232. See *Ask Turn-in of Handguns*, MEDFORD MERCURY, Oct. 28, 1976.

233. *Id.*

234. See *Commonwealth v. Davis*, 343 N.E.2d 847, 848, 850 (Mass. 1976).

235. See *id.* at 848.

236. See *id.*

237. *Id.*

238. *Id.* at 848-49.

defence.”<sup>239</sup> Since then, Massachusetts courts had recognized the right to arms as an individual one, subject to legitimate restrictions (such as a ban on mass armed parades without a license).<sup>240</sup> Courts in other states, interpreting identical or near-identical language, came to similar results.<sup>241</sup>

But on March 9, 1976, the Massachusetts Supreme Judicial Court handed down its unanimous decision in *Commonwealth v. Davis*: there was *no* individual right to arms in Massachusetts.<sup>242</sup> Whatever the right had meant in 1780, as of 1976 nobody in Massachusetts had any right to keep or bear a firearm.<sup>243</sup> A complete ban on all guns would be constitutional. The implication for the pending vote on handgun confiscation was obvious.

The court also did an even bigger favor for the confiscation advocates. At the urging of gun rights supporters, the state legislature had put an alternative proposal on the ballot: if a violent criminal who had used a gun to commit crime was sentenced to a term of imprisonment (say, “one to five years”), then the criminal would actually have to serve at least the minimum sentence.<sup>244</sup> If the public voted in favor of Question 5A (handgun confiscation) and 5B (mandatory prison sentences for violent gun criminals), only the question that received the most votes would become law.<sup>245</sup> Everyone knew that 5B would pass in a landslide, and so less than two months before the election, the Massachusetts Supreme Judicial Court threw 5B off the ballot, insisting that incarcerating and deterring violent gun

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239. MASS. CONST. art. 17.

240. *Commonwealth v. Murphy*, 44 N.E. 138 (Mass. 1896) (upholding ban on unlicensed armed parades); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825) (“The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”).

241. *See, e.g.*, *Wilson v. State*, 33 Ark. 557, 560 (1878) (interpreting ARK. CONST. OF 1868, art. I, § 26, which provides “[t]he citizens of this State shall have the right to keep and bear arms for their common defense”); *Andrews v. State*, 50 Tenn. 165, 178–80 (1871) (interpreting TENN. CONST. OF 1870, which provides “the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime”).

242. *Davis*, 343 N.E.2d at 849.

243. *Id.* at 848–49.

244. *Mass. Gun Law Fails To Cut Hard Crime*, AM. RIFLEMAN, Sept. 1976, at 51.

245. *See* HOLMBERG, *supra* note 218, at 2.

criminals did not involve the same subject matter as handgun confiscation.<sup>246</sup>

In a sense, the court was right. Advocates of gun confiscation were aiming at law-abiding citizens, not criminals. At an anti-gun rally the week before the election, Senator Edward Kennedy explained, “We won’t keep guns out of the hands of criminals.”<sup>247</sup> After the election, an official with the League of Women Voters (which vigorously supported the ban) said, “I think a lot of voters have the idea this was designed to get guns away from the criminals. That’s not the real purpose.”<sup>248</sup>

In 1974, the NRA had helped organize a joint sportsmen’s committee in Massachusetts, which soon became the Gun Owners Action League (GOAL).<sup>249</sup> Together, GOAL and NRA worked against Question 5. They garnered the support of the Farm Bureau, Veterans of Foreign Wars, American Legion, the Western Massachusetts Labor Council and many local union members.<sup>250</sup> By far the most important allies they recruited were the police. Every major police organization in the state opposed Question 5—including the Chiefs of Police Association, the State Police Association, Boston Police Patrolmen’s Association, and the Sheriffs Association.<sup>251</sup>

246. *Buckley v. Sec’y of Commonwealth*, 355 N.E.2d 806, 811 (Mass. 1976).

247. See Robert J. Rosenthal, *Handgun Question Elicits Differing Styles, Emotions*, BOS. GLOBE, Oct. 25, 1976.

248. Gwenn Wells, *Wiesner Breathes Easier with Gun Ban Defeat*, HYANNIS TIMES, Nov. 3, 1976.

249. See HOLMBERG, *supra* note 216, at 1-2, 30.

250. Wayne Phaneuf, *Labor Council Opposes Handgun Confiscation*, SPRINGFIELD NEWS, Aug. 13, 1976; Taxpayers Against Question 5, Information Package on Referendum Question 5 (1976) (unpublished manuscript) (on file with author).

251. Beth R. Bond, *Police Chiefs Oppose Proposed Handgun Ban*, EAGLE-TRIB., Oct. 22, 1976; Nyck Pappas, *Area Police Chiefs Oppose Referendum to Ban Private Possession of Handguns*, ASSABET VALLEY BEACON, Oct. 14, 1976; *Police Chiefs Oppose Ban on Handguns*, WAKEFIELD ITEM, Oct. 26, 1976; *Police Chiefs Speak on Gun Control*, FRAMINGHAM NEWS, Oct. 26, 1976; Jim Quirk, *Cape Police Officials Oppose Gun Ban; Prefer Enforcement*, HYANNIS TIMES, Oct. 27, 1976; Robert J. Rosenthal, *Arguments Pro and Con: Statistics Fly Like Confetti*, BOS. GLOBE, Oct. 25, 1976 (“Most Massachusetts police have opposed the ban.”); Patricia Wagner, *Local Police Oppose Private Handgun Ban*, THE SUN (Lowell), Oct. 24, 1976; Taxpayers Against Question 5, All Major Police Organizations Say Vote No on Question 5 (1976) (campaign flyer) (on file with author) (“WHO SUPPORTS OUR POSITION? Massachusetts Chiefs of Police[,] State Police of Massachusetts[,] Boston Police Patrolmen’s Association[,] Massachusetts Police Association[,] Massachusetts Auxiliary Police Association[,] Western Massachusetts Auxiliary Police[,] Interstate Police Officers Association[,] Central Massachusetts Police

The police argued that the ban was not enforceable, that it took the focus off the criminals, and that it was unfair to deprive good citizens of defensive handguns.<sup>252</sup> The police also objected that the law would disarm off-duty police: Massachusetts law required off-duty police have a pistol carry permit, and if Question 5 passed, pistol carry permits would no longer exist.<sup>253</sup>

Perhaps surprised by the police opposition, DiGrazia ordered the Planning and Research Department of the Boston Police Department to conduct the first national survey of police attitudes toward guns.<sup>254</sup> The survey of leading police officials found that 82.8% did not believe that only the police should be allowed to have handguns.<sup>255</sup> Police opposition would continue to be one of the most serious problems faced by handgun prohibition advocates almost everywhere in the United States.

Another major public concern was the hundreds of millions of taxpayer dollars that would be needed to compensate gun owners for the seizure of at least 800,000 handguns.<sup>256</sup> Even Dukakis admitted that there was no money in the state budget to do so.<sup>257</sup> Buckley retorted that the proposal said that the compensation price would be “determined by the Commissioner of Public Safety.”<sup>258</sup> So, continued Buckley, gun owners should receive “not . . . one penny,”<sup>259</sup> nor would they receive anything for their now-worthless ammunition, holsters,

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Association[,] Southern Massachusetts Police Association[,] Franklin County Police Association[,] New England Police Pilots Association[,] Massachusetts Sheriffs Association[,] Worcester County Deputy Sheriffs[,] Holyoke Auxiliary Police[,] Worcester County Chapter 2 of the Blue Knights[.]”).

252. See sources cited *supra* note 251.

253. The confiscation advocates did not intend to disarm the police, but their bill had been drafted by someone who admitted that he did not understand guns. HOLMBERG, *supra* note 218, at 33. Apparently he did not understand Massachusetts’s complex gun laws very well, either.

254. See *Boston Police Poll Backfires on DiGrazia*, AM. RIFLEMAN, Nov. 1977, at 16.

255. *Id.* The survey was kept under wraps until 1977, by which time DiGrazia had left Boston. *Id.*

256. C. Peter Jorgensen, *Sheriff Urges State To Take Guns Without Payment*, BELMONT CITIZEN, Oct. 7, 1976.

257. R.S. Kindleberger, *Dukakis Has \$\$ Objection to Gun Law Proposal*, BOS. GLOBE, Sept. 20, 1976; Robert J. Rosenthal, *Dukakis Supports Handgun Ban*, BOS. GLOBE, Oct. 7, 1976.

258. Jorgensen, *supra* note 256.

259. *Id.*

2012]            *THE GREAT GUN CONTROL WAR*            1565

reloading tools and so on.<sup>260</sup> Buckley's rationale was simple: "We've got a right to get poison out of society."<sup>261</sup> He denounced the Springfield, Massachusetts, handgun manufacturer Smith & Wesson as "merchants of death."<sup>262</sup>

The final poll, a few days before, had showed Question 5 with a ten-point lead.<sup>263</sup> Everyone anticipated a long night waiting for the election results. Everyone was wrong.

Handgun confiscation was crushed by a vote of 69% to 31%.<sup>264</sup> Of the approximately 500 towns in Massachusetts, only about a dozen (including Cambridge, Brookline, Newton, and Amherst) voted for the ban.<sup>265</sup> Even Boston rejected the ban by a wide margin.<sup>266</sup> People vs. Handguns said that supporters were "shocked."<sup>267</sup> The group had been counting on what Buckley called "women power" to defeat the "false machismo" of men.<sup>268</sup> But in the final week, Massachusetts women swung decisively against the ban.<sup>269</sup>

### C. The NRA Counteroffensive, and the Growing Sophistication of the Gun Control Lobby

After the 1977 Revolt at Cincinnati, the new NRA leaders in Washington soon won an easy victory. The Bureau of Alcohol, Tobacco and Firearms proposed new rules mandating collection of gun sales records from federally licensed firearms dealers, to be used to build a national registry of guns and gun owners.<sup>270</sup> BATF said that

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260. Oddly, advocates continued to describe the handgun confiscation plan as a "buyback," even though the government had never owned the guns in the first place, and even though taking someone's property against his or her will and without paying for it is usually called "stealing" rather than "buying."

261. See Jorgensen, *supra* note 256.

262. See Philip Brunelle, *Handgun Maker Buckley Target*, SPRINGFIELD UNION, Oct. 22, 1976.

263. See *Results of Poll*, BOS. GLOBE, Oct. 20 1976 (51% for, 41% against), reprinted in HOLMBERG, *supra* note 218, at 155.

264. See Robert J. Rosenthal, *Handgun Results Decisive, Devastating*, BOS. GLOBE, Nov. 4, 1976.

265. See *Town-by-Town Vote on the Referendum Questions*, BOS. GLOBE, Nov. 4, 1976.

266. See *id.*

267. See *Massachusetts Ban Defeated 2-1*, Targeting In On Handgun Control (United States Conference of Mayors Handgun Control Staff Newsletter), Nov. 1976.

268. Neil R. Pierce, *Massachusetts' Handgun Initiative*, WASH. POST, Oct. 6, 1976.

269. See *Massachusetts Ban Defeated 2-1*, *supra* note 267.

270. See David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 120-21 (2010).



the program would cost about \$5 million, which could be funded out of its existing budget.<sup>271</sup> The congressional response was swift. In 1978, the House of Representatives voted 314 to 80 to block the BATF gun registration plan, and amended the GCA to explicitly forbid BATF from compiling any information beyond that “expressly” required by statute.<sup>272</sup> They also sliced BATF’s appropriation by \$5 million.<sup>273</sup>

The NRA’s major legislative initiative, passage of the Firearms Owners Protection Act (FOPA), took far longer. The NRA, an early master of the art of “direct mail,” sent millions of mailings in support of Ronald Reagan during the 1980 election. While Reagan’s landslide victory was attributable mainly to broad public dissatisfaction with President Carter’s leadership, the NRA probably helped put Reagan over the top in some close states such as Pennsylvania and Michigan.

#### IV. THE AGE OF REAGAN

Candidate Reagan had endorsed the FOPA,<sup>274</sup> which was conceived in the late 1970s and early 1980s as congressional committees recorded horror stories of abusive BATF prosecutions.<sup>275</sup> Many lawmakers found BATF’s explanations unconvincing.<sup>276</sup> Ancillary to the BATF hearings, the Senate Subcommittee on the Constitution, a part of the Judiciary Committee, adopted a detailed report in 1982 finding that the Second Amendment was an individual right.<sup>277</sup> The report was published by the Government Printing Office (GPO), and sold at GPO bookstores nationally.<sup>278</sup> The document also reported on BATF, finding that “75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations.”<sup>279</sup>

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271. *See id.*

272. 18 U.S.C. § 923(g)(1)(A) (2006).

273. Kopel, *supra* note 270.

274. *See* Firearms Owners’ Protection Act (FOPA) of 1986, Pub. L. No. 99-308, 100 Stat. 449 (amending the Gun Control Act).

275. *See, e.g.*, SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS 19-20 (Comm. Print 1982).

276. *See id.*

277. *See id.* at 4.

278. *See id.* at 1.

279. *See id.* at 21. As for BATF’s denials, the Subcommittee found:

2012]            *THE GREAT GUN CONTROL WAR*            1567

According to a conversation I had with Neal Knox, after the election, the new Reagan Administration bluntly informed the NRA that the economy was the top priority, and that gun law reforms would have to wait. Indeed, the NRA found itself opposing one of the Administration's first relevant proposals. The Administration announced plans was a proposal to abolish BATF as a separate bureau, and move its functions to the prestigious and politically influential Secret Service.<sup>280</sup> The liquor lobby's opposition prevented the change; the NRA was initially neutral, and then opposed moving BATF, on the grounds that if the federal gun laws were not fixed, then nothing would have been improved.<sup>281</sup>

On March 30, 1981, John Hinckley attempted to assassinate President Reagan using a cheap handgun.<sup>282</sup> Reagan survived, but his Press Secretary James Brady was permanently disabled by a shot to the head.<sup>283</sup> Because Hinckley's gun was a classic "Saturday Night Special," gun control advocates in Congress seemed to gain the

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The rebuttal presented to the Subcommittee by the Bureau was utterly unconvincing. Richard Davis, speaking on behalf of the Treasury Department, asserted vaguely that the Bureau's priorities were aimed at prosecuting willful violators, particularly felons illegally in possession, and at confiscating only guns actually likely to be used in crime. He also asserted that the Bureau has recently made great strides toward achieving these priorities. No documentation was offered for either of these assertions. In hearings before BATF's Appropriations Subcommittee, however, expert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. (In one case, in fact, the individual was being prosecuted for an act which the Bureau's acting director had stated was perfectly lawful.) In those hearings, moreover, BATF conceded that in fact (1) only 9.8 percent of their firearm arrests were brought on felons in illicit possession charges; (2) the average value of guns seized was \$116, whereas BATF had claimed that "crime guns" were priced at less than half that figure; (3) in the months following the announcement of their new "priorities", the percentage of gun prosecutions aimed at felons had in fact fallen by a third, and the value of confiscated guns had risen. All this indicates that the Bureau's vague claims, both of focus upon gun-using criminals and of recent reforms, are empty words.

*Id.* at 21.

280. WILLIAM J. VIZZARD, *SHOTS IN THE DARK: THE POLICY, POLITICS, AND SYMBOLISM OF GUN CONTROL* 127 (2000).

281. *Id.*

282. See David B. Kopel & Carol Oyster, *Hinckley, John Warnock, Jr., in 1 GUNS IN AMERICAN SOCIETY*, *supra* note 73, at 294.

283. See *id.*

momentum to pass Senator Ted Kennedy's (D-Mass.) SNS ban.<sup>284</sup> The momentum fizzled on June 18, with Reagan's first press conference after his release from the hospital. Asked about the Kennedy bill, he replied:

[M]y concern about gun control is that it's taking our eyes off what might be the real answers to crime; it's diverting our attention. There are, today, more than 20,000 gun-control laws in effect—federal, state and local—in the United States.<sup>285</sup> Indeed, some of the stiffest gun-control laws in the nation are right here in the district and they didn't seem to prevent a fellow, a few weeks ago, from carrying one down by the Hilton Hotel.<sup>286</sup>

In 1983, Reagan became the first sitting President to address the NRA Annual Meeting.<sup>287</sup>

The advocates of SNS bans continued to lose battles in Congress. Congress essentially accepted the same rationale adopted by the D.C. District Court that dismissed James Brady's lawsuit against the maker of Hinckley's gun. Rejecting the label that inexpensive guns are "ghetto" guns, the court wrote that "while blighted areas may be some of the breeding places of crime, not all residents [] are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location . . . it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self-defense. To remove cheap weapons from the community may very well remove a form of protection assuming that all citizens are entitled to possess guns for defense."<sup>288</sup>

Advocates of the SNS ban did get what they wanted in the long term. Although only a few states (most importantly, California) adopted SNS bans, today the classic SNS (small, inexpensive, low quality in terms of durability and accuracy) are a much smaller part of

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284. *See id.*

285. The 20,000 figure apparently traces back to 1965 congressional testimony by Representative John Dingell (D-Michigan). To be accurate, the figure would probably need to count various subsections of a given statute or ordinance as separate laws. Considering the decimation of local gun control ordinances by statewide preemption statutes during the last three decades, the total quantity of American gun control laws has likely been significantly reduced.

