
STUDENT MATERIALS

SOCIAL AND POLITICAL HISTORY OF THE RIGHT TO ARMS IN THE MODERN ERA

This reader provides an overview of shifting social and political views about firearms regulation in the modern era. Prior to 1968, direct federal regulation of firearms had three major components. A 1927 statute prohibited concealable firearms from being shipped through the mail. 18 U.S.C. § 1715(o). As detailed in Chapter 3.A.1, the National Firearms Act of 1934 (later codified as Title II of the Gun Control Act, 26 U.S.C. §§ 5801 et seq.) imposed near-prohibitive taxes and registration requirements on a small category of items considered especially dangerous, such as machine guns and short shotguns. Finally, the Federal Firearms Act of 1938 required interstate sellers of firearms to obtain a one-dollar license and to keep a record of firearms sales. They were barred from shipping guns interstate to designated classes of prohibited persons. *See generally* Alfred M. Ascione, *The Federal Firearms Act*, 13 St. John's L. Rev. 437 (1939).

A. THE CALM BEFORE THE STORM

With a few exceptions, the 1940s and 1950s presented little for the National Rifle Association to contest politically. The NRA found existing federal firearms laws unobjectionable and enjoyed good relations with federal officials. General Dwight Eisenhower, formerly the Supreme Commander of the Allied Forces in Europe during World War II, was the keynote speaker at the NRA 1946 Annual Meeting, and as President sent the NRA laudatory letters. But during President Eisenhower's second term, in 1957, the Alcohol and Tobacco Tax Division of the Internal Revenue Service proposed new regulations, including mandates that firearm dealers keep permanent records on all handgun ammunition purchasers.¹

¹ 22 Fed. Reg. 3153 (May 3, 1957). The ATTD is an ancestor of the Bureau of Alcohol, Tobacco, Firearms and Explosives, which was upgraded to a Bureau in 1969, and which became part of the Department of Justice in 2002.

Led by Representative John Dingell, many congressmen objected, and the final regulations fixed the provisions considered most objectionable by the NRA.²

From there, gun regulation returned to its somnolent state. Nobody was proposing gun control, and nobody was raising Second Amendment objections to gun control. Absent controversy, legal scholars paid little attention to the Second Amendment. This was the state of things until the late 1950s and early 1960s, when the gun issue rose to prominence in tandem with broader social unrest.

B. RACIAL TENSIONS

As discussed in several chapters, overtly racist firearms laws and racist enforcement of facially neutral firearms restrictions have a long history in America. Nevertheless, there has been a strong tradition of arms ownership in the Black community. In practice and philosophically, many in the community endorsed firearms ownership and armed self-defense against private threats. This tradition was embraced by countless Blacks at the grassroots level and by Black leaders including Frederick Douglass, Henry Highland Garnett, W. E. B. Du Bois, Ida B. Wells-Barnett, James Meredith, Robert Moton, A. Phillip Randolph, Daisy Bates, Fannie Lou Hamer, Medgar and Charles Evers, James Farmer, and Floyd McKissick. The tradition of arms had roots in the culture of the rural South and drew a sharp distinction between private self-defense and foolhardy political violence.³

In the 1950s, a robust civil rights movement began in the South. White supremacist tactics were just as violent as they had been during Reconstruction. Over one hundred civil rights workers were murdered during that era. State and local governments were widely hostile to the movement and sometimes directly affiliated with the Ku Klux Klan or other terrorist organizations. Many Blacks and civil rights workers armed for self-defense.

Rosa Parks's account of hosting civil rights meetings at her home is a classic example. "It was the first meeting we ever had at our house, and it was in the front room. There was a little table about the size of the card table that they were sitting around. . . The table was covered with guns. I didn't even think to offer them anything — refreshments or something to drink. But with the table

² 23 Fed. Reg. 343 (Jan. 18, 1958); James B. Trefethen, *Americans and Their Guns* 295 (1967).

³ See Charles Cobb, *This Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible* (2015); Nicholas J. Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014); Akinyele Omowale Umoja, *We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement* (2013); Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 Conn. L. Rev. 1491 (2013).

so covered with guns, I don't know where I would've put any refreshments. No one was thinking of food anyway."⁴

In Birmingham, Reverend Fred Shuttlesworth was protected by armed "Civil Rights Guards" after being attacked by terrorists.⁵ When Freedom Riders from his congregation were assaulted in Anniston, Alabama, some of the injured were taken to a local hospital, where a hostile crowd formed outside. Reverend Shuttlesworth rode to the rescue with a 15-car caravan of armed men.⁶

Daisy Bates, "the first Lady of Little Rock," President of the Arkansas Conference of NAACP Branches and advisor to the "Little Rock Nine," pleaded for federal protection after a firebombing and cross burning at her home. Federal officials declined, and local law enforcement was overtly hostile. Thurgood Marshall found the Bates home "an armed camp" when he stayed there in 1957 while litigating the Little Rock School Board's delay of court-ordered integration.⁷ In October 1957, Daisy Bates was awakened by something crashing through a side window. She bolted to the noise, gun in hand, and saw a man standing in her driveway, poised to throw a flaming missile. She fired five quick shots that sent him running to a truck that sped off.⁸

In 1962, Rebecca Wilson of Dallas, Georgia, returned fire after hooded Klansmen blasted her front door with a shotgun. She killed one man and wounded another. The shooting ultimately was acknowledged as an act of self-defense and several of the Klansmen were charged with violating the state's anti-masking law. Wilson was placed in protective custody and moved out of state.⁹ Unheralded Mississippi activist Leola Blackmon described using a 16-shot semi-automatic rifle to repel Klansmen who set a cross afire in her yard: "I had a rifle. It would shoot sixteen times, and I just lit out up there and started shooting."¹⁰

In all-Black Harmony, Mississippi, a motorcade of Whites, agitated by local desegregation efforts, drove through town, firing shots at houses along the road. They made it through once without resistance. Winson Hudson, president of the local NAACP branch, recalled, "they came through again and

⁴ Rosa Parks and James Haskins, *Rosa Parks: My Story* 30-33, 66-67 (1992).

⁵ Andrew Michael Manis, *A Fire You Can't Put Out: The Civil Rights Life of Birmingham's Reverend Fred Shuttlesworth* 110, 117-18, 169-70 (1999).

⁶ Howell Raines, *My Soul Is Rested: Movement Days in the Deep South Remembered* 115, 141 (1977).

⁷ Grif Stockley, *Daisy Bates: Civil Rights Crusader from Arkansas* 132 (2005).

⁸ *Id.* at 186; Daisy Bates, *The Long Shadow of Little Rock: A Memoir*, 96, 158-59, 174 (2007).

⁹ Christopher B. Strain, "Civil Rights and Self Defense: The Fiction of Nonviolence, 1955-1968" (Ph.D. dissertation, University of California, Berkeley, 2000); *Baltimore Afro-American*, Sept. 15, 1962, at 1.

¹⁰ Youth of the Rural Organizing Cultural Center, *Ms. Leola Blackmon, in Minds Stayed on Freedom: The Civil Rights Struggle in the Rural South: An Oral History* 57, 71-77 (1991).

that time some of [her sister's] boys and some more here were ready for 'em. They ran the whites out of here. They followed 'em back to their homes and shot into them. This stirred things up so bad that even Governor Ross Barnett came out to Harmony and offered to build a junior college up here."¹¹ Later, terrorists began leaving explosives in the roadside mailboxes of Black activists. By then, Hudson's family was on the lookout for such attacks. Her two nephews were standing watch one night when terrorists "drove up and put the bomb in the mailbox, my boys started shooting. They just lined that car with bullets up and down."¹²

A Meridian, Mississippi, defense group drawn from local Baptist church members guarded the home of NAACP leader Claude Bryant. In April 1964, an explosion rocked Bryant's house. He ran into the street and answered with rifle fire. After that incident, Bryant purchased a "high-powered" rifle better suited to the threats. The attack also prompted the organization of an armed neighborhood watch. Three months later, bombers attacked the home of Claude Bryant's brother Charlie. With the front windows blown from her house, Charlie's wife, Ora emerged out of the smoke with a shotgun and fired on the fleeing terrorists.¹³

Jackie Hicks and her husband Robert of Bogalusa, Louisiana, faced threats both from local terrorists and local government when they began hosting interracial groups of northern student activists in their home.¹⁴ One night, a car full of men broke the windows of a van owned by one of the White students and then started shooting. Bob Hicks emerged from his house firing a Winchester rifle and from cover around the house and across the street, other men who had been guarding the Hicks's home opened fire. The Hicks and their guests emerged unscathed. Black hospital workers reported that two Klansmen were shot and the story was suppressed to conceal police complicity in the attack. This episode was an early marker of the rise of the storied Deacons for Defense.¹⁵

The Deacons were an armed Black community defense group formed in Jonesboro, Louisiana, in 1964 with the aim of protecting local civil rights workers. Over the next several years, Deacons chapters sprung up across the South.

¹¹ Winson Hudson & Constance Curry, *Mississippi Harmony: Memoirs of a Freedom Fighter* 8-9, 58-59 (2002).

¹² Hudson & Curry, *Mississippi Harmony*, 2, 51-52, 58-59, 88; John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* 257 (1994); *I Dream a World: Portraits of Black Women Who Changed America* 160 (Barbara Summers ed., 1989).

¹³ Simon Wendt, *The Spirit and the Shotgun: Armed Resistance and the Struggle for Civil Rights* 119 (2007).

¹⁴ Lance Hill, *The Deacons for Defense: Armed Resistance and the Civil Rights Movement* 109-10 (2004).

¹⁵ *Bogalusa Riflemen Fight Off KKK Attack*, *Jet*, Apr. 22, 1965, 5; Hill, *supra* note 14, at 118-19; *N.Y. Post*, Apr. 8, 1965.

One of the most famous acts of the Deacons was their role in the Mississippi March against Fear. The march started as essentially a solo effort by James Meredith, who had broken down boundaries at the University of Mississippi in 1962, on a platform of nonviolence.¹⁶ There were only four people with Meredith when he crossed into Mississippi and an angry bigot stepped from the brush and laid Meredith flat with a shotgun blast.¹⁷

Movement leaders raced to the scene and vowed to continue the protest. They were obviously concerned about safety, but also concerned that security measures would be considered provocative. As people were arriving for a strategy session at the Lorraine Motel in Memphis, a van full of Deacons pulled up and unloaded; their equipment included ammunition bandoliers and semiautomatic .30-06 caliber M-1 Garand rifles — the World War II infantry rifle that General George Patton called the “greatest battle implement ever devised.” Ch. 3.D.1.d.

Martin Luther King was the decisive voice in favor of deploying the Deacons as security.¹⁸ When the March recommenced, armed Deacons were in the wings. At night, they guarded the campsites. In the mornings while the marchers were assembling, the Deacons were in the vanguard, checking along the road and adjacent woodlots for threats, and questioning Whites who lingered too long at the edges of the route. Deacon Charles Sims recalls, “I was carrin’ two snub-nosed .38s and two boxes of shells and had three men ridin’ down the highway with semiautomatic carbines with 30 rounds apiece.”¹⁹

King’s approach was pragmatic. When King stayed at the home of Charles Evers (brother of slain activist Medgar Evers) in Jackson, Mississippi, the place was brimming with pistols and rifles. Evers later wrote that King never “preached down” to him about the guns and teasingly complimented him, “Charles, I’m nonviolent, but I never feel safer anywhere, with anybody, than in your home.”²⁰ Decades later Andrew Young explained:

Martin made distinctions between defensive violence and retaliatory violence. He was far more understanding of defensive violence. Martin’s attitude was you can never fault a man for

¹⁶ Simon Wendt, “Urge People Not to Carry Guns”: *Armed Self Defense in the Louisiana Civil Rights Movement and the Radicalization of the Congress of Racial Equality*, 45 J. La. Hist. Assoc. 261 (2004).