286. Kopel & Oyster, *supra* note 282, at 294.

287. Ronald Reagan, *Remarks at the Annual Members Banquet of the National Rifle Association in Phoenix, Arizona, May 6, 1983*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=41289> (last visited Jan. 18, 2013).

288. *See Delahanty v. Hinckley*, 686 F. Supp. 920, 929 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990).

total firearms sales than they were several decades ago. In 2012, I observe that there are many small handguns for sale, but the vast majority are high quality, relatively higher-priced models from respected manufacturers. With the American gun supply now at over 300 million, about a third of them handguns, the supply of used guns is now so vast that a person who does not have much money to spend on a handgun can purchase a used, good quality handgun for not much more money than the price of a new, lower quality handgun.

Having studied the 1976 Massachusetts defeat, handgun prohibition advocates in 1982 tried a variant approach in California. To avoid the problem of compensating gun owners for confiscated property, the initiative proposed a “handgun freeze.”<sup>289</sup> Current owners could keep their handguns but future sales would be banned. The idea of a “nuclear freeze” was on its way to becoming a mainstream Democratic position, so proponents hoped to gain some ancillary support by calling their idea a “handgun freeze.” The California initiative was defeated by a vote of 63% to 37%.<sup>290</sup> Opposition to the freeze “brought so many additional voters to the polls that they even carried Republican George Deukmejian to a 1[%] victory over Tom Bradley in the [G]overnor’s race.”<sup>291</sup>

The first jurisdiction outside D.C. to successfully install a handgun ban was the Chicago suburb of Morton Grove in 1981.<sup>292</sup> Chicago itself would follow suit in 1983, and the suburbs of Evanston, Oak Park, and Wilmette would also impose bans in the next several years.<sup>293</sup>

The Morton Grove ordinance prompted the first big case. The NRA opposed it in state court, under the Illinois Constitution’s right to arms guarantee. The state case was suspended when attorney Victor Quilici filed suit in federal district court, alleging a Second Amendment violation. *Quilici v. Morton Grove*<sup>294</sup> attracted extensive national attention.

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289. Peter Hart & Doug Bailey, *Gun Control: What Went Wrong in California*, WALL ST. J., Mar. 1, 1983, at 34.

290. David Kopel, *Court, Capital and Handgun*, FORT WORTH STAR TELEGRAM, Nov. 19, 2007, available at <http://www.cato.org/publications/commentary/court-capital-handgun>.

291. *Id.*

292. See Robert Channick, *Morton Grove Repeals 27-year-old Gun Ban*, CHI. TRIB., July 29, 2008; see also David Kopel, *Gun Prohibitions Mostly Misfire*, ORANGE COUNTY REG., Nov. 21, 2007.

293. See John Lucadamo, *Wilmette Gun Ban Discussed*, CHI. TRIB., Sept. 7, 1988.

294. 695 F.2d 261 (7th Cir. 1982).

The loss in federal district court was predictable, because the district judge had already told a television interviewer that he thought the ban was constitutional. The Seventh Circuit upheld the ban 2-1.<sup>295</sup> Dissenting Judge Coffey based his argument for a right to own a defensive handgun in the home not on the Second Amendment, but on the privacy rights protected by the Liberty Clauses of the Fifth and Fourteenth Amendments.<sup>296</sup>

The NRA sought relief in the United States Supreme Court, which issued one of its most highly publicized denials of a petition for a writ of certiorari in October 1983.<sup>297</sup> When the Illinois Supreme Court finally decided the state constitutional law case, it upheld the *Morton Grove* ban 4-3.<sup>298</sup>

The *Morton Grove* cases were an important setback for gun rights in the courts, but there was a silver lining for gun advocates. Handgun bans were now a hot button political issue. The growing movement to ban handguns energized gun owners. For NRA lobbyists in the state legislatures, the Illinois bans were the horror story used to convince state legislators that gun bans were a genuine threat.<sup>299</sup> In response, state after state enacted preemption laws forbidding some or all local gun regulation.<sup>300</sup> The impact of these preemption efforts was evident when California's preemption statute was invoked to overturn ordinances banning handguns in San Francisco.<sup>301</sup>

Handgun prohibition turned out to be much more difficult to achieve than Pete Shields had imagined in 1976, when he suggested that it might take seven to ten years to get to a national ban.<sup>302</sup> The handgun prohibition surge that began in the 1970s had stalled. Ultimately, D.C. was entirely alone in forbidding the use of a gun for self-defense in the home. As Jack Balkin has observed, the Supreme Court tends to be more likely to find violations in laws that are

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295. *Id.*

296. *Id.* at 279-80.

297. See *Quilici v. Morton Grove*, 464 U.S. 863 (1983).

298. See *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

299. See Kristin A. Goss, *Policy, Politics, And Paradox: The Institutional Origins Of The Great American Gun War*, 73 FORDHAM L. REV. 681, 705-07 (2004).

300. See David B. Kopel, *Limited Preemption of Firearms Laws: A Good Step for Civil Rights*, INDEPENDENCE INST. (Mar. 11, 2003), [http://old.i2i.org/main/article.php?article\\_id=444](http://old.i2i.org/main/article.php?article_id=444) (describing laws in forty-four states).

301. See *generally* *Fiscal v. San Francisco*, 158 Cal. App. 4th 895 (2008); *Doe v. San Francisco*, 136 Cal. App. 3d 509 (1982).

302. Harris, *supra* note 188.

national outliers.<sup>303</sup> While it is impossible to know for sure, it is plausible that the outcome of *Heller* and *McDonald* is partly attributable to the fact that handgun prohibition remained very rare in the United States, and that no jurisdiction copied D.C.'s ban on home self-defense with a lawfully owned firearm.

Rather than giving up, Handgun Control, Inc. learned how to make effective use of ancillary issues.

The first of these was the “cop-killer bullet.” The bullets were formally known as KTW bullets, the name derived from the developers, Dr. Paul Kopsch and two police officers named Turcus and Ward.<sup>304</sup> While ordinary bullets have a lead core, KTW bullets used brass or iron.<sup>305</sup> The KTW bullet has a conical shape, and was designed for shooting through glass or a car door.<sup>306</sup> The bullets were developed for police special weapons teams and had not been available for sale to the general public since the 1960s.<sup>307</sup> They were sometimes called “Teflon bullets,” but that was a misnomer, since Teflon is commonly used as a coating on bullets, and it does nothing to make the gun more likely penetrate a bullet-resistant vest.<sup>308</sup>

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303. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 563-65, 593-98 (2009); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 105, 116-17 (2007).

304. See David B. Kopel, *The Return of a Legislative Legend*, NAT'L REV. ONLINE (Mar. 1, 2004), <http://old.nationalreview.com/kopel/kopel200403010926.asp>; David B. Kopel, *Cheney's Cop-Killer Rap*, NAT'L REV. ONLINE (July 31, 2000), [http://old.nationalreview.com/convention/guest\\_comment/guest\\_commentprint073100a.html](http://old.nationalreview.com/convention/guest_comment/guest_commentprint073100a.html).

305. See sources cited *supra* note 304.

306. See sources cited *supra* note 304.

307. See sources cited *supra* note 304.

308. A Teflon coating is applied to the outside of a wide variety of ordinary ammunition. Teflon reduces the lead abrasion caused by the bullet's movement down the barrel of the gun. Thus, the barrel is kept cleaner, and is protected from excessive wear. Also, reduced abrasion means that fewer tiny lead air particles are produced, so the air is cleaner—an especially important consideration at indoor shooting ranges. In addition, a Teflon coating on a bullet also makes the bullet safer to use in a self-defense context. The Teflon helps the bullet “grab” a hard surface such as glass or metal, and thus significantly reduces the risk of a dangerous ricochet. Similarly, canes or walking sticks are often coated with Teflon, so that they will not slip on hard, smooth surfaces.

In the 1992 movie *Lethal Weapon 3*, a so-called “Teflon bullet” from a medium-power handgun was supposedly able to penetrate several inches of hardened steel on a bulldozer blade. In the real world, however, no bullet could possibly perform such a stunt. *LETHAL WEAPON 3* (Warner Bros. Pictures & Silver Pictures 1992), available at [http://www.metacafe.com/watch/an-tHsDbuYb2hbbY2/lethal\\_weapon\\_3\\_1992\\_new\\_bullets](http://www.metacafe.com/watch/an-tHsDbuYb2hbbY2/lethal_weapon_3_1992_new_bullets) (clip of “Cop Killer” scene).

The “cop-killer bullet” bill introduced by Rep. Mario Biaggi (D-N.Y.) went far beyond banning the KTW bullet. It would have outlawed most of the centerfire rifle ammunition in the United States.<sup>309</sup> The NRA pointed out the broad scope of the Biaggi ban, and the fact that there had never been a case in which an officer was killed by “armor-piercing” ammunition penetrating a vest.<sup>310</sup>

Nevertheless, the NRA was trapped. Its arguments depended on the technical details of ammunition ballistics. While those arguments were sufficient to block the ban in Congress, at the more general level of public debate, the NRA was tagged with supporting “cop-killer bullets.”<sup>311</sup> This did lasting damage to the traditional connection between the NRA and law enforcement.<sup>312</sup>

The 1976 Massachusetts and 1982 California handgun campaigns had revealed that many police were gun owners and enthusiasts who strongly opposed handgun prohibition.<sup>313</sup> Many rank and file police supported self-defense by law-abiding citizens and viewed gun bans as unrealistic.<sup>314</sup> Many police also had a long-standing respect for the NRA based on its decades of service in providing firearms training for police departments.<sup>315</sup> The “cop-killer bullet” issue was perfect for driving a wedge between the NRA and its traditional law enforcement allies. For some groups, such as the Fraternal Order of

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309. See sources cited *supra* note 304.

310. The situation has not changed. According to a 1997 ATF report, examining every police officer shooting in 1985 through 1994, “no law enforcement officer in the United States has died as a result of a round of armor piercing ammunition, as defined, having been fired from a handgun, subsequently penetrating an officer’s protective body armor causing lethal injuries.” BUREAU OF ALCOHOL, TOBACCO & FIREARMS, D.C. DEPT. OF THE TREASURY, ASSESSING AND REDUCING THE THREAT TO LAW ENFORCEMENT OFFICERS FROM THE CRIMINAL USE OF FIREARMS AND AMMUNITION 17 (1997), available at [www.vcdl.org/batf\\_rpt.pdf](http://www.vcdl.org/batf_rpt.pdf).

311. See, e.g., William Vizzard, *Armor-Piercing Ammunition*, in 1 GUNS IN AMERICAN SOCIETY 50-51 (Gregg Lee Carter ed., 2d ed. 2012); *The Cops vs. the Big Guns*, N.Y. TIMES, Apr. 12, 1986 (Handgun Control, Inc., took the lead in promoting the ammunition controversy as a tactic to divide NRA from the the police).

312. See Jason DeParle, *Police Chief vs. Officer: Symbolic Rift on Guns*, N.Y. TIMES, June 21, 1990.

313. See *supra* note 251 and accompanying text.

314. *Id.*

315. The NRA’s Law Enforcement Division was created in 1960. Since then, NRA has trained over 50,000 law enforcement firearms instructors. *Law Enforcement Training*, NAT’L RIFLE ASS’N HEADQUARTERS, <http://www.nrahq.org/law/training/training.asp> (last visited Nov. 18, 2012).

2012]            *THE GREAT GUN CONTROL WAR*            1573

Police (the largest rank and file police organization in the United States), the rift was not fully healed until the twenty-first century.<sup>316</sup>

While Biaggi's ammunition ban would not pass, it did have the effect of blocking progress on the NRA's own flagship bill, the Firearms Owners Protection Act (FOPA), a wide-ranging set of reforms to the 1968 GCA.<sup>317</sup> Finally, the NRA decided to work with Biaggi on a compromise bill.<sup>318</sup> As enacted, the compromise bill banned a category of ammunition that was no longer being produced for the retail market.<sup>319</sup> The bill passed Congress almost unanimously.<sup>320</sup> Biaggi proclaimed the bill accomplished everything he had wanted.<sup>321</sup>

In 1982, NRA Executive Vice-President Harlon Carter fired Neal Knox as head of NRA-ILA.<sup>322</sup> Knox had refused Carter's order to negotiate with the White House over FOPA, believing that Reagan's 1980 endorsement of FOPA meant that the White House should not attempt to weaken or change it.<sup>323</sup>

No one had ever been better than Knox at appealing to the hard core of gun rights activists. After his dismissal, Knox registered as an independent lobbyist and started his own newsletter, the "Hard Corps Report."<sup>324</sup> Thereafter, Knox, as well as Gun Owners of America, would define their space in the gun issue by criticizing the NRA for what they saw as an endless series of weak-kneed compromises, including the 1968 GCA.

Getting the "cop-killer bullet" issue off the table cleared the path for FOPA. The bill passed the Senate 79-15 in 1985,<sup>325</sup> and passed the House 292-130 in 1986, with a majority of Democrats voting in favor. Sponsor Harold Volkmer (D-Mo.) used a discharge petition (requiring a signature of the majority of House members) to spring the bill out of the Judiciary Committee, where Chairman Peter Rodino (D-N.J.) had pronounced it "dead on arrival."<sup>326</sup>

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316. See sources cited *supra* note 304.

317. See sources cited *supra* note 304.

318. See Kopel, *The Return of a Legislative Legend*, *supra* note 299.

319. See *id.*

320. See sources cited *supra* note 304.

321. See Kopel, *The Return of a Legislative Legend*, *supra* note 304.

322. KNOX, *supra* note 137, at 314.

323. *Id.* at 190.

324. *Id.* at 334.

325. 131 CONG. REC. 18,232 (1985).

326. David B. Kopel, *Rep. Harold Volkmer, R.I.P., VOLOKH CONSPIRACY* (Apr. 18, 2011), <http://www.volokh.com/2011/04/18/rep-harold-volkmer-r-i-p/>.



FOPA curtailed ATF's powers of forfeiture, and search and seizure; created due process rules for dealer licensing or license revocation; explicitly outlawed federal gun registration; and declared the Second Amendment to be an individual right.<sup>327</sup>

Because of an amendment added on the floor of the House, FOPA also banned the sale of new machine guns (manufactured after the date that FOPA became law, May 19, 1986) to the public.<sup>328</sup> The NRA successfully challenged the ban in district court, but lost in the Eleventh Circuit, and the Supreme Court denied certiorari.<sup>329</sup> (The challenge had asked that language allowing the sale of new machine guns "under the authority of the United States" be construed to allow sales that complied with the Federal National Firearms Act of 1934.<sup>330</sup>)

Although defeated on FOPA, HCI was becoming more effective politically. The organization had a long-standing practice of calling the victims of notorious gun crimes, or their relatives, and asking them to join the organization as gun control advocates.<sup>331</sup> They approached Sarah Brady, the wife of Reagan's well-liked Press Secretary.<sup>332</sup> Brady threw herself into the movement that her husband would later join as well. Eventually, the organization would bear her name.<sup>333</sup> HCI renamed its waiting period proposal for Sarah Brady,

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327. FOPA begins by declaring:

The Congress finds that—(1) the rights of citizens (A) to keep and bear arms under the second amendment to the United States Constitution; (B) to security against illegal and unreasonable searches and seizures under the fourth amendment; (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies.

Act of May 19, 1986, Pub. L. No. 99-308, § 1(b).

The best in-depth explication of FOPA is David T. Hardy, *Firearms Owners Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986) (cited by the Supreme Court, and almost every Federal Court of Appeals). See also David T. Hardy, *Firearm Owners' Protection Act of 1986*, AM. FIREARMS L., <http://www.firearmslaw.info/FOPA> (providing a full legislative history of FOPA) (last visited Nov. 18, 2012).

328. 18 U.S.C. § 922(o) (2006).

329. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

330. *Id.* at 1043.

331. See GREGG LEE CARTER, *THE GUN CONTROL MOVEMENT* 95 (1997).

332. See *id.*

333. See *id.*

2012]            *THE GREAT GUN CONTROL WAR*            1575

and later for Jim Brady.<sup>334</sup> As Republican insiders, the Bradys offered the possibility of taking the gun control message to the Republican establishment.

HCI found another effective issue in the “plastic gun.” Today, handguns made in part from plastic polymers are common.<sup>335</sup> They are much more durable, and their light weight makes them popular for defensive carry.<sup>336</sup> But polymer guns were novel when Austria’s Gaston Glock introduced his eponymous pistol to the U.S. market.<sup>337</sup> Gun control groups dubbed the Glockes “terrorist specials,” claiming that they were invisible to metal detectors.<sup>338</sup> Senator Howard Metzenbaum (D-Ohio) introduced an “undetectable” firearms ban.<sup>339</sup> Ironically, Metzenbaum’s bill would not have banned Glockes because they contain enough metal to be easily detectable.<sup>340</sup> But the bill would have banned many small, all-metal firearms.<sup>341</sup>

In early 1988, the Reagan White House was on the verge of endorsing Metzenbaum’s bill, at the behest of Attorney General Edwin Meese.<sup>342</sup> The endorsement ultimately was withheld in order to accommodate Vice President George H.W. Bush, who was running for President.<sup>343</sup> Bush had run into trouble on the gun issue not only in 1970 when it cost him the a U.S. Senate seat in Texas, but also in 1980, when he and Ronald Reagan emerged as the leading candidates for the Republican presidential nomination. Reagan gained support among gun owners then by highlighting Bush’s support for a “Saturday Night Special” ban. As of 1988, Bush had just bought an NRA Life Membership, was courting the gun vote, and sought to avoid connection with another provocative gun ban.<sup>344</sup>

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334. Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993).