¹⁷ Roy Reed, *Meredith Regrets He Was Not Armed*, N.Y. Times, June 8, 1966; James H. Meredith, *Big Changes Are Coming*, Saturday Evening Post, Aug. 13, 1966, 23-27; *He Shot Me Like . . . a God Damn Rabbit*, Newsweek, June 20, 1966, 30.

¹⁸ Henry Hampton, Steve Fayer & Sarah Flynn, Cleveland Sellers, in *Voices of Freedom: An Oral History of the Civil Rights Movement from the 1950s through the 1980s* at 284-86 (1995).

¹⁹ Hill, *supra* note 14, at 246; Stephen B. Oates, *Let The Trumpet Sound: A Life of Martin Luther King, Jr.* (1994) 397-98; Cleveland L. Sellers & Robert L. Terrell, *The River of No Return: The Autobiography of a Black Militant and the Life and Death of SNCC* (2018) 162, 166; Raines, *supra* note 6, at 422; Hampton et al., *supra* note 18, at 281-95.

²⁰ Charles Evers, *Have No Fear: The Charles Evers Story* 214 (1997).

protecting his home and his wife. He saw the Deacons as defending their homes and their wives and children. Martin said he would never himself resort to violence even in self-defense, but he would not demand that of others. That was a religious commitment into which one had to grow.²¹

Movement activists carried guns in defiance of discretionary permitting schemes — like the one that said that a bombing at Martin Luther King’s home did not constitute good cause for granting him a license to carry a gun. Delta activist Dr. T. R. M. Howard kept his gun in a secret compartment built into his car.²² Fannie Lou Hamer’s mother carried her gun concealed in a bucket.²³ Medgar Evers hid a pistol in a driver’s seat pillow.²⁴

Beginning in the 1960s, Black radicals increasingly challenged the line between taboo political violence and legitimate self-defense that had defined the use of guns in the Black freedom movement. Roy Wilkins of the NAACP responded by emphasizing the community’s traditional support of private self-defense, and the vital distinction between lawful self-defense and foolhardy political violence.²⁵

As riots engulfed Black neighborhoods, Wilkins and the NAACP resisted calls for discriminatory disarmament of Blacks. Wilkins was asked, “Would you be in favor of a massive effort to disarm the Negroes in the ghettos, just to try to prevent these open-shooting wars such as occurred in Newark last night?” He flatly rejected the idea of discriminatory regulations. “I wouldn’t disarm the Negroes and leave them helpless prey to the people who wanted to go in and shoot them up. . . Every American wants to own a rifle. Why shouldn’t the Negroes own rifles?” *Meet the Press*, July 16, 1967, Tr. at 9.

While Wilkins rejected gun restrictions targeted exclusively at Blacks, he showed sympathy for more sweeping measures. “I would be in favor of disarming everybody, not just the Negroes.” *Id.* It is unclear whether Wilkins was referring to nationwide disarmament or disarming everyone in riot-torn cities, but the statement does suggest a turn in the leadership toward support of gun control.

As Black communities withered under waves of rioting, pressure on the tradition of armed self-defense grew. The substantially rural and Southern tradition of arms was wilting under the heat and backlash against untethered urban violence. At the same time, the modern gun control movement emerged, and was embraced by many of the liberals who had been instrumental in

²¹ Hampton et al., *supra* note 18, at 287.

²² David T. Beito & Linda Royster Beito, *Black Maverick: T. R. M. Howard’s Fight for Civil Rights and Economic Power* 103 (2009).

²³ Wendt, *supra* note 13, at 121; Charles Payne, *I’ve Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle* (1995) 233.

²⁴ Raines, *supra* note 6, at 251-52.

²⁵ Roy Wilkins, *Whither Black Power*, *Crisis*, Aug.-Sept. 1966, at 353-54.

advancing Black civil rights goals. Soon, a new wave of Black elected officials and appointees adopted gun control as their own. The 1968 federal Gun Control Act (Ch. 4) was driven substantially by a desire to control Black violence,²⁶ and many Black politicians agonized over sharply rising rates of gun crime in Black communities, now viewing the proliferation of firearms as a serious threat.

By the mid-1970s, the Black political establishment was firmly allied with the national gun control movement. Maynard Jackson, the first Black mayor of Atlanta, became the chairman of the National Coalition to Ban Handguns. A succession of Black mayors endorsed stringent gun control and gun bans. The Congressional Black Caucus reliably supported severe federal gun control proposals. Representative Major Owens persistently introduced bills to repeal the Second Amendment. By the time the Supreme Court took up *Heller* (Ch. 6.A) in 2008, it was entirely predictable that the NAACP would file an amicus brief, urging the Court to reject the individual rights view of the Second Amendment and to uphold the Washington, D.C., handgun ban.

C. COMPREHENSIVE NATIONAL GUN CONTROL

Even into the early 1960s, war surplus guns were plentiful and long guns could be ordered by mail. But the thriving culture of gun trading, collecting, and shooting sports would be rocked by the next major federal gun control act. Gun control supporter and historian Robert Sherrill characterized the period:

There had been gun-control bills eddying around the backwash of Congress for years. The big emotional tidal wave that set them going was President Kennedy's death; the momentum was perpetuated by the assassinations of Robert Kennedy and Martin Luther King, Jr., and by the massacre of fourteen people by Charles Whitman, shooting from the top of the University of Texas tower. Also, from Watts to Newark, rioters did a good job during the 1960s of suggesting that maybe everybody should disarm before a few nuts triggered a race war.²⁷

In the early 1960s, the only significant gun control proposal in Congress was Connecticut Senator Thomas Dodd's protectionist measure to shield U.S. gun manufacturers from foreign competition, particularly surplus World War II bolt action rifles imported from Europe. The "Gun Valley" along New England's Connecticut River had been the heart of the American firearms industry since the eighteenth century. Friendly relations with New England's

²⁶ Robert Sherrill, *The Saturday Night Special* 283-95 (1973).

²⁷ *Id.* at 70.

firearms industry were probably a reason why Massachusetts Senator, and later President, John F. Kennedy was a member of the NRA.

Kennedy's assassination in November 1963 by Lee Harvey Oswald had little immediate effect on the gun issue. Oswald had used an imported Italian military surplus rifle that was precisely the type of gun Dodd was trying to block from importation.

By 1966, things were changing drastically. Blacks in the Watts neighborhood of Los Angeles rioted in 1965, in response to police brutality. In the summers of 1966, 1967, and 1968, rioting occurred in big cities across the country. At the same time, crime was rising sharply. Crime and riots led many people to arm for self-defense. Some of this was derided as "white backlash" in the media. The media also gave enormous coverage to Black militants like Stokely Carmichael and H. Rap Brown, who terrified many Americans.

The Black Panthers added to the disquiet. The Panthers discovered that California had no law against openly carrying loaded rifles and shotguns in public, and they started to do so. In one episode, Panthers carried loaded guns into the state capitol in Sacramento. The California legislature speedily passed, and Governor Ronald Reagan signed, a bill that outlawed open carry in most circumstances.²⁸ Many cities and states followed suit.

By the mid-1960s, violence and social upheaval was fueling new calls for gun control. The first major law came from Illinois in 1966, requiring a license from the state police (the "Firearms Identification Card") for gun ownership. Having controlled handguns since the 1911 Sullivan Act, New York City imposed long gun registration in 1967. The next year, New Jersey adopted and expanded the Illinois system, requiring licensing of all gun owners, registration of all guns, and police permission for handgun purchases.

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.

The April 4, 1968, assassination of Martin Luther King, Jr., set off another round of race riots. On June 5, 1968, New York Senator Robert Kennedy was killed, after delivering his California Democratic presidential primary victory speech. The assassin used a small, cheap, imported pistol.

Almost immediately, the U.S. Senate Judiciary Committee — traditionally a bulwark against federal gun control — reported out a gun control bill. The National Emergency Committee for Gun Control was created, with the aim of producing a federal bill. President Lyndon Johnson, himself a hunter, gave a speech endorsing national gun registration on June 24.

²⁸ Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 San Diego L. Rev. 947 (1999).

Gun control advocates acknowledged that gun bans were not yet politically viable. So the primary immediate goal was national gun registration. Conversely, gun rights advocates, aware that gun registration lists originally compiled by democratic governments had been used for gun confiscation by Nazis and Communists in Europe, were terrified of registration.

More riots occurred in August at the Democratic National Convention in Chicago. This time, the riots were led by radical leftists who succeeded in hijacking planned peaceful protests against the Vietnam War. Chicago Mayor Richard Daley authorized what amounted to a counter-riot by the Chicago police, who indiscriminately beat rioters, peaceful protestors, and even reporters.

In the context of national unrest, Congress passed the Gun Control Act of 1968 (“GCA”) in September 1968. The Act required gun dealers to keep a federal form (now known as Form 4473) detailing the information for each sale. The forms would be available for government inspection and for criminal investigations, but the forms would not be collected in a centralized registration list. In addition, mail-order sales of guns were banned, as were all interstate gun sales to consumers (except long guns where allowed by contiguous states).

The GCA also banned gun possession by enumerated prohibited persons, such as convicted felons, illegal aliens, and illegal drug addicts. Buyers had to certify on Form 4473 that they were not in a prohibited category. Gun imports were banned, except for the guns determined by the Treasury Secretary to be “particularly suitable for sporting purposes.” As implemented, this prohibited small, inexpensive foreign handguns, and surplus World War II rifles, but allowed almost all other gun imports. The GCA preamble disclaimed any intention to interfere with sporting gun use, gun collecting, or self-protection. The GCA also substantially revised the National Firearms Act’s preexisting “any other weapon” category, adopting the more elaborate definition now codified at 26 U.S.C. § 5845(e). Although ATF’s application of that amorphous definition at the margins has sometimes been difficult to predict, the agency has consistently treated disguised firearms such as cane guns and pen guns as AOWs. The GCA also changed the National Firearms Act, by adding the amorphous category “any other weapon,” which ATF interpreted unpredictably over time. *See* Ch. 3.C.2.g. While the AOW boundaries are uncertain, it is clear that AOW includes disguised firearms like cane guns and pen guns.²⁹

Every member of the Texas congressional delegation voted against the GCA, except for freshman Republican George H. W. Bush. The future president called the GCA a positive step and added that “much more” was needed. In 1972, Bush won the Republican nomination for U.S. Senate, but was defeated

²⁹ *See* 26 U.S.C. § 5845(a)(5); Stephen Halbrook, *Firearms Law Deskbook* § 6.15 (2020). This annually updated treatise is the best practice manual for federal gun-control laws.

by Democrat Lloyd Bentsen, who exploited Texans' unhappiness with Bush's vote for the GCA. For more on the political and social history of this period, see Robert Sherrill, *The Saturday Night Special* (1973); Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brook. L. Rev. 715 (2005).

D. THE RISE OF THE MODERN GUN-CONTROL MOVEMENT AND THE REVOLT AT THE NRA

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. The new bureau was known as BATF. In the late 1980s, the Bureau adopted the three-letter moniker "ATF," to emulate the FBI and DEA.

Gun control advocates in Congress saw a domestic ban on "Saturday Night Specials" as the logical next step. The high-water mark was a lopsided 1973 Senate vote to ban about one-third of all handguns. But the Saturday Night Special ban never passed both houses. Many in the American gun industry were ready to accept some sort of ban. The relatively new trade association for the firearms industry, the National Shooting Sports Foundation (NSSF, founded 1961), was dominated by long gun manufacturers; it reflected their discomfort with making self-defense and handguns into major themes of American gun ownership.