335. Examples include all Glock pistols, many Smith & Wesson pistols, the Springfield Armory XD line, some Kimber guns, and various Heckler & Koch models. See Wiley Clapp, *Of Polymer and Progress*, GUNS & AMMO, Jan. 2003; David B. Kopel, *The Cheney Glock-n-Spiel*, NAT’L REV. ONLINE (July 27, 2000), <http://old.nationalreview.com/comment/commentprint072700a.html>.

336. See Kopel, *supra* note 326.

337. See *id.*

338. See *id.*

339. See *id.*

340. See *id.*

341. See *id.*

342. See *id.*

343. See *id.*

344. See David Kopel, *George Bush and the NRA*, GUN WORLD (1996), available at <http://davekopel.org/2A/Mags/George-Bush-and-the-NRA.htm>.

Even without White House support, Metzenbaum's bill lost by only two votes in the Senate.<sup>345</sup> Again, the NRA compromised, and almost everyone in Congress voted for it.<sup>346</sup> As enacted, the law banned no existing firearms and did nothing to stop using polymers to build firearms.<sup>347</sup> It did require that all new handguns contain at least 3.7 ounces of metal, with the profile of a handgun.<sup>348</sup> After winning the Republican presidential nomination in 1988, George Bush wrote a public letter to the NRA promising to oppose waiting periods, gun bans, gun registration, and other forms of gun control.<sup>349</sup>

Bush's opponent in the 1988 race was Massachusetts Democratic Governor Michael Dukakis. Dukakis had a solid record on gun control. He had supported Massachusetts's 1976 handgun confiscation initiative, proclaimed a "Domestic Disarmament Day" in which he urged handgun owners to turn over their firearms to police, endorsed what he called "stiff federal gun control," and signed a proclamation that the Second Amendment is not an individual right.<sup>350</sup>

As Governor, Dukakis had recommended a pardon to a man named Sylvester Lindsey.<sup>351</sup> Lindsey had been sentenced to a year in state prison under a new state law imposing the mandatory sentence for any unlicensed possession or carrying of guns or ammunition.<sup>352</sup> Lindsey was caught carrying a handgun after a co-worker, a convicted felon, tried to kill him with a knife, threatened to try again, and then assaulted Lindsey a second time.<sup>353</sup> When Lindsey was pardoned, on June 16, 1986, Governor Dukakis stated, "You know I don't believe in people owning guns, only the police and military. And I'm going to do everything I can to disarm this state."<sup>354</sup>

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345. See Kopel, *supra* note 326.

346. See *id.*

347. See *id.*

348. 18 U.S.C. § 922(p) (2006).

349. KNOX, *supra* note 136, at 195-96.

350. See David Kopel, *Gun Control and the 1988 Election*, GUN WORLD (1990), available at <http://www.davekopel.org/2A/Mags/1988elec.htm>.

351. Diego Ribadeneira, *Gun-Law Term Forgiven Lindsey To Perform Community Service*, BOS. GLOBE, Aug. 15, 1986.

352. See *Commonwealth v. Lindsey*, 489 N.E.2d 666 (Mass. 1986).

353. See *id.*

354. See David B. Kopel, *Gun Week*, in 1 GUNS IN AMERICAN SOCIETY, *supra* note 73, at 265.

*Gun Week* (owned by the Second Amendment Foundation)<sup>355</sup> reported the statement shortly after the 1988 Democratic National Convention, and the NRA put the words on the front cover of its main magazine.<sup>356</sup> The NRA also spent \$1.5 million publicizing Dukakis's record.<sup>357</sup> In Pennsylvania, and in many states to the south and west, the effect was devastating. Dukakis went from a small lead in Texas to a landslide loss. He also lost California, Michigan, and some of the Rocky Mountain states in part because of the gun issue.<sup>358</sup>

After the election, the Democratic vice-presidential nominee, Texas Senator Lloyd Bentsen, noted the "incredible effect of gun control," and observed, "We lost a lot of Democrats on peripheral issues like gun control and the pledge."<sup>359</sup> (George H.W. Bush had vociferously criticized Dukakis for opposing Massachusetts legislation to have the Pledge of Allegiance recited in public schools.<sup>360</sup>)

Even normally Democratic Maryland went for Bush due to extra gun owner turnout related to a gun control initiative on the state ballot that year.<sup>361</sup> Maryland was, however, a net win for gun control advocates. A few years earlier, the state supreme court had voted to impose strict liability on the manufacturers and retailers of Saturday Night Specials.<sup>362</sup> This was the one major win for the plaintiffs' attorneys who had brought strict product liability suits against handgun manufacturers since the early 1970s (and who had spurred a legislative response in about a third of the states, outlawing such suits). In 1988, the Maryland Legislature responded by abolishing strict liability for handguns, but at the same time setting up a Maryland Handgun Roster Board, whose approval would be required

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355. A much smaller organization than the NRA, but larger than any other pro-gun organization.

356. See *American Rifleman*, Oct. 1988.

357. KNOX, *supra* note 137, at 195-96.

358. See Kopel, *supra* note 350.

359. WINKLER, *supra* note 75, at 112; see also Ernest B. Furgurson, *Bentsen and Mitchell, Democrats*, BALTIMORE SUN, Dec. 2, 1988.

360. See RICHARD BEN CRAMER, *WHAT IT TAKES: THE WAY TO THE WHITE HOUSE* (1992).

361. David Leip, *1988 Presidential General Election Results—Maryland*, ATLAS U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/> (select "1988" in "General by Year" and "Maryland" in "General by State" option) (last visited Nov. 11, 2012).

362. See *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1159 (Md. 1985).

for the sale of any new models of handguns in Maryland.<sup>363</sup> An NRA-led initiative to overturn the law failed by a vote of 58% to 42%.<sup>364</sup>

### V. GEORGE H.W. BUSH

As President, George Bush was more the Bush of 1968-80 than the candidate of 1988. Shortly after Bush was inaugurated in January 1989, a repeat violent criminal with severe mental problems used a Kalashnikov-style, semi-automatic rifle to murder five children at a schoolyard in Stockton, California.<sup>365</sup> “Assault weapons” were suddenly a major national issue.

The previous year, the Communications Director of the National Coalition to Ban Handguns, Josh Sugarmann, had written a public strategy memo.<sup>366</sup> He pointed out that the media had grown tired of the handgun issue, but “assault weapons” would be novel to them. Further:

The semi-automatic weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase that chance of public support for restrictions on these weapons.<sup>367</sup>

Sugarmann was exactly right.

President Bush’s Drug “Czar,” William Bennett, convinced the Treasury Department to impose a temporary ban on the import of “assault weapons” pursuant to its GCA authority to block import of non-sporting arms.<sup>368</sup> That authority generally had been used only to block handgun imports or surplus military rifles. A few weeks later the import ban was expanded. The NRA protested that FOPA had specifically mandated the import of firearms “generally recognized as particularly suitable for or readily adaptable to sporting purposes,

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363. See MD. CODE ANN., CRIM. LAW § 36-I(h) (West 2012).

364. See Howard Schneider, *Maryland Handgun Board Upheld by Courts*, WASH. POST, June 22, 1992, at D5.

365. See Marcia C. Godwin, *Stockton, California, Massacre*, in 1 GUNS IN AMERICAN SOCIETY 559, *supra* note 73, at 559.

366. EDUCATIONAL FUND TO END HANDGUN VIOLENCE & NEW RIGHT WATCH, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA 26 (1988), available at <http://www.vpc.org/studies/awacont.htm>.

367. *Id.*

368. See Charles Mohr, *U.S. Bans Imports of Assault Rifles in Shift By Bush*, N.Y. TIMES, Mar. 15, 1989. The import ban was expanded a few weeks later. Stephen Kurkjian, *Bush Approves Total Suspension of Importation of Assault Rifles*, BOS. GLOBE, Apr. 6, 1989, at 5.

excluding surplus military firearms.”<sup>369</sup> Opponents argued that almost all of the banned guns were suitable for and often used at rifle target competitions, such as the federally sponsored National Matches.<sup>370</sup> Almost all of the guns were lawful for hunting in almost every state when equipped with a hunting capacity ammunition magazine. However, the Treasury Department made the import bans final a few months later.<sup>371</sup>

More significantly, proposals for “assault weapon” restrictions cropped up in Congress, in most state legislatures, and in many municipalities. I recall that the NRA’s top lobbyist, James J. Baker, told gun owners that there were simply too many fronts for the NRA to fight all at once, and local gun owners would have to organize and fight the bans on their own. Many elected officials who had previously been pro-gun stalwarts could not understand why anyone would want to own what President Bush called “automated attack weapons.”<sup>372</sup> Senator Dennis DeConcini (D-Ariz.) had been one of the NRA’s best friends in Congress, but introduced his own ban.<sup>373</sup> DeConcini considered his proposal a moderate measure, since it would ban fewer guns than some competing bills.<sup>374</sup>

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369. 18 U.S.C. § 925(d)(3) (2006).

370. See Preston K. Covey, *Sporting Purposes Test*, in 3 GUNS IN AMERICAN SOCIETY 773-76 (2d ed. 2012). For the types of rifles that may be used in such matches, see NATIONAL RIFLE ASSOCIATION, OFFICIAL RULES FOR HIGH POWER RIFLE MATCHES § 3 (2012), available at <http://www.nrahq.org/compete/RuleBooks/HPR/hpr-book.pdf>. The NRA has for well over a century been the governing body for rifle competition in the United States. *Id.* In the context of the Official Rules, “high power” means centerfire firearms, rather than .22 caliber. *Id.*

371. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP’T OF TREASURY, REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES (July 6, 1989).

372. See *Excerpts from President’s News Session on Foreign and Domestic Issues*, N.Y. TIMES, Mar. 8, 1989.

373. See Antidrug, Assault Weapons Limitation Act of 1989, S. 747, 101st Cong. (1989).

374. DeConcini’s main aide in pushing the “assault weapon” ban was Dennis Burke, who under President Obama would be appointed U.S. Attorney for Arizona. In 2009-11, U.S. Attorney Burke was involved in “Operation Fast & Furious,” conducted by the Phoenix office of the Bureau of Alcohol, Tobacco, Firearms and Explosives. In Fast & Furious, BATFE paid licensed firearms dealers to sell firearms to known “straw purchasers.” (A straw purchaser is someone who illegally purchases a firearm on behalf of someone else.) Despite what BATFE told the firearms dealers, once the guns left the store, BATFE made little or no effort to conduct surveillance of the straw purchasers. Over 2,000 firearms, most of them “assault weapons,” were thus put into the hands of criminals who were procuring the guns for Mexican drug trafficking organizations, principally the Sinaloa cartel. According to the Attorney General of Mexico, over 300 Mexicans have been murdered with Fast

Prohibition laws passed in California and several cities.<sup>375</sup> Over the next several years, New Jersey, Connecticut, New York, and Massachusetts would pass bans, while Maryland and Hawaii would ban “assault pistols.”<sup>376</sup> In Congress, DeConcini’s bill passed the Senate by one vote, as an amendment to a comprehensive crime bill sponsored by Senator Joe Biden (D-Del.).<sup>377</sup> The ban was defeated in the House by the substitution of “the Unsoeld Amendment” from Rep. Jolene Unsoeld (D-Wash.).<sup>378</sup> That amendment ratified the Bush import ban by prohibiting the domestic assembly from foreign parts of a non-importable “assault weapon.”<sup>379</sup>

Along with “assault weapons,” the other major item on HCI’s agenda was a waiting period for handgun purchases. As with “assault weapons,” HCI was not initially successful at passing its bills through Congress, but it did force the NRA to fall back. For several years, HCI had been pushing a national waiting period of two or three weeks for all handgun purchases.<sup>380</sup> HCI almost passed the bill through the House in September 1988 by cutting the wait down to

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& Furious guns. U.S. Border Patrol agent Brian Terry was murdered with one such gun in December 2010. In an April 2010 e-mail, Burke had predicted that Fast & Furious would help promote gun control: “It’s going to bring a lot of attention to straw purchasers of assault weapons . . . . Some of these weapons bought by these clowns in Arizona have been directly traced to murders of elected officials in Mexico by the cartels, so Katie-bar-the-door when we unveil this baby.” Dennis Wagner, *Burke of Fast and Furious Had Anti-Gun History*, ARIZ. REPUBLIC, Jan. 28, 2012; see also Ken Ellingwood et al., *Mexico Still Waiting for Answers on Fast and Furious Gun Program*, L.A. TIMES, Sept. 19, 2011.

375. See, e.g., Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE § 30500 (West 2012); DENVER REV. MUN. CODE § 38-130 (1989); COLUMBUS MUN. CODE § 2323.05 (West 1989), *invalidated by* People’s Rights Org. v. City of Columbus, 152 F.3d 522, 526 (6th Cir. 1998).

376. CONN. GEN. STAT. § 53-202(a)–(d) (2012); HAW. REV. STAT. § 134-4 (2012); MD. CODE ANN., CRIM. LAW § 4-303 (West 2012); MASS. GEN. LAWS ANN. ch. 269 § 10 (West 2012); N.J. STAT. ANN. § 2C:58-5 (West 2012) (“assault weapons” subject to same licensing system as machine guns); N.J. STAT. ANN. § 2C:58-13 (West 2012); N.Y. PENAL LAW § 265.10(3) (McKinney 2012).

377. Steven Holmes, *Senate Votes Sweeping Crime Bill, Banning Some Assault Weapons*, N.Y. TIMES, July 11, 1990, at B1; Susan F. Rasky, *Senate Backs Curb on Assault Rifles by a Vote of 50-49*, N.Y. TIMES, May 24, 1990, at A1.

378. David Schaefer, *Unsoeld Expected to Draw Fire—Amendment on Assault-Rifle Issue Is Likely to Trigger Liberals’ Anger*, SEATTLE TIMES, Sept. 27, 1990.

379. See 18 U.S.C. § 922(r) (2006).

380. Donald E. Fraher, Legislative Director, Handgun Control, Inc., Some Questions and Answers about Handgun Control (on file with author) (touting the Kennedy-Rodino “Handgun Crime Control Bill,” S.974 & H.R. 3200, with a 21-day wait); Handgun Control, Inc., letter to Rep. Ron Packard (May 2, 1985) (on file with author) (advocating “a mandatory waiting period of no less than fourteen days”).

seven days and by limiting its application to retail sales by licensed dealers (exempting private sales between individuals).<sup>381</sup>

The “Brady Bill,” as HCI now called it, was stopped only by an alternative offered by Representative Bill McCollum (R-Fla.) to study the creation of a national instant check system for handgun sales.<sup>382</sup> In 1989, Virginia became the first state to actually implement an instant check.<sup>383</sup>

Throughout the Bush Administration, the NRA managed to defend against HCI’s major bills, but the NRA was clearly on its heels. The Bush administration refused to endorse a domestic ban on “assault weapons,” but it did propose a ban on ammunition magazines holding more than 15 rounds.<sup>384</sup> The White House offered to sign the Brady Bill and a domestic ban on new “assault weapons” (plus a registration requirement for grandfathered guns) if the gun control laws were included in a crime bill that the White House wanted.<sup>385</sup> Gun rights advocates were shut out of the White House. Even with President Bush polling poorly against Bill Clinton in the late summer of 1992, the Bush Administration refused any overtures from the gun lobby. The NRA declined to endorse Bush for reelection.<sup>386</sup>

HCI favored Clinton.<sup>387</sup> Ross Perot made the best showing of any third-party candidate since Theodore Roosevelt in 1912.<sup>388</sup> Conventional wisdom is that he helped Clinton win by attracting

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381. See David Finkel, *The Gun and the Law: Could the Brady Bill—or Any Existing Gun Restrictions—Have Kept A301256 Out of the Wrong Hands?*, WASH. POST MAG., Apr. 28, 1991, at W42.

382. 134 Cong. Rec. 24,062 (1988).

383. See VA. CODE ANN. § 18.2-308.2:2; 1989 Va. Acts. (West 1989).

384. See James Gerstenzang & Paul Houston, *Bush Drops Curbs on Assault Weapons Ammunition*, L.A. TIMES, May 23, 1990, at A18.

385. Steven Holmes, *Senate Votes Sweeping Crime Bill*, N.Y. TIMES, July 11, 1990, at B1.

386. See Sam Howe Verhouek, *An Angry Bush Ends His Ties to Rifle Group*, N.Y. TIMES, May 11, 1995, at A1.

387. Handgun Control, Inc., *HCI Semi-Annual Progress Report* (Dec. 1992), <http://www.textfiles.com/politics/hcinews.txt>.