In 1972 Congress granted the new Consumer Product Safety Commission extremely broad powers to ban any consumer product deemed to impose unwarranted risks. The NRA defeated an amendment giving the CPSC authority to ban firearms. 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.³⁰ 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 cultural shift took place among American elites. 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 was reviled by much of the urban intelligentsia. Prominent historian Richard Hofstadter spoke for many when he complained that "Americans cling with pathetic stubbornness" to "the supposed 'right' to bear arms," and refused to adopt European-style gun control laws. Richard

³⁰ 90 Stat. 504 (1976); 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 (2005-2006).

Hofstadter, *Gun Culture*, American Heritage, Oct. 1970. While some of the intelligentsia might concede a limited place for sporting guns, guns for self-defense were considered an insult to a well-ordered society.³¹

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.” Sprecher’s historical analysis endorsed the individual-rights view that would later be known as the Standard Model. 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.³²

The as-yet-unnamed Standard Model (the Second Amendment is a standard individual right bounded by permissible controls) remained the dominant view among the general public. But elite opinion mostly considered the Second Amendment as purely a “collective right” or a “state’s right.” Exactly what constituted positive content of a “collective right” or “state’s right” was never defined. The function of the terms was simply to negate the Second Amendment as a barrier to gun prohibition. To the extent that anyone needed proof, there was an often-cited article from the *Northwestern Law Review*.³³ The conclusion was further supported by the gun control task force of President Johnson’s Commission on Violence. The task force was led by the energetic young scholar Franklin Zimring, whose work would influence the gun debate for years to come.³⁴

Although gun control was supported by much of the media, and endorsed by prestigious and powerful individuals and organizations, it lacked an organization whose primary purpose was to advance the cause. That changed in 1974 with the founding of the National Coalition to Control Handguns. (The group would change its name to Handgun Control, Inc., and then to the Brady Campaign.) 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. Shields accepted the chairmanship and explained his long-term plan:

The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of

³¹ See Barry Bruce-Briggs, *The Great American Gun War*, The Pub. Int. 37 (Fall 1976) (criticizing elite attitudes).

³² Robert Sprecher, *The Lost Amendment*, 51 ABA J. 554, 664 (June-July 1965) (two-part article). Sprecher later served on the U.S. Court of Appeals for the Seventh Circuit, from 1971 to 1982.

³³ Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 46 (1966).

³⁴ 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 (1969).

all handguns and all handgun ammunition — except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors — totally illegal.³⁵

At the time, the NCCH was a member organization of another new gun control group, the National Council to Ban Handguns. (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. Shields explained, “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.”³⁶ Later, both groups broadened their focus to include restrictions or prohibitions on all types of firearms.

Since the mid-1960s, there had been internal conflict at the NRA. Some of the staff considered gun control to be a passing fad that would never endanger traditional American rights. Others saw gun control as an enduring and very dangerous threat that the NRA should fight. The legislative office was upgraded to the Institute for Legislative Action (ILA) in 1974. Meanwhile, NRA membership had changed significantly. By the early 1970s, 25 percent of NRA members were what the NRA calls “non-shooting constitutionalists” — members who did not own guns but joined the NRA to defend gun rights. Sherill 188.

Things came to a head when the NRA leadership announced plans to abandon politics, move the headquarters from D.C. to Colorado Springs, and focus purely on hunting and sports. They fired dozens of employees who were considered supporters of ILA head Harlon Carter. Carter resigned and set about organizing members who feared that political abdication by NRA would unleash stringent gun controls and prohibitions. The showdown came at the 1977 NRA Annual Meeting in Cincinnati. In “The Revolt in Cincinnati,” Carter’s “Committee for the NRA” won vote after vote and changed the NRA’s by-laws. Carter was elected Executive Vice-President; he appointed gun periodical editor Neal Knox head of ILA. Joseph P. Tartaro, *Revolt at Cincinnati* (1981).

Carter, Knox, and their allies began formulating a political agenda. One of their first priorities was reform of the 1968 Gun Control Act, which they argued was being abusively enforced by the ATF. The new approach seemed popular; NRA membership, which was about a million just before the Cincinnati Revolt, grew to 2.6 million by 1983.

The growing grassroots gun rights movement was also sufficient to engender the birth of other new gun rights organizations. NRA publications staffer John Snyder had left in 1975 to become the first lobbyist for the Citizens Committee for the Right to Keep and Bear Arms (CCRKBA), eventually

³⁵ Richard Harris, *A Reporter at Large: Handguns*, New Yorker, July 26, 1976, at 58.

³⁶ Pete Shields, *Guns Don’t Die, People Do* 47-48 (1981).

becoming known as the “dean” of gun lobbyists. David B. Kopel, *John Snyder: An Oral History of the Dean of Washington Gun Lobbyists*, (Firearms Rsch. Ctr., Working Paper No. 2025-7). Alan Gottlieb founded the Second Amendment Foundation (SAF) in 1974, and Larry Pratt created Gun Owners of America (GOA) in 1975. All the organizations continue to influence firearms policy.

E. HANDGUN PROHIBITION

The mid-1970s witnessed important advances for gun prohibition. Having just been granted home rule by Congress, the District of Columbia city government banned handguns, in early 1976.³⁷ (It would be overturned in *District of Columbia v. Heller* 32 years later. Ch. 6.A.) 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.

The NRA sued to overturn the D.C. ban on numerous grounds. Notably, this challenge 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. *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978).

The first serious chance for the D.C. ban to spread nationally came in a 1976 Massachusetts election. The “People vs. Handguns” initiative proposed to confiscate all private handguns in the state. It was supported by Governor Michael Dukakis, and “by much of the state’s press.” *Bets, Bottles and Bullets*, Time, Nov. 15, 1976. On election day, 69 percent of the state’s voters rejected it, partly because of near-unanimous law enforcement opposition, except for the Boston police superintendent. Proponents of the confiscation initiative had been frank. At a rally the week before the election, Sen. Edward Kennedy explained, “We won’t keep guns out of the hands of criminals.”³⁸ After the election, an official with the League of Women Voters, which vigorously supported the ban, said, “I think a lot of voters have that idea that this was designed to get guns away from the criminals. That’s not the real purpose.”³⁹

³⁷ The District of Columbia had for almost all of its history been ruled by the House and Senate Committees on the District of Columbia. The District of Columbia Home Rule Act was enacted in 1973. 87 Stat. 777 (1973).

³⁸ Robert J. Rosenthal, *Handgun Question Elicits Differing Styles, Emotions*, Bos. Globe, Oct. 25, 1976.

³⁹ Gwenn Wells, *Wiesner Breathes Easier with Gun Ban Defeat*, Hyannis Times, Nov. 3, 1976.

The idea behind handgun bans was that ordinary Americans were not capable of owning handguns responsibly.⁴⁰

The next major initiative came in California in 1982. To avoid the problem of compensating gun owners for confiscated property, the initiative proposed a “handgun freeze.” Current owners could keep their handguns but future sales would be banned. The California initiative was defeated 63 to 37 percent. Opposition brought so many additional voters to the polls that they carried Republican George Deukmejian to a 1 percent victory over Tom Bradley in the governor’s race.

The first jurisdiction outside D.C. to successfully install a handgun ban was the Chicago suburb of Morton Grove in 1981. Chicago itself would follow suit in 1983, and the suburbs of Evanston, Oak Park, and Wilmette also would enact bans in the next several years. The NRA challenged the Morton Grove ordinance 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* attracted extensive national attention.

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. *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982). 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.

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 June 1983. 464 U.S. 863 (1983). When the Illinois Supreme Court finally decided the state constitutional law case, it upheld the *Morton Grove* ban 4-3. *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (relying on the unique wording in the Illinois right to arms, “Subject only to the police power . . .” and brushing aside records from the 1970 Illinois Constitutional Convention that the new right to arms did not allow handgun bans).

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 Chicagoland bans helped convince state legislators that gun bans were a genuine threat. In response, state after state enacted preemption laws forbidding some or all local gun regulation. California’s preemption statute was

⁴⁰ See, e.g., Josh Sugarmann, *The NRA Is Right: But We Still Need to Ban Handguns*, Wash. Monthly, June 1987 (agreeing with NRA “that handgun controls do little to stop criminals”).

successfully invoked in 1982 and 2008 to overturn ordinances banning handguns in San Francisco.⁴¹

By the early 1990s, local handgun bans were blocked by state preemption laws almost everywhere in the United States. One of the few states without a preemption law was Wisconsin, which bordered the one state where handgun bans existed. Proposals for handgun bans were put on the ballot in three left-leaning Wisconsin cities. In 1993, voters in Madison rejected a handgun ban by 51 percent. In 1994, handgun bans were voted down by 67 percent in Milwaukee and 73 percent in Kenosha.

The Wisconsin handgun ban initiatives had unintended consequences. The backlash led to passage of a preemption law in 1995. And by 1998, the legislature put a state constitutional right to arms amendment on the ballot. On Election Day, 73 percent of voters approved the addition of a right to arms guarantee to the state constitution. Wisconsin is one of 18 states that have added or strengthened a state right to arms guarantee since the 1960s. (See the Student Materials page of <http://firearmsregulation.org> for all state constitutional provisions and revisions of the right to arms.)

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. Professor Jack Balkin observes that the Supreme Court is more likely to declare unconstitutional laws that are national outliers.⁴² The outcomes of *Heller* (Ch. 6.A) and *McDonald* (Ch. 6.B) are consistent with Balkin's observation.

F. THE NRA COUNTEROFFENSIVE, AND THE GROWING SOPHISTICATION OF THE GUN-CONTROL LOBBY

The NRA's major legislative initiative, the Firearms Owners Protection Act (FOPA), took a long time. The NRA had strongly supported Ronald Reagan during the 1980 presidential election. Reagan had endorsed the FOPA, which was conceived in response to abusive ATF prosecutions. After the election, the new Reagan administration told the NRA that the economy was the administration's top priority, and that gun law reforms would have to wait. Congress did move ahead with hearings. For example, a 1982 report by the Senate Subcommittee on the Constitution found that BATF habitually engaged "in conduct which borders on the criminal. . . [E]nforcement tactics made possible by current firearms laws are constitutionally, legally and practically reprehensible." Based on a study of BATF cases in Maryland and

⁴¹ *Fiscal v. San Francisco*, 158 Cal. App. 4th 895 (2008); *Doe v. San Francisco*, 136 Cal. App. 3d 509 (1982).

⁴² See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U.L. Rev. 549 (2009).

Virginia, “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.”⁴³

On March 30, 1981, John Hinckley attempted to assassinate President Reagan, using a cheap handgun. Reagan survived, but his press secretary James Brady was permanently disabled by a shot to the head. Because Hinckley’s gun was a classic Saturday Night Special (SNS), gun control advocates in Congress seemed to have momentum to pass Senator Ted Kennedy’s SNS ban. 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.⁴⁴ 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.” In 1983, Reagan became the first sitting President to address the NRA Annual Meeting.

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

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 law abiding 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.⁴⁵

Advocates of the SNS ban did achieve success in the long term. The 1968 Gun Control Act had shut off imports, and product liability suits over the next several decades, brought under conventional product liability theories, drove the domestic SNS manufacturers out of the market by the end of the twentieth

⁴³ Senate Committee on the Judiciary, Subcommittee on the Constitution, *The Right to Keep and Bear Arms*, 97th Congress, 2d sess., Senate Doc. 2807, at 20-23 (February 1982).