388. Perot received 18.9% of the popular vote. See David Leip, *1992 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/> (select “1992” in “General by Year” option) (last visited Nov. 12, 2012). Roosevelt had received 27.4%. See David Leip, *1912 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/> (select “1912” for “General by Year” option) (last visited Nov. 12, 2012).



voters who were dissatisfied with Bush, but unwilling to vote for Clinton. Clinton won the election handily.<sup>389</sup>

## VI. THE CLINTON ERA

In 1965, South Carolina repealed<sup>390</sup> its 1901 ban on handgun sales<sup>391</sup> but enacted a new law limiting purchasers to one handgun a month.<sup>392</sup> Three decades later, HCI picked up the idea, advanced it as a national goal, and concentrated on lobbying Virginia to enact it. HCI argued that gun traffickers purchased Virginia guns and resold them illegally in New York City.<sup>393</sup> This claim was disputed, but many acknowledged that the trafficking issue was hurting Virginia's national reputation. The producers of Batman comics even published a special issue, "Seduction of the Gun," highlighting the claims about Virginia guns in "Gotham City," procured for the gangster "Chaka Zulu."<sup>394</sup>

One-gun laws did not get national traction, but they did eventually pass in California in 1999,<sup>395</sup> Maryland in 2003,<sup>396</sup> and New Jersey in 2009.<sup>397</sup> Inside the Beltway, developments in Virginia and Maryland garner close attention, so HCI's success in normally pro-gun Virginia was seen by many in Washington as a sign of a changing national mood about firearms.

In the fall of 1993, the Brady Act easily passed Congress.<sup>398</sup> The NRA put up a token effort to stop it, but focused primarily on influencing the final law through amendments. This yielded several important changes, including requirements that background check records of sales to lawful purchasers be destroyed, and that the Brady

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389. Clinton won 370 out of 538 electoral votes. *See 1992 Presidential General Election Results, supra* note 377.

390. *See* Act of May 27, 1965, NO. 330, § 16-145-1, 1965 S.C. Acts 578.

391. *See* Act of February 20, 1901, NO. 435, § 1, 1901 S.C. Acts 74.

392. *See* S.C. CODE ANN. § 23-31-140(C). The one-gun limit was later repealed by Act of May 24, 2004, § 1, 2004 S.C. Acts 242.

393. Anne Gearan, *Virginia's Bumper Crop Is Firearms: New York, Washington Criminals Find Access To Guns Easy, Critics Say*, ROCKY MOUNTAIN NEWS, Feb. 7, 1993.

394. *See* JOHN OSTRANDER, SEDUCTION OF THE GUN (Dennis O'Neil ed., 1993).

395. *Senate OKs Restriction on Handgun Buys*, CHI. TRIB., July 2, 1999, at 10.

396. MD. CODE ANN., Pub. Safety § 5-128(b) (West 2012).

397. Jonathan Tamari, *Corzine Signs Law Limiting Handgun Purchases*, PHILA. INQUIRER, Aug. 7, 2009, at B01.

398. *See* The Brady Handgun Control Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

2012]            *THE GREAT GUN CONTROL WAR*            1583

handgun waiting period would sunset within five years, to be replaced by the National Instant Check System.<sup>399</sup> HCI had already conceded the superiority of the instant check, so the primary issue was whether Attorney General Janet Reno would have to implement the instant check by a particular date.<sup>400</sup>

Violent crime, having declined during most of the Reagan administration, had begun rising sharply in the late 1980s.<sup>401</sup> By early 1993-94, crime was once again a major national issue. The time seemed ripe for another effort at handgun prohibition. However, local handgun bans were blocked by state preemption laws almost everywhere in the United States.<sup>402</sup> One of the few states without a preemption law was Wisconsin, which bordered the one state (Illinois) where local handgun bans existed.<sup>403</sup> Proposals for handgun bans were put on the ballot in three left-leaning Wisconsin cities.<sup>404</sup> In 1993, 51% of voters in Madison rejected a handgun ban.<sup>405</sup> In 1994, handgun bans were voted down by 67% in Milwaukee and 73% in Kenosha.<sup>406</sup>

The Wisconsin handgun ban initiatives had unintended consequences. The backlash led to passage of a preemption law in 1995.<sup>407</sup> And by 1998, the legislature put a state constitutional right to

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399. 18 U.S.C. § 922(t).

400. 139 Cong. Rec. H9124-31 (daily ed. Nov. 10, 1993) (adoption of Gekas amendment to start the Instant Check no more than five years after the Brady Act interim waiting period is imposed).

401. UNIFORM CRIME REPORTING STATISTICS, *supra* note 71.

402. *See* District of Columbia v. Heller, 554 U.S. 570, 713 (Breyer, J., dissenting) (pointing to preemption laws in most states as reason why municipal handgun bans are rare); Goss, *supra* note 291, at 156.

403. Chicago had banned handguns in 1982, and several Chicago suburbs, including Morton Grove also had bans. *See* Channick, *supra* note 292.

404. In the 1992 U.S. Senate election, progressive Democratic Senator Russ Feingold was re-elected with 52.57% of the statewide vote. Feingold won 64% in Milwaukee County, 72% in Dane County (whose county seat is Madison), and 54% in Kenosha County. *See* WIS. LEGIS. REFERENCE BUREAU, 1993-1994 WISCONSIN BLUE BOOK 913 (Lawrence S. Barish & H. Rupert Theobald eds. 1993-94), *available at* <http://images.library.wisc.edu/WI/EFacs/WIBLueBks/BlueBks/WIBLueBk1993/reference/wi.wibluebk1993.i0016.pdf>. Kenosha City, where the handgun vote took place, voted strongly Democratic that year, whereas most of the rest of Kenosha County voted Republican. *Id.* at 937-38.

405. David Kopel, *Court, Capital and Handgun*, STAR TELEGRAM, Nov. 19, 2007, *available at* [http://www.cato.org/pub\\_display.php?pub\\_id=8799](http://www.cato.org/pub_display.php?pub_id=8799).

406. *Handgun Ban Loses*, CAPITAL TIMES, Nov. 9, 1994, *available at* 1994 WLNR 2084675; Kopel, *supra* note 405.

407. WIS. STAT. ANN. § 66.0409 (West 2012).

arms amendment on the ballot.<sup>408</sup> On election day, 73% of voters approved the addition of a right to arms guarantee to the state constitution.<sup>409</sup> Wisconsin is one of twenty-three states that added, readopted, or strengthened a state right to arms guarantee since 1968.<sup>410</sup>

As HCI grew more sophisticated politically in the late 1980s, it abandoned the ambition of handgun prohibition.<sup>411</sup> The Wisconsin handgun ban advocates received no public support from HCI. Despite protests from HCI's old allies in the prohibition movement, HCI judged that public opinion did not support prohibition.<sup>412</sup> HCI's public education campaign began to emphasize injuries and deaths of children by gunshot, and the need to impose gun safety laws. During the early 1990s, HCI was successful at winning many state laws restricting gun possession by minors, and won unanimous support in the Senate for a federal statute restricting handgun possession by anyone under eighteen.<sup>413</sup>

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408. See Enrolled J. Res. 27, 1995–96 Leg. (Wis. 1996); Enrolled J. Res. 21, 1997–98 Leg. (Wis. 1998). Wisconsin's Constitution required that a constitutional referendum be passed by two separate legislatures. See WIS. CONST. art. 12, § 1.

409. See WIS. CONST. art. 1, § 25; WIS. LEGISLATIVE REFERENCE BUREAU, 1999-2000 WISCONSIN BLUE BOOK 847 (1999) (1,205,873 in favor and 425,052 against), available at <http://legis.wisconsin.gov/lrb/bb/99bb/index.htm>.

410. Since 1963, the people of Alaska, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia, and Wisconsin have chosen, either through their legislature or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms, or to strengthen an existing right. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT, *supra* note \* at 27-36; Louisiana Secretary of State, *Official Election Results Inquiry, Results for Election Date: 11/6/2012*, [http://staticresults.sos.la.gov/11062012/11062012\\_Statewide.html](http://staticresults.sos.la.gov/11062012/11062012_Statewide.html) (Amendment to require strict scrutiny judicial protection for right to arms passed with 73% support). In every state where the people have had the opportunity to vote directly, they have voted for the right to arms by overwhelming margins. For example, the 2010 amendment in Kansas received 88% support. Kansas Secretary of State, *2010 General Election, Official Vote Totals 15*, [http://www.sos.ks.gov/elections/10elec/2010\\_General\\_Election\\_Results.pdf](http://www.sos.ks.gov/elections/10elec/2010_General_Election_Results.pdf). In 1998 Wisconsin adopted a guarantee by a vote of 1,205,873 to 425,052, WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 404, at 847. In 1986, West Virginia adopted its guarantee by a vote of 342,963 to 67,168. See W. VA. CONST. art. 3, § 22; James W. McNeely, *The Right of Who to Bear What, When, and Where: West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment*, 89 W. VA. L. REV. 1125, 1151 (1987), available at <http://saf.org/LawReviews/McNeelyJ.htm>.

411. CARTER, *supra* note 323.

412. See JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 198 (2004).

413. See 18 U.S.C. § 922(x) (2006).

2012]            *THE GREAT GUN CONTROL WAR*            1585

While “assault weapon” bans had been stalled in Congress during the Bush years, HCI improved its strategy in 1993. HCI gave its “assault weapon” ban proposal the oddly positive-sounding title “Recreational Firearms Protection Act.”<sup>414</sup> The bill—which banned 19 guns by name, and about 200 by generic definition—included an appendix listing over 600 rifles and shotguns that were explicitly *not* banned.<sup>415</sup> New ammunition magazines holding over ten rounds also were banned.<sup>416</sup> Along the way the bill picked up support through the addition of a ten-year sunset clause and provision for a federal study of the effectiveness of the ban.<sup>417</sup>

The bill passed the Senate 56-43 in November 1993,<sup>418</sup> and the stage was set for a showdown in the House, for which the NRA had been marshaling its resources. President Clinton committed his full resources to passing a gun control bill. With both sides all-in, the “assault weapon” ban passed the House by a single vote in May 1994.<sup>419</sup>

The ban was part of a comprehensive crime bill, intended to be the signature achievement of the new President, given that his efforts toward a comprehensive health care law were foundering in Congress.<sup>420</sup> After months of hard politicking, the Clinton crime bill became law in September 1994.<sup>421</sup> The ban included a variety of politically necessary, but irrational, distinctions. For example, included in the “recreational” guns explicitly exempted from the ban was the Ruger Mini-14.<sup>422</sup> The Ruger was functionally identical to

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414. See Public Safety and Recreational Firearms Protection Act, H.R. 4296, 103d Cong. (1993).

415. *Id.* at §§ 2, 7.

416. *Id.* at §4(b)(31)(A)(i).

417. 18 U.S.C. 922(v) (repealed by Title XI, § 110105(2), Pub. L. No. 103-322, 108 Stat. 2000 (1994)); Violent Crime Control Law Enforcement Act of 1994, Title XI, § 110105(2), Pub. L. No. 103-322, 108 Stat. 2000 (1994).

418. See William J. Eaton, *Assault Weapon Ban Added Onto Senate Crime Bill*, L.A. TIMES, Nov. 18, 1993, at A1.

419. See Jean Latz Griffin & Eric Krol, *Federal Gun Bill Fails to Disarm Illinois Debate*, CHI. TRIB., May 7, 1994, at 1.

420. See Violent Crime Control and Law Enforcement Act, Pub. L. 103-322, 108 Stat. 1976 (1994).

421. *Id.*

422. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110,106, 108 Stat. 2000 (1994) (exempting “Ruger Mini-14 Autoloading Rifle (w/o folding stock), Ruger Mini Thirty Rifle”; the Mini Thirty is the Mini-14 in a different caliber).

banned guns like the AR-15. But at the time, it had a much larger base of owners than any other “assault weapon.”<sup>423</sup>

Also included in the crime bill was a measure that the NRA had not resisted. Senator Paul Wellstone (D-Minn.) successfully proposed a ban on gun possession by anyone under a domestic violence restraining order.<sup>424</sup> (The Wellstone ban would be the issue in *United States v. Emerson*, discussed *infra*, the first modern federal case to provide a detailed exposition of the Second Amendment.<sup>425</sup>)

On close inspection, the “assault weapon” ban was mostly about appearances. The generic definition focused on accessories such as bayonet lugs and adjustable stocks.<sup>426</sup> So I observed that manufacturers simply removed the prohibited features, renamed the guns, and were soon selling firearms that in internal operation were operationally the same as the banned guns. On the other hand, the ban on new magazines over ten rounds was real. For some guns of recent vintage, I saw the price of grandfathered “high capacity” magazines increase tenfold. However, when one considers many of the older model guns on the list, such as the AR-15 (in production since the 1960s), I estimate that the world-wide inventory of ammunition magazines holding more than 10 rounds was probably in the tens or even hundreds of millions. Whatever the practical impact, the ban had substantial political resonance. *Washington Post* columnist Charles Krauthammer, a gun prohibition advocate, expressed the view of knowledgeable people on both sides: the ban was “purely symbolic . . . . Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation.”<sup>427</sup>

There was large backlash by gun owners against the “assault weapon” ban in particular, and the Clinton gun control agenda in general. The 1994 elections were a catastrophe for Democratic gun control advocates. Democrats lost the Senate, and they also lost the House for the first time since 1953.<sup>428</sup> President Clinton said several

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423. Editorial, *Treason Against Reason*, RICHMOND TIMES DISPATCH, Aug. 27, 1994, available at 1994 WLNR 983733 (400,000 AR-15s in circulation).

424. See 18 U.S.C. § 922(d)(8), (g)(8) (2006).

425. See 270 F.3d 203 (5th Cir. 2001).

426. See 18 U.S.C. § 921(a)(30) (repealed).

427. Charles Krauthammer, *Disarm the Citizenry. But Not Yet*, WASH. POST, Apr. 5, 1996. Krauthammer’s article is available in syndication, under a different title, at <http://community.seattletimes.nwsourc.com/archive/?date=19960408&slug=2323082>.

428. *Party Division in the Senate, 1789-PRESENT*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last

2012]            *THE GREAT GUN CONTROL WAR*            1587

weeks later, “The NRA is the reason the Republicans control the House.”<sup>429</sup> All of the Democratic congressional incumbents endorsed by the NRA retained their seats.<sup>430</sup> A study of U.S. House races in 1994 and 1996 concluded that NRA endorsement could shift between 1% and 5% of the vote, depending on the number of NRA members in a district.<sup>431</sup> NRA influence was most significant for endorsements of non-incumbents.<sup>432</sup>

In 1995, Clinton made a public appearance with former New Jersey Governor James Florio, who had been defeated for re-election in 1993, and whose Democratic party had lost control of both houses in the New Jersey Legislature, in part because of the “assault weapon” ban in that state.<sup>433</sup> Florio had given up the governorship in order to ban “assault weapons,” said Clinton, and Clinton declared himself ready to lose his presidency over the same issue.<sup>434</sup>

As it turned out, Clinton’s commitment would not be tested. For the next several years, Washington was stalemated over guns, and the only new enactments were appropriations riders inserted into spending bills. The 1994 elections did end any hopes of passing “Brady II,” HCI’s bill for mandatory national licensing of handgun owners, registration of all guns, and warrantless police inspections of the homes with “arsenals” (defined as twenty or more guns or gun parts, or as little as \$50 worth of ammunition).<sup>435</sup>

The 1994 elections led to tremendous changes in state gun laws. State after state enacted licensing for handgun carry permits, preemption laws to eliminate local gun control, instant checks to replace state-level waiting periods for handgun purchases, range

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visited August 6, 2012); *Party Divisions of the House of Representatives (1789 to Present)*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://artandhistory.house.gov/house\\_history/partyDiv.aspx](http://artandhistory.house.gov/house_history/partyDiv.aspx) (last visited August 6, 2012).

429. *A Conversation with President Clinton*, CLEVELAND PLAIN DEALER, Jan. 14, 1995, at 11B.

430. Christopher B. Kenny et al., *Does the National Rifle Association Influence Federal Elections?*, INDEPENDENCE INST. (Dec. 2006), <http://davekopel.org/2A/OthWr/Does-the-NRA-Influence-Federal-Elections.pdf>.

431. *See id.*

432. *See id.*

433. *See* Susan Page, *Prez Hits the Road, Assails GOP as He Launches Re-Election Bid*, NEWSDAY, June 23, 1995, at 21.