⁴⁴ The 20,000 figure apparently traces back to 1965 congressional testimony by Rep. John Dingell. 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, the total quantity of American gun control laws may have been significantly reduced.

⁴⁵ *Delahanty v. Hinckley*, 686 F. Supp. 920 (D.D.C. 1986), *aff’d*, 900 F.2d 368 (D.C. Cir. 1990).

century. Today there are many small handguns for sale, but they are higher quality, relatively higher priced models from mainstream manufacturers.

Handgun prohibition had turned out to be much more difficult to achieve than Pete Shields imagined in 1977. Rather than giving up, Handgun Control, Inc. made 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. Whereas ordinary bullets have a lead core, KTW bullets used brass or iron. The KTW bullet has a conical shape and was designed for shooting through glass or a car door. The bullets were developed for police special weapons teams and had not been available for sale to the general public since the 1960s. They were sometimes called “Teflon bullets,” but that name reflected a misunderstanding. A Teflon coating reduces a bullet’s abrasion in the gun barrel, keeps the barrel cleaner, and prevents ricochets off a hard target. Teflon has nothing to do with a bullet’s penetrability.

The “cop-killer bullet” bill introduced by Rep. Mario Biaggi went far beyond the KTW bullet. It would have outlawed most of the centerfire rifle ammunition in the United States. (For an explanation of centerfire versus rimfire ammunition, see online Chapter 20.B.) The NRA opposed the bill based on technical details of ammunition ballistics. Those arguments were sufficient to block the ban in Congress, but in the broader public debate, the NRA was tagged as supporting “cop-killer bullets.”

After the failure of the 1982 California handgun freeze, gun control advocates realized that one of their problems was that many police were gun owners who strongly opposed the freeze. Many rank-and-file police supported self-defense by law-abiding citizens, and viewed gun bans as unrealistic. The “cop-killer bullet” issue was different and drove a wedge between the NRA and its traditional law enforcement allies. For some groups, such as the Fraternal Order of Police (the largest-rank-and file police organization in the United States), the rift was not fully healed until the twenty-first century.

While Biaggi’s ammunition ban would not pass, it did have the effect of blocking progress on FOPA. Finally, the NRA decided to work with Biaggi on a compromise bill. As enacted, the compromise bill banned a category of ammunition that was no longer being produced for the retail market. The bill passed Congress almost unanimously. Biaggi proclaimed the bill accomplished everything he had wanted.⁴⁶

In 1982, NRA Executive Vice President Harlon Carter fired Neal Knox from ILA. 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. Knox was also

⁴⁶ See 18 U.S.C. §§ 921(a)(17), 922(a)(7), (8); 27 C.F.R. § 478.37.

unhappy about what he saw as the NRA misinforming its membership about the compromises on the ammunition bill.

No one was better than Knox at appealing to hard-core gun rights activists. After his dismissal Knox registered as an independent lobbyist and started his own newsletter, the “Hard Corps Report.” Thereafter, Knox, as well as Gun Owners of America, would define their space by criticizing the NRA for what they saw as an endless series of weak-kneed compromises.

Getting the cop-killer bullet issue off the table cleared the path for FOPA. It passed the Senate 79-15 and the House 292-130, with a majority of Democrats voting in favor. FOPA curtailed the ATF’s powers of forfeiture and of 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.⁴⁷

Because of an amendment added on the floor of the House, FOPA also changed the NFA provisions governing machine guns and banned the sale of new machine guns after the effective date of FOPA. The NRA successfully challenged the ban on statutory interpretation grounds in district court, but lost in the Eleventh Circuit, and the Supreme Court denied certiorari.⁴⁸

Although defeated on FOPA, Handgun Control, Inc. (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. They approached Sarah Brady, the wife of Reagan’s well-liked press secretary. Brady threw herself into the movement that her husband would later join as well. Eventually, the organization would bear her name. Gregg Lee Carter, *The Gun Control Movement* 95 (1997). HCI renamed its waiting period proposal for the Bradys. 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, many handguns are made in part from plastic polymers. They are durable, and their light weight makes them popular for defensive carry. But polymer guns were not well-known by the public when Austria’s Gaston Glock introduced his eponymous pistol to the U.S. market. Gun control groups dubbed the Glocks “terrorist specials,” claiming that they were invisible to metal detectors. Sen. Howard Metzenbaum introduced an “undetectable” firearms ban. Ironically, Metzenbaum’s bill would not have banned Glocks because they contained plenty of metal. But the bill would have banned many small all-metal handguns.

⁴⁷ 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 U.S. Supreme Court and many U.S. Courts of Appeal).

⁴⁸ *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

In early 1988, Attorney General Edwin Meese had moved the Reagan White House toward endorsing the Metzenbaum bill. Reagan ultimately withheld his endorsement in order to aid the presidential bid of Vice President George H. W. Bush. Bush had run into trouble on the gun issue in 1972 and again in 1980, when Reagan and he emerged as the leading candidates for the Republican presidential nomination. Reagan gained among gun owners then by highlighting Bush's support for a Saturday Night Special ban. In 1988, Bush had just bought an NRA Life Membership, was courting the gun vote and sought to avoid connection with another provocative gun ban.

Even without White House support, the Metzenbaum bill lost by only two votes in the Senate. Again, the NRA compromised, and almost everyone in Congress voted for the compromise. As enacted, the law banned no existing firearm, and did nothing to stop the use of polymers to build firearms. It did require that all new handguns contain at least four ounces of metal in the profile of a handgun. 18 U.S.C. § 922(p). After winning the Republican presidential nomination in 1988, George Bush wrote a public letter to the NRA promising his opposition to waiting periods, gun bans, gun registration, and other forms of gun control.

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 "stiff federal gun control," and signed a proclamation that the Second Amendment is not an individual right.