434. *See id.*

435. Gun Violence Prevention Act of 1994, S. 1878, 103d Cong. §§ 101(a)(u)(1), 204(a).

protection bills to prevent noise nuisance suits against shooting ranges, and other gun rights measures.<sup>436</sup>

At the NRA, Neal Knox was working his way back from exile, and some of his allies were winning spots on the board of directors.<sup>437</sup> He was elected Second Vice President of the NRA, which by NRA tradition would normally lead to him becoming NRA President a few years later.<sup>438</sup> The NRA Presidency is an unpaid honorary position. While it is important, as a practical matter the Association is run by the Executive Vice President, who is a full-time, salaried employee, and who is chosen by the seventy-six member NRA Board of Directors.<sup>439</sup>

Knox announced plans to run for Executive Vice President, to take the job away from incumbent Executive Vice President Wayne LaPierre.<sup>440</sup> In a 1997 showdown, LaPierre turned back Knox's challenge.<sup>441</sup> At the NRA's Annual Meeting, LaPierre maneuvered to help the actor Charlton Heston win election to the Board on a Saturday, and then on Monday to replace Knox as First Vice President.<sup>442</sup> Heston instantly became the public face and most prominent spokesman for NRA. A few years later, he was elected to three consecutive terms as NRA President.<sup>443</sup> Heston was a popular actor who had marched on Washington with Martin Luther King and was an outspoken advocate for civil rights in the early 1960s, when many in Hollywood stayed on the sidelines.<sup>444</sup>

Knox believed that the NRA could succeed through the power of gun owners voting politicians in or out of office.<sup>445</sup> While LaPierre and Heston acknowledged the importance of grassroots voters, they considered the electoral anxiety of politicians as an incomplete,

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436. Randy Kozuch, *Victory Report from the States*, AM. RIFLEMAN, Sept. 1995, at 44; Tanya K. Metaksa, *Victory Report from the States*, AM. RIFLEMAN, Feb. 1996, at 42.

437. See KNOX, *supra* note 137.

438. See *id.* at 153.

439. See TARTARO, *supra* note 193.

440. See KNOX, *supra* note 137, at 361.

441. See *id.* at 363.

442. Tim Klass, *Heston to Help Deliver NRA*, DAILY NEWS L.A., May 6, 1997, at N3.

443. See Steve Persall, *No Mere Actor*, ST. PETERSBURG TIMES, Apr. 8, 2008, at 2B; NRAVideos, *NRA Tribute to Charlton Heston*, YOUTUBE (May 23, 2008), [https://www.youtube.com/watch?v=0297\\_ha8zXE](https://www.youtube.com/watch?v=0297_ha8zXE).

444. See NRAVideos, *supra* note 443.

445. See Knox, *supra* note 137.

limited tool. LaPierre and Heston saw the broader fight as a contest for the hearts and minds of the American people. In the long run, they believed, the NRA needed a broad base of public support from citizens who saw the NRA as it sees itself—a civic organization dedicated to mainstream American values. Knox wanted the NRA to be feared. LaPierre and Heston wanted it to be loved.

The NRA's traditionally positive reputation with the American public had been falling, thanks in large part to HCI's efforts (strongly supported by much of the media) to delegitimize the NRA.<sup>446</sup> As long as NRA was strong and popular, much of HCI's agenda would be politically impossible to achieve. Gun control advocates sniffed that Heston was merely putting a sunny face on the same old gun rights zealotry.<sup>447</sup> But in the aftermath of the second ouster of Knox, LaPierre was able to firmly steer the NRA away from Knox-style absolutism. Unlike Knox, LaPierre favored the National Instant Check System. At the same time, there was no going back to the days of Franklin Orth. The NRA was not absolutely opposed to every possible gun control, but except for instant checks and laws aimed at criminals, there were not many gun controls that the NRA did support. The Heston/LaPierre strategy worked. By the early twenty-first century, the NRA was viewed favorably by 60% of Americans and unfavorably by 34%.<sup>448</sup> The proportion of Americans who viewed the NRA favorably rose to 68% by 2012, with NRA been seen favorably, on net, among every demographic group polled, and by Democrats, Republicans, and independents.<sup>449</sup>

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446. The only time Gallup has recorded a public opinion about the National Rifle Association was in June 1995, with 42% approval of the NRA and 51% disapproval. David B. Kopel, *Public Opinion About the National Rifle Association*, VOLOKH.COM (June 2, 2012), <http://www.volokh.com/2012/06/02/public-opinion-about-the-national-rifle-association/>; *Guns*, GALLUP.COM, <http://www.gallup.com/poll/1645/Guns.aspx> (last visited Jan. 18, 2013).

447. *Charlton Heston Rips Media, Says Gun Rights Outweigh All Others*, CHI. TRIB., Sept. 12, 1997, available at 1997 WLNR 5776555 ("Gun-control organizations labeled the speech as that of an extremist and said it would hurt the gun lobby's cause. 'His interpretation of the 2nd Amendment is unique to him and his organization and has never been upheld in court,' said Jake Tapper, a spokesman for Handgun Control Inc.").

448. See Lydia Saad, *NRA Viewed Favorably by Most Americans*, GALLUP (Apr. 15, 2005), <http://www.gallup.com/poll/15868/nra-viewed-favorably-most-americans.aspx>.

449. Deborah Charles, *Most Americans Back Gun Lobby, Right to Use Deadly Force*, REUTERS, Apr. 13, 2012, available at <http://www.reuters.com/article/2012/04/13/us-usa-guns-poll-idUSBRE83C0G420120413>.



## VII. THE RE-EMERGENCE OF THE SECOND AMENDMENT

In 1974, a Ph.D. candidate attempting to study the Second Amendment began his thesis: “Anyone undertaking research on the origins of the Second Amendment to the Constitution is bound to be impressed by the paucity of published materials on the subject.”<sup>450</sup> To the chagrin of some and the delight of others, however, by the mid-1990s the Second Amendment had become a topic of serious academic debate.

Considered inconsequential by many courts and professors, the Second Amendment now attracted a growing number of scholars who thought that the individual right view might be right after all. One of the first to reexamine the Second Amendment in a serious way was Don Kates. As a Yale Law School student, Kates had volunteered to spend one summer in Mississippi, working for the Freedom Summer voter registration.<sup>451</sup> There, he observed that many of the civil rights workers were armed in self-defense against racist terrorists who were often tolerated by local law enforcement.<sup>452</sup> After graduating, Kates worked for the radical New York City lawyer William Kunstler, and later was named California’s Poverty Lawyer of the Year.<sup>453</sup> He eventually went to teach at St. Louis University Law School, where his pro-choice stance on abortion was incompatible with his employer’s Catholic mission and ultimately cost him his job.<sup>454</sup> Kates returned to private practice and continued his life as a scholar. He became a prolific legal commentator, focusing primarily on gun policy.<sup>455</sup> One of his early works, a collection of pro-gun scholarly essays that he edited, entitled *Restricting Handguns: The Liberal Skeptics Speak Out* (1979), featured a foreword by the very liberal Senator Frank Church (D-Idaho).<sup>456</sup>

The late 1970s also saw the first legal scholarship from Stephen Halbrook, a philosophy professor at Howard University, who left

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450. Charles J. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution* (1974) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

451. David B. Kopel, *Kates, Don B., Jr.*, in 1 GUNS IN AMERICAN SOCIETY, *supra* note 73, at 327.

452. *See id.*

453. *See id.*

454. *See id.*

455. *See id.* at 328.

456. *See* Frank Church, *Foreword*, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (Don B. Kates ed., 1979).

academia for private law practice.<sup>457</sup> Halbrook and Kates were unabashed gun rights advocates, and Halbrook would later represent the NRA as its outside counsel.<sup>458</sup> Halbrook and Kates both agreed the Second Amendment prohibited gun bans, but Kates readily conceded the constitutionality of many forms of non-prohibitory controls, even though he considered some of them unwise in terms of criminology.<sup>459</sup> Halbrook was a relentless miner of original sources. Kates's work tended toward interdisciplinary synthesis.<sup>460</sup>

In 1983, the *Michigan Law Review* published Kates's *Handgun Prohibition and the Original Meaning of the Second Amendment*.<sup>461</sup> It was only the third time in history that a top-ten law review had published a serious article on the Second Amendment.<sup>462</sup> The Michigan Law Review was prominent, but the NRA took no chances. It bought reprints and mailed them to every constitutional law professor in the United States.

The ultimate impact within the legal academy was dramatic. Professor William Van Alstyne later recounted that "this pipsqueak Kates" convinced many of the leading constitutional law professors that the Second Amendment really was an individual right.<sup>463</sup> Still, few law professors even dared to mention the Second Amendment in their own articles.<sup>464</sup>

The reason is difficult to know for sure. Professor Sanford Levinson later suggested that

the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that

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457. See David B. Kopel, *Halbrook, Stephen P.*, in 1 GUNS IN AMERICAN SOCIETY, *supra* note 73, at 385–90.

458. See *id.* at 387.

459. *Id.*

460. *Id.*

461. 82 MICH. L. REV. 204 (1983).

462. See David B. Kopel, *Comprehensive Bibliography of the Second Amendment in Law Reviews*, 11 J. ON FIREARMS & PUB. POL'Y 1, 26 (1999). The previous two were Feller & Gotting's 1966 *Northwestern* article, stating that the Second Amendment is only for the National Guard, see Feller & Gotting, *supra* note 144; and a 1915 *Harvard* piece from retired Maine Supreme Judicial Court Chief Justice Lucilius Emery, arguing that the Second Amendment is for the entire militia, but only for them, and therefore the Amendment poses no barrier to disarming women, children, the elderly, or the disabled, see Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915).

463. Letter from William W. Van Alstyne, Professor of Law, William & Mary Law School, to Aspen Publishers (2010) (on file with author).

464. See Kopel, *supra* note 462.

component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even “winning,” interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.<sup>465</sup>

Levinson’s eminence as a legal scholar and credentials as a political liberal are unquestioned. So when he wrote in the *Yale Law Journal* that the individual rights view was likely correct and that the legal academy had been avoiding the issue for fear of what it would find,<sup>466</sup> it spurred law professors to begin to engage with the Second Amendment.<sup>467</sup> With Levinson as the example, it was no longer taboo for law professors to write about the Second Amendment.

The trickle started by Kates and Halbrook became a flood as successive scholars engaged with the material and concluded the Second Amendment really was an individual right. Even Harvard’s Lawrence Tribe reevaluated the individual rights view.<sup>468</sup> Tribe’s *American Constitutional Law* treatise defined liberal constitutionalism for a generation. Between the second edition (1987) and the third (2000), Tribe assessed the new scholarship; the third edition endorsed what was now called “the Standard Model” (a term Professor Glenn Reynolds borrowed from physics).<sup>469</sup> The Standard Model understood the Second Amendment as an individual right of law-abiding people, including the right to keep and bear arms for defense.<sup>470</sup> The Standard Model also accepted that some non-prohibitory controls were constitutionally permissible.<sup>471</sup>

By the mid-1990s, the growing acceptance of the Standard Model sent gun prohibition advocates in search of an alternative. Essayist Garry Wills, having previously described gun owners as “traitors” and homosexuals,<sup>472</sup> declared in the *New York Review of Books* that the

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465. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

466. *Id.*

467. See generally Kopel, *supra* note 462.

468. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 894–95 (3d ed. 2000).

469. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

470. See *id.* at 467.

471. See *id.* at 478.

472. See Garry Wills, *John Lennon’s War*, CHI. SUN-TIMES, Dec. 12, 1980 (people who own guns for self-defense are “traitors”); Garry Wills, *The Pope is Shot; the Gun Rules the Rulers*, ANCHORAGE DAILY NEWS, May 14, 1981 at A-12 (“the sordid race

2012]            *THE GREAT GUN CONTROL WAR*            1593

individual right was a modern hoax.<sup>473</sup> The truth, according to Wills, was that the Second Amendment had no legal meaning, but was in fact a clever trick by James Madison, deliberately written so as to have no significant content.<sup>474</sup> Similarly, the American Bar Association (“ABA”) adhered to its 1975 position: “It is doubtful that the founding fathers had any intent in mind with regard to [the] meaning of this amendment.”<sup>475</sup>

The Wills/ABA view of a nihilist Second Amendment would soon be displaced by something far more plausible. Dennis Henigan, who ranks with Halbrook and Kates as one of the most influential Second Amendment lawyers in the period between *Miller* and *Heller*, had already cut the new path.

Henigan was a young corporate law partner in D.C. when he followed his ideals and went to work for the litigation branch of Handgun Control, Inc.<sup>476</sup> Before Henigan, HCI received pro bono help from some of the best liberal D.C. corporate law firms. Henigan developed an impressive network of pro bono support from corporate law firms all over the United States.

It was Henigan who masterminded the wave of municipal government lawsuits against handgun manufacturers in the late 1990s, bringing in tobacco lawsuit plaintiffs’ lawyers to run the litigation.<sup>477</sup> The suits nearly pushed major handgun manufacturers to capitulation in 2000.<sup>478</sup> Although the lawsuits strategy failed in the end, it was the closest thing to a knockout punch ever devised by the gun control lobby.

But most important in the historical development of Second Amendment scholarship was Henigan’s pivot away from the “collective right” or the “state’s right” view of the Amendment. These terms were still commonly used in the lower federal courts in

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of gunsels”). Literally, a “gunsel” is the passive partner in male homosexual intercourse.

473. See Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995.

474. *Id.* For decades, the *New York Review of Books* was the flagship publication of New York’s left intelligentsia.

475. Ben R. Miller, *The Legal Basis for Firearms Controls*, 100 ANN. REP. A.B.A. 1050, 1052 (1975).

476. See Gregg Lee Carter & Walter F. Carroll, *Henigan, Dennis A.*, in GUNS IN AMERICAN SOCIETY 399–400 (1st ed. 2002).

477. See Peter J. Boyer, *Big Guns*, NEW YORKER, May 17, 1999, at 54–55.

478. See David B. Kopel, *Smith and Wesson’s Faustian Bargain, Part I*, NAT’L REV. ONLINE (Mar. 20, 2000), available at <http://www.davekopel.com/NRO/2000/Smith-and-Wesson%27s-Faustian-Bargain.htm>.

the 1990s, with little definition or purpose other than to perfunctorily dismiss individual right claims.<sup>479</sup>

To close observers, the ground was shifting. The Supreme Court's 1990 *United States v. Verdugo-Urquidez* decision said "people" was a term of art in the Bill of Rights and that its meaning was the same in the First, Second, and Fourth Amendments—protecting members of the American community, but not persons in foreign nations.<sup>480</sup> This made it difficult to claim that the right of the people in the Second Amendment was transformed by the prefatory militia clause into a right of the states.

Henigan had already spotted the problem, and pivoted:

It may well be that the right to keep and bear arms is individual in the sense that it may be asserted by an individual. But it is a narrow right indeed, for it is violated only by laws that, by regulating the individual's access to firearms, adversely affect the state's interest in a strong militia.<sup>481</sup>

Further, Henigan suggested the long list of collective rights and state's right cases should be construed as if they had recognized a narrow individual right whose sole purpose was for the state or collective purpose of maintaining an organized militia.<sup>482</sup>

Over the coming years, this theory was called various things, including "sophisticated collective right"<sup>483</sup> (a backhanded admission that the older cases were simplistic). The most straightforward and precise name was "Narrow Individual Right."<sup>484</sup>

Towards the end of the 1990s, scholars sympathetic to gun control took Henigan's thesis and elaborated on it in considerable depth. Most prominent among these was the prolific Ohio State (and later, Fordham) history professor Saul Cornell, whose research is encapsulated in his book, *A Well-Regulated Militia: The Founding*

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479. See generally David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901 (2009) (distinguishing different conceptions of the Second Amendment).

480. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

481. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 47–48 (1989).

482. See *id.* at 47.

483. See, e.g., *United States v. Emerson*, 270 F.3d 203, 219 n.11 (2001).

484. See generally Kevin D. Szezepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197 (1996) (arguing that the Second Amendment confers only a narrow individual right).

2012]            *THE GREAT GUN CONTROL WAR*            1595

*Fathers and the Origins of Gun Control in America*.<sup>485</sup> The theory is well presented in H. Richard Uviller & William G. Merkel's *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*.<sup>486</sup>

From the late 1990s until *Heller*, the proponents of the Standard Model and the Narrow Individual Right fought it out in journals and books. In what would have been a surprise to a law professor from 1970, the debate was almost entirely on originalist grounds.<sup>487</sup> The *Heller* decision<sup>488</sup> showed that advocates on both sides of the issue, including Halbrook, Kates, and Henigan, all of whom filed briefs in *Heller*, had succeeded in their own ways. Halbrook and Kates had brought the Second Amendment back into the realm of respectable discussion about the Constitution. They had presented extensive evidence about the original understanding of the Constitution. Their scholarship had become part of the foundation for the Standard Model—which, in their view, had been the traditional understanding of the Second Amendment and its state analogues, as reflected in court cases, treatises, and near-universal understanding, from 1791 until the Great Forgetting of the 1960s.<sup>489</sup>

Henigan succeeded in offering a coherent but tightly bounded theory of the Second Amendment that would appeal to one wing of the Supreme Court. The Narrow Individual Right enjoyed the advantage that militia issues were a major concern at the state ratifying conventions that asked for a federal bill of rights, and thereby set in motion the movement toward enactment of the Second Amendment. The Narrow Individual Right won four votes in *Heller*,

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485. SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

486. H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002). For a critique, see Nelson Lund, *Putting the Second Amendment to Sleep*, 8 GREEN BAG 2D 101 (2004) (book review).

487. See *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (“The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.”).

488. *Id.*

489. “The Great Forgetting” is a term coined by originalist professor Rob Natelson to describe the progressive loss of public memory about the assumptions and background understandings on which the Constitution and the Bill of Rights had been built. See Robert G. Natelson, *The Great Forgetting*, INDEPENDENCE INST. (Feb. 26, 2012), <http://constitution.i2i.org/2012/02/26/the-great-forgetting>. Natelson uses the term specifically to refer to losses that took place during the nineteenth century. *Id.*

led by Justice Stevens in dissent.<sup>490</sup> Had John Kerry been elected President in 2004, different appointments probably would have resulted in a 6–3 win for the Stevens and Henigan view of the Second Amendment.

In contrast to the 5–4 split on standard versus narrow individual right, the states/collective right that long dominated lower federal court decisions would be rejected 9–0 by the Court.<sup>491</sup> Justice Stevens said the Court had always considered the Second Amendment “[s]urely . . . a right that can be enforced by individuals.”<sup>492</sup> Justices Scalia and Stevens disagreed about whether the right was for all individuals, or only for individuals in a militia.<sup>493</sup> All the Justices agree that the right was an individual one. The dissenters’ arguments and the 9-0 rejection of states/collective rights are a direct outgrowth of the intellectual foundation that Dennis Henigan constructed. Indeed, Justice Stevens’s statement of “a right that can be enforced by individuals” comes nearly verbatim from Henigan.<sup>494</sup> It is rare that an advocate is wise enough to see that his side’s consistently winning arguments require major reformulation. Dennis Henigan was such an advocate.

From the primitive scholarship of the mid-twentieth century, the Second Amendment had developed into two serious schools of thought, each with some historical support. For the Supreme Court, this scholarship gave both the majority and the dissent an arsenal of arguments and counterarguments. But ultimately, the full explanation for the Court’s affirmation of the right to keep and bear arms lies not in textbook originalism but in living constitutionalism.

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490. *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

491. *See id.* at 592 (Scalia, J., majority opinion) (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”); *id.* at 636 (Stevens, J., dissenting) (“Surely it protects a right that can be enforced by individuals.”).

492. *Id.* at 636 (Stevens, J., dissenting).

493. *Id.* at 589 (Scalia, J., majority opinion) (“Thus, the purposive, qualifying phrases positively establish that ‘to bear arms’ is not limited to military use.”); *id.* at 636 (Stevens, J., dissenting) (“The Second Amendment . . . encompass[es] the right to use weapons *for certain military purposes*.” (emphasis added)).

494. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); Ehrman & Henigan, *supra* note 481, at 47 (“It may well be that the right to keep and bear arms is individual in the sense that it may be asserted by an individual. But it is a narrow right indeed . . .”).

### VIII. COLUMBINE AND THE 2000 ELECTION

At the federal level, gun control from 1995 to 1998 was less of an issue than it had been in the previous several years. One side of the aisle had the Presidency, and the other side had the Congress.<sup>495</sup> Neither side could enact more than minor items on its agenda. The Clinton Administration began pushing harder once the 1996 election was over, and accomplished what it could through regulations, such as the import ban on fifty-eight more semiautomatic rifles.<sup>496</sup>

The Columbine High School murders in April 1999 changed everything. Two students— who had planned their crime for over a year—murdered twelve students and a teacher.<sup>497</sup> There had been school mass murders as early as 1927, when a disgruntled school caretaker used explosives to murder forty-four people in Bath, Michigan.<sup>498</sup> But nothing shocked the nation like Columbine.

One change that resulted from Columbine was police tactics.<sup>499</sup> Although the Columbine murders began while a sheriff's deputy was on the campus, and another officer arrived almost instantly, neither officer entered the school building to pursue the killers.<sup>500</sup> Most of the killing happened in the school library, where students were methodically murdered while dozens of police officers were outside just a few yards away and could have entered from a library door that opened to the outside.<sup>501</sup> Post-Columbine, police tactics changed to emphasize immediate action against “active shooters,” rather than

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495. Bill Clinton, a strong supporter of gun control, *see supra* Part VI, was still President; the Republicans who had gained control of Congress in November 1994 because of their opposition to Clinton's gun control program, *see supra* Part VI, still were the majority in both houses.

496. *See* Springfield, Inc. v. Buckles, 292 F.3d 813, 815, 819 (D.C. Cir. 2002) (upholding the import ban by deferring to ATF's definition of “sporting purpose”); DEPARTMENT OF THE TREASURY STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES (Apr. 1998), <http://www.atf.gov/publications/download/treas/treas-study-on-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>.

497. David B. Kopel & Carol Oyster, *Columbine High School Tragedy*, in GUNS IN AMERICAN SOCIETY 181–90 (1st ed. 2002).

498. *See* Nadia Reiman & Michael Garofalo, *Survivors Recall 1927 Michigan School Massacre*, NPR (Apr. 17, 2009), <http://www.npr.org/templates/story/php?storyid=103186662>.

499. *See* Kopel & Oyster, *supra* note 497 at 197.

500. *See id.* at 182.

501. *See id.*



waiting for a SWAT team to assemble and then clearing rooms one at time.<sup>502</sup>

Columbine prompted California to pass a one-gun-a-month law, but other than that, legal changes at the state level were few. Colorado Governor Bill Owens (R) proposed a five part gun control program, every item of which was rejected by the state legislature the next year.<sup>503</sup> Colorado and Oregon (where a school shooting had taken place in 1998) both passed “gun show” initiatives by statewide ballots.<sup>504</sup>

Three of the four Columbine murder weapons had been obtained by another student who acted on behalf of the killers.<sup>505</sup> She had bought them at a gun show.<sup>506</sup> This transformed gun shows into a major national issue.<sup>507</sup> A few weeks after Columbine, Vice President Al Gore cast the tie-breaking vote in the U.S. Senate for an amendment to a juvenile crime bill that would have given the BATF the administrative power to shut down any or all gun shows in the United States.<sup>508</sup>

“It doesn’t take the NRA long to reload,”<sup>509</sup> warned Rep. Anthony Weiner (D-N.Y.), who objected to the House waiting a few weeks before taking up gun control legislation.<sup>510</sup> What eventually passed the House was a bill (similar to the Colorado and Oregon laws) requiring background checks on all gun show sales, not just sales by

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502. The new tactical approach did not become universal. In July 2011, a man spent eighty minutes murdering young people at a youth camp on an island in Norway. Local police, rather than acting immediately, waited for the arrival of a special police team from Oslo, forty-five miles away. The killer surrendered the moment he saw a police officer. *See Norway Police Admit Slow Response During Massacre*, CBS NEWS (Mar. 15, 2012), [http://www.cbsnews.com/8301-202\\_162-57398244/norway-police-admit-slow-response-during-massacre](http://www.cbsnews.com/8301-202_162-57398244/norway-police-admit-slow-response-during-massacre).

503. *See* David B. Kopel, *Colorado Senate Rejects Gun Legislation*, NAT’L REV. ONLINE (Apr. 12, 2000), <http://davekopel.org/NRO/2000/Colorado-Senate-Rejects-Gun-Legislation.htm>.

504. *See* Kopel & Oyster, *supra* note 497, at 189.

505. *See id.* at 183.

506. *See id.*

507. *See id.* at 189

508. *See id.*

509. *Pending Firearms Litigation and the Administration’s Enforcement of Current Gun Laws: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 24 (1999) (statement of Rep. Weiner, Member, H. Comm. on the Judiciary).

510. *See id.*

2012]            *THE GREAT GUN CONTROL WAR*            1599

licensed dealers. The bill also would have repealed the D.C. handgun ban.<sup>511</sup>

None of the bills were enacted.<sup>512</sup> The House and Senate negotiators could not agree about what should happen when the National Instant Check System failed to produce a prompt approval or denial of a proposed private sale.<sup>513</sup> The Republican leadership and the NRA wanted to let the sale go ahead after twenty-four hours.<sup>514</sup> The Clinton administration and HCI insisted on delaying the sale for up to three days, by which point the gun show (almost all are held on weekends) would be over, and the sale would never take place.<sup>515</sup> Ultimately, gun rights advocates in Congress did not want any new laws and gun control advocates wanted much more than Congress was willing to pass. The Clinton Administration preferred to keep the issue active for the upcoming 2000 election.<sup>516</sup>

On Mother's Day 2000, over 100,000 people participated in a gun control rally at the National Mall in Washington.<sup>517</sup> Many others participated in smaller rallies around the country.<sup>518</sup> This "Million Mom March" was organized by Donna Dees-Thomases, a former Democratic Senate staffer who was the sister-in-law of Hillary Clinton's best friend.<sup>519</sup> The Office of the First Lady provided substantial support to the organizers.<sup>520</sup> The hope was that angry mothers would change the politics of gun control in the United States.<sup>521</sup> Their most prominent supporter was television show host Rosie O'Donnell, who had thrown herself into gun control advocacy

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511. See Kopel & Oyster, *supra* note 497, at 188.

512. See *id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. See David B. Kopel, *The Million Mom March: Much Less than Advertised*, NAT'L REV. ONLINE (May 12, 2000, 10:50 AM), <http://davekopel.org/NRO/2000/Million-Mom-March-Much-Less-than-Advertised.htm>. But see Robin Toner, *Mothers Rally to Assail Gun Violence*, N.Y. TIMES, May 15, 2000, <http://www.nytimes.com/2000/05/15/us/mothers-rally-to-assail-gun-violence.html>.

518. See Toner, *supra* note 517.

519. See *id.*

520. See *id.*

521. DONNA DEES-THOMASES WITH ALISON HENDRIE, *LOOKING FOR A FEW GOOD MOMS: HOW ONE MOTHER RALLIED A MILLION OTHERS AGAINST THE GUN LOBBY* xiii (2004).

after Columbine, urging that all guns be banned and anyone who possessed a gun serve a mandatory sentence.<sup>522</sup>

The 2000 presidential election promised to be the great showdown on gun control. Like the election of 1800 for the First Amendment,<sup>523</sup> the 2000 election would decide the fate of the Second Amendment. In the Democratic primaries, former Senator Bill Bradley (D-N.J.) attempted to ride the issue by proposing gun controls that went beyond what Vice President Gore supported.<sup>524</sup>

But by the fall, gun control no longer looked like a winning issue. The Million Mom Movement had fizzled, and a few years later would simply be absorbed into HCI.<sup>525</sup> Gore's running mate, Connecticut Senator Joe Lieberman, tried to convince crowds that "Al Gore and I respect the Second Amendment right to bear arms."<sup>526</sup>

When *United States v. Emerson* was being argued in the Fifth Circuit in the spring of 2000, the Clinton Department of Justice ("DOJ") told the judges that the Second Amendment protected solely National Guardsman while on active duty.<sup>527</sup> In response to a letter from a concerned citizen, Solicitor General Seth Waxman articulated the DOJ's position that "the Second Amendment does not extend an individual right to keep and bear arms."<sup>528</sup> Quoting the citizen's letter, Waxman concurred that the government believes that it "could 'take guns away from the public,' and 'restrict ownership of rifles, pistols and shotguns from all people.'"<sup>529</sup> The NRA put Waxman's "take guns" quote on billboards in swing states.<sup>530</sup>

522. See *Rosie's K-onfused Gun Message*, N.Y. POST, Apr. 29, 1999, at 008 ("I know it's an amendment. I know it's in the Constitution. But you know what? Enough! I would like to say, I think there should be a law—and I know this is extreme—that no one can have a gun in the U.S. If you have a gun, you go to jail. Only the police should have guns. . . . I'd like to start the NGA—the No Guns Association, and get celebrities to do ads for that.").

523. See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999).

524. Patty Reinert & Bennett Roth, *Bradley Hits Gore's Record on Gun Control*, HOUSTON CHRON., Feb. 11, 2000.

525. See *History of the Brady Campaign*, *supra* note 187.

526. Brigette Greenburg, *Lieberman Counters Gun Lobby in Washington*, HAYS DAILY NEWS, Nov. 3, 2000, at 12.

527. See Letter from Seth Waxman (Aug. 22, 2000) (on file with NRA-ILA); *The "Good" and "Bad" of the Emerson Appeal Oral Arguments*, SECOND AMENDMENT FOUND., available at <http://thefiringline.com/forums/showthread.php?t=27477> (last visited Nov. 5, 2012).

528. *Id.*

529. *Id.*

530. See Stephen P. Halbrook, *Debating the Second Amendment: The Constitution Protects Each American's Right to Own a Firearm*, SAN DIEGO UNION-

2012]            *THE GREAT GUN CONTROL WAR*            1601

George W. Bush won Florida by a few hundred votes,<sup>531</sup> and thus the election by five electoral votes.<sup>532</sup> If not for the gun issue, the election would not have been close. The gun issue cost Gore Missouri, West Virginia (voting Republican in a close election for the first time in a century), Gore's home state of Tennessee, Clinton's home state of Arkansas, and Florida.<sup>533</sup> President Clinton later wrote that the NRA had been the reason that Gore lost.<sup>534</sup>

#### IX. THE GREAT AMERICAN GUN WAR WINDS DOWN

For the next decade, very little went right for gun control advocates. Had Gore been President on September 11, 2001, his version of the PATRIOT Act might have included many gun control measures. President Bush's PATRIOT Act did not.<sup>535</sup> Attorney General John Ashcroft repudiated the Johnson-Nixon era DOJ position on the Second Amendment and accepted the Standard Model.<sup>536</sup>

The Clinton Administration had been working for years with many allies at the United Nations toward an international gun control treaty. But the July 2001 U.N. gun control conference ended with only a non-binding Programme of Action.<sup>537</sup> Even that was watered

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TRIB., May 19, 2002, *available at* [http://www.wmsa.net/People/Stephen\\_Halbrook/020519\\_debating\\_2nd\\_amendment.htm](http://www.wmsa.net/People/Stephen_Halbrook/020519_debating_2nd_amendment.htm).

531. *See 2000 Presidential Election: Popular Vote Totals*, NAT'L ARCHIVES, [http://www.archives.gov/federal-register/electoral-college/2000/popular\\_vote.html](http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html) (last visited Sept. 24, 2012).

532. *See 2000 Presidential Election: Electoral Vote Totals*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/votes/2000.html> (last visited Sept. 24, 2012).

533. BILL CLINTON, MY LIFE 928 (2004); Bill McAllister, *Clinton Pins Gore Loss on NRA*, DENVER POST, Dec. 20, 2000, at A06.

534. CLINTON, *supra* note 533, at 928; McAllister, *supra* note 533, at A06 ("President Clinton said Tuesday that his administration's advocacy of gun control measures had cost Vice President Al Gore 'at least' five states in the election and suggested that Colorado illustrated Gore's difficulty with the gun issue.").

535. *See* USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001).

536. *See* Memorandum for the Attorney Gen. from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen. et al., on Whether the Second Amendment Secures an Individual Right (Aug. 24, 2004) (on file with the U.S. Department of Justice); Memorandum to All U.S. Attorneys from the Attorney Gen., on *United States v. Emerson* (Nov. 9, 2001) (on file with the U.S. Department of Justice); David B. Kopel, *An Army of One*, NAT'L REV. ONLINE (May 29, 2001), <http://davekopel.org/NRO/2001/An-Army-of-One.htm> (history of U.S. Attorneys General stances on the Second Amendment).

537. *See generally* United Nations Conference on the Illicit Trade on Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *Programme of Action to*

down at the insistence of the U.S. delegation, including John Bolton, the Undersecretary of State for Arms Control and International Security. The absolute red line for the U.S. delegation was insistence that the document not delegitimize the transfer of arms to “non-state actors” (e.g., rebel groups, such as the Kurds fighting Saddam Hussein, or, in earlier times, anti-Nazi partisans, or the American Revolutionaries).<sup>538</sup>

September 11, 2001 led to a wave of gun-buying by Americans,<sup>539</sup> as did the inept government response to Hurricane Katrina in 2005.<sup>540</sup> “Shall issue”<sup>541</sup> concealed carry laws continued to advance state by state. In the early 1990s, gun control advocates at the Federal Center for Disease Control aimed to make guns like cigarettes in public perception: “dirty, deadly—and banned.”<sup>542</sup> Now, the “shall issue” laws were making it routine for Americans to be around guns when they went to a shopping mall, a public park, or almost anywhere else.

One reason for the proliferation of shall issue laws in particular, and of the political success of the gun rights movement in general, was its superiority in the communications and organization contest. Ever since gun control became an important national issue in the 1960s, gun control advocates had enjoyed strong support in what is today called “the mainstream media” (MSM). Not all MSM stories

*Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. Doc. A/CONF.192/15.

538. David B. Koppel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by 'Non-State Actors': the Question of Sovereignty*, 8 TEX. REV. L. & POL. 373 (2004); David B. Koppel, *The UN Small Arms Conference*, 23 SAIS REV. 319 (2003).

539. See *Total NICS Background Checks, Nov. 30 1998 to April 30, 2011*, FBI, <http://www.fbi.gov/about-us/cjis/nics/reports/total-nics-background-checks> (last visited Nov. 12, 2012); Robert Seltzer, Letter to the Editor, *After Sept. 11, A Rise in Gun Sales*, N.Y. TIMES (Dec. 9, 2001), <http://www.nytimes.com/2001/12/09/opinion/l-after-sept-11-a-rise-in-gun-sales-565520.html>.

540. See *Gun Sales Surge Going Strong*, NRA-ILA (Sept. 16, 2005), <http://www.nraila.org/news-issues/in-the-news/2005/9/gun-sales-surge-going-strong.aspx>.

541. See “*Shall Issue*” *Concealed Weapons Laws*, PUB. HEALTH L. RES., <http://publichealthlawresearch.org/public-health-topics/injury-prevention/gun-safety/evidence-brief/%E2%80%9Cshall-issue%E2%80%9D-concealed-weapons-law> (last visited Sept. 24, 2012) (“State ‘shall issue laws’ require state and local authorities to issue licenses to individuals authorizing the carrying of a concealed firearm as long as the individuals meet enumerated criteria. These laws are distinguishable from ‘may issue laws,’ which require an individual to establish a compelling need to carry a concealed firearm.”).

542. William Raspberry, *Sick People with Guns*, WASH. POST, Oct. 19, 1994, at A23 (based on interview with Dr. Mark Rosenberg, Director of the Centers for Disease Control, National Center for Injury Prevention and Control).

2012]            *THE GREAT GUN CONTROL WAR*            1603

were biased, but when there was bias, it almost always tilted pro-control.<sup>543</sup> Gun rights advocates felt that it was difficult to get their side of the story out to the general public. But hostile media coverage also had the unintended consequence of increasing NRA membership, as Second Amendment supporters turned to the one group that they felt spoke for their interests.<sup>544</sup>

In the late 1960s and early 1970s, the NRA was one of the first major organizations to successfully use “direct mail.”<sup>545</sup> Although direct mail techniques are now well-developed, the NRA blazed trails in the use of mass mailings to encourage supporters to take particular political actions and to make donations for special legislative projects. Eventually, almost every interest group in the United States began using effective direct mail programs, but for a while, the NRA’s sophisticated program made it unusually effective when compared to other interest groups.

By the early 1990s, I observed that the proliferation of fax machines and computer modems provided a vast boost to local gun rights groups. In the days before the Worldwide Web and e-mail became the primary means of high-speed communication, local gun activists used computer bulletin boards and other text-based electronic communications to mobilize supporters. Later in the 1990s, the national and local gun groups moved quickly to utilize websites and e-mail. There was, of course, no reason why gun control groups could not do the same, and eventually they did. But for every new technology—from fax machines to Facebook—they tended to trail the gun rights organizations in the exploitation of new technology.

There are several possible explanations for the gap in the communications race. The first is simple necessity in the sense that gun rights groups had a communications problem to solve, whereas gun control groups could rely on a usually sympathetic MSM.<sup>546</sup> Second, the gun rights groups had a much larger base of activists.<sup>547</sup>

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543. See BRIAN ANSE PATRICK, *THE NATIONAL RIFLE ASSOCIATION AND THE MEDIA: THE MOTIVATING EFFECTS OF NEGATIVE COVERAGE* (2002).

544. See *id.*

545. OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* 66 (1993) (“The NRA pioneered the use of direct-mail techniques in politics.”).

546. See *id.*

547. See BRIAN ANSE PATRICK, *RISE OF THE ANTI-MEDIA: IN-FORMING AMERICA’S CONCEALED WEAPON CARRY MOVEMENT* 55 (Lexington Books ed., 2009).

This meant that they had more to gain from enhancing communications with their membership, and it increased the possibility of finding technologically talented people within the group. Third, the personality type that is often attracted to gun rights—the individualist interested in proficiency with tools (e.g., guns)—may be a type more willing to learn how to use new tools.

Whatever the underlying reasons, the growing ability of gun rights activists to end-run the MSM and to disseminate their own information and viewpoint is one important reason for their political success.<sup>548</sup>

Gun ownership itself continued to grow, nearly tripling from about one gun per three persons after World War II, to about one gun per person in the twenty-first century.<sup>549</sup>

By 2004, the federal “assault weapon” ban expired pursuant to its own terms.<sup>550</sup> HCI had changed its name to “the Brady Campaign,” eliminating the grating connotations of “control,” and emphasizing its popular public spokes-couple; the conventional wisdom was that “gun control” was unpopular, but that gun control proposals could become attractive if relabeled as “gun safety.”<sup>551</sup> But the political slide

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548. *See id.* at 81.

549. *See* Brief of International Law Enforcement Educators & Trainers Ass’n et al. as Amici Curiae in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 405576, at \*6aa-7aa (citing GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 96-97 (James D. Wright ed., 1997); BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *ANNUAL FIREARMS MANUFACTURE AND EXPORT REPORT*). The most precise data are in Chapter 12 of the *Firearms Law and the Second Amendment* textbook. Chapters 12 through 15 of the textbook will be online, and available for free, at the textbook’s public website, [www.firearmsregulation.com](http://www.firearmsregulation.com), later in 2013.

550. 18 U.S.C. §§ 922(v)–(w) (repealed Sept. 13, 1994).

551. BRADY CAMPAIGN, *supra* note 187; Nicholas Confessore, *Control Freaks*, AM. PROSPECT, Apr. 8, 2002; Kenneth R. Bazinet, *Gun-Control Backer Shifts Aim*, N.Y. DAILY NEWS, Aug. 26, 2001 (Rep. Carolyn McCarthy “one of Congress’ most visible gun-control advocates,” explained, “Before I came to Congress, I told people in New York gun control sounds like you’re trying to control everybody, but really it’s a gun-safety issue.”); Karie Stakem, Letter to the Editor, *Gun “Control” Isn’t Our Aim—Just Gun Safety*, VIRGINIAN-PILOT & LEDGER STAR, June 29, 2001, at B10, available at 2001 WLNR 2096578 (“As an officer of the Hampton Roads Chapter of the Million Mom March, I recently attended a conference in Washington, D.C., sponsored by Handgun Control Inc. (HCI). I also attended a reception in honor of Jim and Sarah Brady, where HCI and the Center to Prevent Gun Violence officially announced that their names were changing to the Brady Campaign and the Brady Center to Prevent Gun Violence. . . . Changing the name from Handgun Control to the Brady Campaign will have a positive effect, especially since this organization is a key player in the fight against the powerful gun lobby. The word ‘control’ suggested that gun safety advocates wanted control over gun rights activists by infringing on

2012]            *THE GREAT GUN CONTROL WAR*            1605

continued. “We’ve hit rock bottom,” Sarah Brady told a friendly interviewer.<sup>552</sup> She was wrong.

The 2004 Democratic presidential nominee, John Kerry (Mass.), had a strong record of supporting gun control, but he was pretty good at shooting clay pigeons with a shotgun.<sup>553</sup> Despite claiming to be a friend of the Second Amendment, he too ran into trouble on gun control. When union supporters presented him with a rifle at a West Virginia rally in September, the gun turned out to be one that Kerry had co-sponsored legislation to ban.<sup>554</sup> The NRA chided Kerry in ads featuring an exquisitely coiffed French poodle and the headline: “This dog won’t hunt.”<sup>555</sup> In smaller text, the ads detailed Kerry’s gun votes as a Senator. The poodle mockery attacked Kerry’s gun control record, but was also a culture war slap at the Boston Brahmin, who became a billionaire by marrying a wealthy widow. That President Bush, rather than President Kerry, appointed the Justices to replace William Rehnquist and Sandra Day O’Connor turned out to make all the difference a few years later in *Heller*.<sup>556</sup>

The last of the municipal lawsuits against gun manufacturers were shut down by the 2005 Protection of Lawful Commerce in Arms Act, which passed in significant part due to the hard work of Senate Minority Leader Harry Reid (D-Nev.).<sup>557</sup> Senator Charles Schumer, who in 1994 masterminded House passage of the “assault weapon” ban, was now saying that he believed the Second Amendment was an

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their Second Amendment right to bear arms. This couldn’t be farther from the truth.”).

552. See ARNOLD GROSSMAN, *ONE NATION UNDER GUNS: AN ESSAY ON AN AMERICAN EPIDEMIC* 48 (2006).

553. At an event at the Gunslick Trap Club in LaCrosse, Wisconsin, Kerry hit seventeen out of twenty-five disks. See *Kerry Tries to Shoot Down ‘Big-City Liberal’ Label*, EDMONTON J. (Can.), July 4, 2004, available at 2004 WLNR 11077696.

554. See S. 1431, 108th Cong. (2003). The bill would have expanded the definition of “assault weapon” to include semi-automatic rifles or shotguns with a “pistol grip.” *Id.* According to the bill, “(42) PISTOL GRIP—The term ‘pistol grip’ means a grip, a thumbhole stock, or any other characteristic that can function as a grip.” *Id.* § 2. Kerry’s gift had a protrusion below the stock, which a person could grip with some fingers. The protrusion is not a “pistol grip” in the ordinary meaning of the term, but it was a “pistol grip” as defined by S. 1431. See *id.*

555. See Dean Speir, *Kerry’s Gun Votes*, GUN ZONE, <http://www.thegunzone.com/rkba/kerry04/gun-votes.html> (last visited Jan. 19, 2013).

556. Chief Justice John Roberts replaced Chief Justice Rehnquist; Associate Justice Samuel Alito replaced Associate Justice Sandra Day O’Connor; and Justices Roberts and Alito both joined the 5-4 majority opinion in *Heller*.

557. See 15 U.S.C. §§ 7901-03 (2006).



individual right.<sup>558</sup> Senator Hillary Clinton said the same during the 2008 presidential primaries: “You know, I believe in the Second Amendment. People have a right to bear arms.”<sup>559</sup> Campaigning in Pennsylvania, she fondly recalled her father teaching her to use a shotgun on family vacations, and her mailers warned voters about Senator Barack Obama’s anti-gun views.<sup>560</sup> Obama, for his part, insisted that he also believed the Second Amendment to be an individual right.<sup>561</sup>

None of this is to say that Schumer, Clinton, or Obama believed that the Second Amendment prevented the various gun control proposals that they supported. But it was quite a change from 1988 when the Democratic Party could nominate a candidate who would forthrightly declare that there was no individual right.<sup>562</sup>

By the time *Heller* arrived at the Supreme Court, the great gun control war of the twentieth century was receding into history. The 1976 D.C. handgun ban was no longer the hopeful beginning of a national trend. Now it was a vestigial oddity, out of step with a national consensus.<sup>563</sup> Politically, “gun control” had evolved to mean something entirely different from gun prohibition. The public had rejected the choice between Neal Knox’s hard corps and the National Coalition to Ban Handguns. The American wanted gun rights *and* gun control. And that is what the political system had provided, and what the Supreme Court in *Heller* and *McDonald* would affirm.<sup>564</sup>

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558. John J. Myers, *Anti-Gun Democrats Set Trap For Election*, COLUMBUS DISPATCH (OH), Aug. 14, 2002, 2002 WLNR 13807957 (“[O]ur individual right to bear arms is shared by many Americans, including myself.” (quoting Schumer)). *Contra* Edward M. Kennedy & Charles E. Schumer, *Ashcroft’s Assault on Gun Laws*, BOS. GLOBE, July 21, 2001 (harshly criticizing Attorney General John Ashcroft for adopting a Department of Justice position that the Second Amendment is an individual right).

559. C. Douglas Nielsen, *Dems’ Positions on Gun Control Lacking*, LAS VEGAS REV. J. (Jan. 17, 2008), <http://www.lvrj.com/sports/13861097.html> (discussing Clinton’s remarks in a January 15 nationally televised debate).

560. *See* James Oliphant, *In Pennsylvania, Democrats Gun for Tough Crowd*, CHI. TRIB., Apr. 18, 2008, at C1; David B. Kopel, *Gun Owners for Hillary*, TOWNHALL.COM (May 8, 2008), [http://townhall.com/columnists/davekopel/2008/05/08/gun\\_owners\\_for\\_hillary/page/full/](http://townhall.com/columnists/davekopel/2008/05/08/gun_owners_for_hillary/page/full/).

561. *See* sources cited *supra* note 560.

562. *See supra* Part IV.

563. *See* Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 252-53 (2008).

564. *See* WINKLER, *supra* note 75, at 298 (treating *Heller* as the triumph of the majority’s belief that gun rights and gun control can co-exist); *see also* Cass R. Sunstein, *supra* note 560, at 247, 262 (treating *Heller* as comparable to *Brown v.*

Gallup, which since 1959 has been asking Americans about handgun prohibition, continues to report new-record lows of support.<sup>565</sup>

## X. GUN CONTROL IN THE TWENTY-FIRST CENTURY

Like the First Amendment in the 1930s, the Second Amendment today is in its early stages of doctrinal development. That doctrinal development is provided with some guidance by two centuries of state cases on state right to arms guarantees and by eight decades of First Amendment doctrine. That doctrine can also be informed by the history—and the settlement—of the Great American Gun War.

The first principle is that the right to keep and bear arms is not absolute in every possible form.<sup>566</sup> If a densely-populated jurisdiction places some limits on outdoor firearms discharge because of genuine, serious risks that a stray bullet could cross the property line and injure an innocent person, that is not unconstitutional.

### A. No Systems Designed to Impede Responsible Gun Ownership and Use

A second principle is that gun control laws may not be premised on the notion that ordinary citizens are unfit to possess firearms (or handguns). That was the core claim of the anti-gun lobbies. It was explicit in the 1976 Massachusetts handgun ban initiative,<sup>567</sup> and it has been implicit in most of the work of the anti-gun lobbies throughout their existence. *Heller* and *McDonald* formalize the overwhelming

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*Board of Education*, in that it was the product of a mature social movement that had already won the hearts and minds of most of the majority; comparable to *Griswold* in that the case involved a law that was an extreme outlier compared to the rest of the nation); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193 (2008) (treating *Heller* as the result of a successful social movement); Kopel, *The Right to Arms in the Living Constitution*, *supra* note 269, at 103, 127–28 (applying the living constitutionalism theories of Jack Balkin and Bruce Ackerman to post-ratification history of the Second Amendment).

565. Jeffrey M. Jones, *Record-Low 26% in U.S. Favor Handgun Ban: Support for Stricter Gun Laws in General Is Lowest Gallup Has Measured*, GALLUP.COM (Oct. 26, 2011), <http://www.gallup.com/poll/150341/Record-Low-Favor-Handgun-Ban.aspx> (noting decline from 60% support in 1959).

566. On the other hand, that right does contain an absolute core that is inviolable even under strict scrutiny. Justice Hugo Black argued that all of the Bill of Rights, including the Second Amendment, contained core rights that were absolute. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (“Although the Supreme Court has held [the Second] Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute.”).

567. See *supra* Part III.B.

public consensus which has rejected the dystopian view of Americans as a bunch of hot-tempered, bigoted, clumsy dolts who cannot be allowed to possess a gun.

Gun-owner licensing laws, such as those promulgated in the District of Columbia, Chicago, and New York City and whose manifest purpose is to erect numerous bureaucratic obstacles to the exercise of the right, are unconstitutional. As is New Jersey's gun licensing law, at least as it is administered in some cities of New Jersey'.<sup>568</sup> When computer background checks can be done in a matter of minutes, and when the applicant has already passed a fingerprint-based background check, it is absurd for some New Jersey police chiefs to sit for eight months on a citizen's application to purchase a second handgun.

No one should have to say that a ban on firearms safety training is unconstitutional. But the Seventh Circuit did have to tell Chicago that the City Council could not blithely outlaw all shooting ranges in the city limits.<sup>569</sup> Legitimate, non-prohibitive safety regulations for ranges were fine; prohibition is not.<sup>570</sup>

### B. No Bans on Common Types of Firearms

*Heller* struck down a ban on handguns, while articulating a standard that firearms in "common use" could not be banned.<sup>571</sup> By this same reasoning, bans on semi-automatic firearms are also prohibited. Semi-automatic AR-15 rifles are some of the most popular guns in the United States.<sup>572</sup> The *Heller* Court ruled that the D.C. handgun ban was unconstitutional under "any of the level of scrutiny [the Court has] applied to enumerated constitutional rights."<sup>573</sup> This means that it would fail strict scrutiny. Because handguns are used in the large majority of firearms homicides and other violent firearms crimes, and yet a handgun ban fails strict scrutiny, then *a fortiori* the prohibition of long guns, or particular

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568. See N.J. STAT. ANN. § 2C:58-3(i) (West 2012).

569. See *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) ("[T]he City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.").

570. See *id.* at 711.

571. See *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

572. See Chris Cox, *More Popular than Ever, the AR-15 Under Attack*, GUNS & AMMO (Mar. 3, 2012), <http://www.gunsandammo.com/2012/03/03/the-ar-15-more-popular-than-ever-and-still-under-attack>.

573. *Heller*, 554 U.S. at 628.

types of long guns, also fails strict scrutiny and any other level of relevant scrutiny.

Josh Sugarmann was adroit at showing how to fool many of the people for some of the time, but that time is over.<sup>574</sup> Bans on ordinary firearms because they had a bayonet lug or some other politically incorrect cosmetic were supposed to be the starting point for banning all guns. Instead, they were the starting point for changing control of both Houses of Congress in 1994. Today, bans on semi-automatic firearms are eccentricities in a few states.<sup>575</sup> There are many fewer of them today than there were of miscegenation laws in 1967 (sixteen states),<sup>576</sup> and like miscegenation laws, they infringe national civil rights and impose serious harms on their victims.

Gun owners in 1968 tried to argue against gun bans because guns have “sporting purposes.”<sup>577</sup> They surely do, but making sports the foundation for the right is like trying to argue for the First Amendment based on the right to read football scores. The experience in Western Europe, where timid, sports-only organizations and even more timorous manufacturers have relied exclusively on sports to defend firearms ownership,<sup>578</sup> shows that sports-only justifications are likely to fail.

The gun control movement is, and always has been, heavily motivated by moral opposition to armed self-defense by people who are not government employees.<sup>579</sup> The prohibition lobbies engaged the issue for decades, and the American people overwhelmingly rejected them. *Heller’s* holding that the core of the Second Amendment is the right of self-defense reflected the American consensus, all the more solid because of the efforts of gun prohibitionists to challenge it.

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574. See *supra* note 366 and accompanying text.

575. For a detailed description of American firearm ownership restrictions, see NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, COMPENDIUM OF STATE LAWS GOVERNING FIREARMS 2010 (2010), available at <http://nraila.org/media/2441225/compendium.pdf>.

576. *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

577. See *supra* Part II.C.

578. See, e.g., George Schreuder Hes, *Gun Laws in the Netherlands*, RADIO NETH. WORLDWIDE (Apr. 9, 2011), <http://www.rnw.nl/English/article/gun-laws-netherlands>. See generally Joseph Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399 (1999).

579. See David B. Kopel, *Pacifist-Aggressives vs. the Second Amendment: An Analysis of Modern Philosophies of Compulsory Non-Violence*, 3 *CHARLESTON L. REV.* 1, 7-8 (2008).

### C. Protection of the Right of Self-Defense

Self-defense is not explicitly mentioned in the Second Amendment, just as “association” is not explicitly mentioned in the First Amendment.<sup>580</sup> The Court was right to recognize that the First Amendment inescapably implies a right of association,<sup>581</sup> and courts should recognize the same for self-defense and the Second Amendment.<sup>582</sup> Nor is the self-defense right contingent on firearms. The right to use one’s right arm to punch a violent attacker is also part of the right of self-defense.

In general, the core right of self-defense has rarely been questioned in American law. There is one place where self-defense denials are common. *Heller’s* approval of “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” makes it clear that guns can be banned at K-12 schools.<sup>583</sup> But that does not mean that self-defense itself may be banned. Many public schools currently have discipline policies that punish equally a

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580. U.S. CONST. amends. I–II.

581. The foundational cases are *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Bates v. City of Little Rock*, 361 U.S. 516 (1960). Lead petitioner in the latter case was Daisy Bates, secretary of the Little Rock branch of the National Association for the Advancement of Colored People. *See Bates*, 361 U.S. at 519. She refused to comply with a municipal ordinance requiring all corporations doing business in the city file a report listing the names of all their contributors. *See id.* at 521. She argued that public disclosure would expose the contributors to the risk of retaliation, including violence. *See id.* at 520–21. Bates and her husband L.C. Bates were also publishers of a black newspaper, the *Arkansas State Press*, which criticized local acts of racial discrimination. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 119–20 (1988). During the Little Rock High School desegregation case, three crosses were burned on her lawn and gunshots were fired into her home. *Id.* at 124. After the Bates’s front lawn was bombed, Mrs. Bates telegraphed Attorney General Herbert Brownell in Washington. *Id.* at 125. He answered that there was no federal jurisdiction and advised them to contact the local police. *Id.* “Of course *that* wasn’t going to protect us,” Mrs. Bates recalled. *Id.* L.C. Bates stayed up at night guarding their home with a .45 caliber semi-automatic pistol. *Id.* Some of their friends organized a volunteer patrol. *Id.*

582. *See* David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008) (“It is now beyond dispute in an American court that self-defense is an inherent right, and that it is protected by the United States Constitution.”); David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 641 (2008) (“The Court held that the Second Amendment gives individuals a right not only to get a gun but also to use it for certain purposes, especially self-defense. And if the Constitution protects the right to use a gun for self-defense, then it follows that the Constitution must also protect the underlying right to self-defense itself.”).

583. *District of Columbia v. Heller*, 554 U.S. 570, 627–28 (2008).

violent aggressor and the victim who tries to defend herself.<sup>584</sup> Such rules violate the constitutional right of self-defense. While it could plausibly be argued that the Fifth, Ninth, or Fourteenth Amendments are the loci for the right of self-defense, I suggest that the best locus for the implicit right of unarmed self-defense is the Amendment which guarantees the right of armed self-defense. Unarmed self-defense might be considered as an “incident” of the right of armed self-defense. It would hardly be sensible to believe that if the crime victim runs out of ammunition, the government may forbid her to use her hands and feet to fight back.

#### D. Judicial Protection of the Right to Licensed Carry, but Not to Unlicensed Concealed Carry

Another settlement of the Great American Gun War has been *shall issue* licensed carry. It is the law in all but nine states, and we know from other constitutional cases that a mere nine states can be viewed as unconstitutional outliers from the national consensus of rights.<sup>585</sup> The mainstream position of nineteenth century right to arms state case law was that concealed carry could be forbidden, while open carry was permissible.<sup>586</sup> That was emphatically not an originalist position, since there is no evidence that the Founding Era made any distinction between open and concealed carry.

The twentieth and early twenty-first centuries show us the path to a better resolution, which takes into account local diversity, while respecting Second Amendment rights everywhere. Open carry, without a license, is legal in about half the states,<sup>587</sup> but that right is rarely exercised except in a few states. Perhaps that will change in the future, but at least for the time being, most people who carry weapons

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584. See, e.g., J. Kevin Jenkins & Michelle Bowman, *Fights, Zero Tolerance, and Students' Rights to Self Defense*, 230 EDUC. L. REP. 127, 127 n.4 (2008).

585. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (finding a “national consensus” opposed to the death penalty for juveniles because thirty states did not allow execution of juvenile murderers; of the other twenty, only six had executed such a murderer from 1989 to 2005, and only three in past ten years; five states had abolished the death penalty for juvenile murderers since 1989); *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003) (“emerging awareness” of right of consenting adults, regardless of gender, to engage in oral and anal sex shown by fact that only thirteen states outlaw such conduct, and those laws are rarely enforced); *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (only sixteen states still had laws against interracial marriage).

586. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1432–33.

587. See *Open Carry of a Loaded Handgun*, OPENCARRY.ORG, <http://opencarry.org/opencarry.html> (last visited Aug. 19, 2012).

prefer to conceal them, even if that requires obtaining a license to carry a concealed weapon.

Accordingly, legislatures may require carry licenses for most carrying in public, and may, depending on their preference, allow concealed carry, open carry, or both. That is the constitutional minimum. While unlicensed “constitutional carry” remains an important objective of many activists, it is not *yet* the policy of the overwhelming majority of states. To the extent that judicial decisions about the Constitution depend upon a living tradition,<sup>588</sup> there is at present no national super-majority on which to base a judicially-enforced right to unlicensed concealed carry under the Second Amendment.<sup>589</sup>

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588. See *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 197, 542 (1961) (Harlan, J., dissenting)) (explaining that Due Process draws from a living American tradition).

589. If judges follow *Heller*'s blend of originalism and living tradition, they would not today rule in favor of a plaintiff who asserts a Second Amendment right to unlicensed concealed carry. However, legislators who favor unlicensed concealed carry could still vote in favor of “constitutional carry” based on constitutional principles. It is too often forgotten that in our constitutional system, legislators have their own duties to make constitutional choices, independent of what the judiciary does.

Chief Justice Marshall and President Andrew Jackson together demonstrated the distinct roles of the different branches in constitutional decision-making. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Marshall's opinion for the unanimous Court upheld the congressional creation of the Second Bank of the United States under the Necessary and Proper Clause. First, the Court examined whether the incorporation of the Bank met the minimum legal criteria for “Necessary and Proper,” which at the time was a well-known legal term of art. See *id.* at 324-25. The law creating the Bank passed every item of Marshall's multipart test: Is the power to create a corporation “incidental” to an enumerated power? See *id.* at 411. Is the creation of a bank either a customary or nearly-indispensable way of exercising an enumerated power? See *id.* at 386. Does the creation of a bank properly respect the letter and the spirit of the Constitution? See *id.* at 421. If the answer to any of these questions had been “no,” then it would have been “the painful duty of [the Court] to say, that such an act was not the law of the land.” *Id.* at 423. For the original meaning of the Necessary and Proper Clause, which *McCulloch* carefully followed, see GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

Since the answer to all the questions was “yes,” the Court left to the political branches the further determination of whether the law was constitutionally “Necessary and Proper,” based on their own good-faith judgment. President Jackson's 1832 veto message on the re-charter of the Bank invokes the “Necessary and Proper” standard discussed in *McCulloch*. With the Court having left to the political branches their own good judgment about constitutional necessity and propriety, those branches were duty-bound to exercise that judgment. The Bank passed the lower bar of constitutional judicial review set by the *McCulloch* Court, but not the higher bar of legislative/presidential constitutional judgment to which the *McCulloch* Court explicitly deferred. See Andrew Jackson, *Veto Message, July 10,*

The more important business of the federal courts is to address the flagrant denials of the right to carry, in any mode whatsoever, that remain in a minority of recalcitrant states. The experience of the forty-one rights-respecting states leaves the prohibitive nine without an “important” (let alone a “compelling”) interest in claiming that allowing carry by licensed, trained, law-abiding citizens will lead to mayhem and lawlessness. Perhaps the hysterical warnings had some plausibility in Florida in 1987,<sup>590</sup> but a quarter-century of experience has shown them to be false everywhere. Indeed, persons with handgun carry licenses are *much more* law-abiding than the general population, and all the more so with regard to violent misuse of handguns.<sup>591</sup>

Besides, *Heller* and *McDonald* both directly state that the Second Amendment right includes the right to carry in public. According to *Heller*, the right to bear arms does not bar “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .”<sup>592</sup> The obvious and inescapable implication is that there is a right to carry firearms in places that are not “sensitive.” The nineteenth century cases that *Heller* cites as exemplars of correct understanding of the right to keep and bear

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1832, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT, 1789–1908, at 576 (1909).

In regards to constitutional carry, only few states currently allow carry either openly or concealed, without a permit required for either: Vermont, Alaska, Arizona, and Wyoming. See *Constitutional Carry*, OPENCARRY.ORG, <http://www.opencarry.org/constcarry.html> (last visited Aug. 19, 2012). So a federal court in, say, Kansas or Pennsylvania, should not strike down that state’s concealed carry licensing system, on the grounds that the Second Amendment requires the ability to carry without a permit. At the same time, a legislator in Kansas or Pennsylvania can vote for “constitutional carry” based on her personal constitutional oath, and her understanding that the normal exercise of Second Amendment rights should never require advance permission from the government.

Admittedly, all of the above is living constitutionalism. A hardcore originalist would not care about the lessons of the election of 2000, or of 1800. On the other hand, judicial interpretation of the Constitution has rarely been exclusively originalist. My suggestions about “constitutional carry” and other issues are aimed at those who believe that constitutional interpretation must be informed by history and tradition, and that “tradition is a living thing.” *Poe*, 376 U.S. at 542, (Harlan, J., dissenting).

590. The Florida Legislature passed the state’s concealed carry law in 1987. Fla. Stat. Ann. § 790.06 (West 1987); 1987 Fla. Sess. Law Serv. 87-24; David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Fiction*, 42 CONN. L. REV. 515, 569 n.245 (2008).

591. See *id.* at 564–69 (reporting statewide data gathered from Minnesota, Michigan, Ohio, Louisiana, Texas, and Florida).

592. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).



arms (*State v. Reid*; *Nunn v. State*; *State v. Chandler*; and *Andrews v. State*) all specifically affirm the right to carry.<sup>593</sup>

*Heller* also discussed an alternative reading of the Second Amendment that today's carry prohibitionists prefer: that everyone has a Second Amendment right to "keep" arms in the home, but everyone does not have a right to "bear" arms in public.<sup>594</sup> This is the approach that the post-*Heller* Maryland Supreme Court<sup>595</sup> and the Fourth Circuit's Judge Harvie Wilkinson have favored.<sup>596</sup> But they defy, rather than follow, *Heller*. *Heller* explicitly described the no-carry theory as an "odd reading of the right" and "not the one we adopt."<sup>597</sup> The Supreme Court has already announced that a home-only version of the Second Amendment is not the law of the land.

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593. *State v. Reid*, 1 Ala. 612 (1840), upheld a ban on carrying a weapon concealed, but cautioned: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17. This sentence is quoted in *Heller* as an accurate expression of the right to bear arms. *See Heller*, 554 U.S. at 629. Even more "clearly unconstitutional" than a law which allowed carrying arms only in a "wholly useless" manner is a law which forbids gun carrying itself.

*Nunn v. State*, 1 Ga. 243, 251 (1846), relying on the Second Amendment, struck down a general ban on carrying handguns for protection. *Nunn* upheld a ban on concealed carry because open carry was allowed. *Id.* at 251. Furthermore, *Heller* cites *Nunn* approvingly for having "perfectly captured" a correct understanding of the Second Amendment. *Heller*, 554 U.S. at 612. For an explanation of how the post-*Barron* Georgia Supreme Court, like many state supreme courts of the post-*Barron* period, exercised the authority to enforce portions of the Bill of Rights against state laws, see Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007) (explaining, *inter alia*, the doctrine of constitutional common law, and the federal appellate jurisdiction statute which did not allow U.S. Supreme Court review of state court decisions holding that a state law violated the U.S. Constitution).

*Heller* also relies on *State v. Chandler*, 5 La. Ann. 489 (1850), for correctly expressing that the Second Amendment guarantees a right to carry, but the legislature may determine whether the carry is to be open or concealed. *Heller*, 554 U.S. at 613 (citing *Chandler*, 5 La. Ann. at 490).

To the exact same effect is *Andrews v. State*, 50 Tenn. 165 (1871), where the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment, and struck down a law against carrying handguns "publicly or privately, without regard to time or place, or circumstances." *Id.* at 187. Again, the legislature had the power to determine the mode of carry, but no legislature (let alone a sheriff misapplying a statute) could ban public carry. *Andrews*, too, is cited as authoritative by *Heller*, 554 U.S. at 629.

594. *Heller*, 554 U.S. at 613, discussing *Aymette v. State*, 21 Tenn. 154 (1840).

595. *See Williams v. Maryland*, 10 A.3d 1167, 1171 (Md. 2011).

596. *See United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (Wilkinson, J., concurring); *see also* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1278 (2009).

597. *Heller*, 554 U.S. at 613.

2012]            *THE GREAT GUN CONTROL WAR*            1615

Right at the beginning of the discussion of the constitutional violations that the Fourteenth Amendment was designed to remedy, *McDonald* points to a firearms carry license law with excessive discretion. The Fourteenth Amendment, according to *McDonald*, was aimed at laws such as the Mississippi statute providing that “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . .”<sup>598</sup> The Court then cited the Regulations for Freedmen in Louisiana, which included the following: “No negro who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the parish, without the special written permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol.”<sup>599</sup>

*McDonald* described a convention of black citizens in South Carolina who petitioned Congress, stating in their petition that the Constitution “explicitly declares that the right to keep and bear arms shall not be infringed,” and urging that “the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution.”<sup>600</sup> Representative George W. Julian described that law and another in urging adoption of the Fourteenth Amendment:

Although the civil rights bill is now the law . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped . . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.<sup>601</sup>

“The most explicit evidence of Congress’ aim” regarding the Fourteenth Amendment, *McDonald* continued, appeared in the Freedmen’s Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning

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598. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038 (2010) (internal quotation marks omitted).

599. 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 2809 (Walter L. Fleming ed., 1950).

600. *McDonald*, 130 S. Ct. at 3038 n.18 (quoting STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 9 (1998)).

601. CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms.*<sup>602</sup>

*McDonald* rejected the argument that the Freedman's Bureau Act and the Fourteenth Amendment sought only to provide a non-discrimination rule. The Act referred to a "full and equal benefit," not just an "equal benefit." The equality-only theory would imply that "the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion."<sup>603</sup>

Justice Thomas's concurrence referred to states that "enacted legislation prohibiting blacks from carrying firearms without a license,"<sup>604</sup> and quoted Frederick Douglass as stating that "the black man has never had the right either to keep or bear arms," a problem which would be remedied by adoption of the Fourteenth Amendment.<sup>605</sup>

Ever since the mid-1970s, the Supreme Court has shown little appetite for inserting itself into "culture war" issues when there is *not* already a strong consensus, as exemplified by relevant state and federal legislation. On some issues involving firearms regulation there is no national consensus, and on some issues there is. The Great American Gun Control War lasted nearly a century, and the greatest national battles of all were fought in the last quarter of the twentieth century. The results of that War are settled, and obvious: First, gun rights are no more "absolute" than are any other rights. Second, the most unconstitutional laws on guns are the laws which attempt to deprive law-abiding Americans of their right of armed self-defense, and their choice of a proper firearm with which to exercise the right, or which attempt to limit self-defense solely to the home.

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602. *McDonald*, 130 S. Ct. at 3040 (emphasis in original).

603. *Id.* at 3043.

604. *Id.* at 3082 (Thomas, J., concurring).

605. *Id.* at 3083 (internal quotation marks omitted).