As governor, Dukakis had stated publicly, "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." *Gun Week* (owned by the Second Amendment Foundation) reported that statement shortly after the 1988 Democratic National Convention, and the NRA put the words on the front cover of its magazines. The NRA also spent a then-record \$6 million publicizing Dukakis's record in Pennsylvania, Texas, and other swing states. Dukakis went from a small lead in Texas to a landslide loss. He also lost California, Michigan, Montana, and some other states, in part because of the gun issue. 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. . ."⁴⁹

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. 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

⁴⁹ Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 112 (2011); Ernest B. Furgurson, *Bentsen and Mitchell, Democrats*, Balt. Sun, Dec. 2, 1988.

manufacturers and retailers of Saturday Night Specials. *Kelley v. R.G. Industries*, 497 A.2d 1143 (Md. 1985). This was the one major win for the plaintiffs' attorneys who had brought strict product liability suits against handgun manufacturers since the early 1970s. 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 for the sale of any new models of handguns in Maryland. Md. Ann. Code art. 27 § 36-I(h). An NRA-led initiative to overturn the law failed by a vote of 58 to 42 percent.

G. 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 felon with severe mental problems used a Kalashnikov-style semi-automatic rifle to murder five children at a schoolyard in Stockton, California. "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. He pointed out that the media had grown tired of the handgun topic, but "assault weapons" would be novel to them. Further:

The semiautomatic weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons — anything that looks like a machine gun is assumed to be a machine gun — can only increase the chance of public support for restrictions on these weapons.⁵⁰

Sugarmann was 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 Gun Control Act authority to block import of nonsporting arms. The NRA protested that FOPA had specifically mandated the import of firearms "generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms." 18 U.S.C. § 925(d)(3). They argued that almost all the banned guns were suitable for and often used at rifle target competitions, such as the federally sponsored National Matches (Ch. 3.B.2.b.i). Almost all the guns were lawful for hunting in almost every state, when equipped with a hunting capacity ammunition

⁵⁰ Assault Weapons and Accessories in America (Educ. Fund to End Handgun Violence and New Right Watch, Sept. 1988), at 26.

magazine — typically, five rounds. The Treasury Department made the import bans permanent a few months later.

More significantly, proposals for “assault weapon” restrictions cropped up in Congress, in most state legislatures, and in many municipalities. 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.”⁵¹

Prohibition laws passed in California and several cities. Over the next several years, New Jersey, New York, and Massachusetts would enact bans, while Maryland and Hawaii would ban “assault pistols.” In Congress, the DeConcini bill to ban a list of rifles, shotguns, and pistols passed the Senate by one vote, as an amendment to a comprehensive crime bill sponsored by Senator Joseph Biden. The ban was defeated in the House by the substitution of “the Unsoeld Amendment” from Rep. Jolene Unsoeld. That amendment ratified the Bush import ban by prohibiting the domestic assembly from foreign parts of a nonimportable “assault weapon.” 18 U.S.C. § 922(r); Ch. 9.C.

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 15-day waiting period for all handgun purchases. HCI almost passed the bill through the House in September 1988 by cutting the wait down to 7 days, and by limiting its application to retail sales by licensed dealers, exempting private sales between individuals. The “Brady Bill,” as HCI now called it, was stopped by an alternative offered by Rep. Bill McCollum to study the creation of a national instant check system for handgun sales. In 1989, Virginia became the first state to actually implement an instant check.

Throughout the Bush administration, the NRA defeated HCI’s major bills. But the NRA was on its heels. The Bush administration refused to endorse a domestic ban on “assault weapons,” but did propose a ban on ammunition magazines holding more than 15 rounds. The White House offered to sign the Brady Bill and a domestic ban on new semi-automatics (plus a registration requirement for grandfathered guns) if the gun control laws were included in a crime bill that the White House wanted.⁵²

⁵¹ Mar. 7, 1989, press conference, 25 Weekly Comp. Pres. Docs. 294.

⁵² Specifically, Attorney General Richard Thornburgh promised that Bush would sign a crime bill with gun control if the bill also eliminated the exclusionary rule for firearms seized as evidence. “Cracking Down on Violent Crime,” Remarks by Dick Thornburgh, Attorney General

H. THE CLINTON ERA

In 1965 South Carolina repealed its 1903 ban on handgun sales but enacted a new law limiting purchasers to one handgun a month. Three decades later, HCI advanced one gun a month 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. This claim was disputed, but many acknowledged that the trafficking issue was hurting Virginia's national reputation. One-gun laws did not get national traction, but they did eventually pass in Virginia in 1993, California in 1999, Maryland in 2003, and New Jersey in 2009.⁵³

In the fall of 1993, the Brady Act easily passed Congress. The NRA put up a token effort to stop it but focused primarily on influencing the final law through amendments. The adopted amendments required that background check records of sales to lawful purchasers be destroyed and that the Brady handgun waiting period would sunset within five years, to be replaced by the National Instant Check System for retail sales of both handguns and long guns. HCI had already conceded the superiority of the instant check.

As HCI grew more sophisticated politically, it abandoned the ambition of handgun prohibition. Despite protests from its old allies in the prohibition movement, HCI judged that public opinion did not support prohibition. HCI also concluded that many people were put off by the phrase "gun control," and so transitioned to "gun safety." HCI's public education campaign began to emphasize injuries and deaths of children by gunshot, and the need to impose "gun safety" laws. During this period, HCI pressed successfully for many state laws restricting gun possession by minors and won a federal statute restricting handgun possession by anyone under 18. 18 U.S.C. § 922(x); Ch. 4.A.3.k.

Violent crime had peaked around 1980, declined thereafter, and started rising sharply late in the decade. By 1993-94, public and political concern over crime was at a level not seen since the late 1960s. HCI gave its "assault weapon" ban proposal the positive sounding title "Public Safety and Recreational Firearms Protection Act." The bill—which banned 19 guns by name, and about 200 by generic definition—included an appendix listing more than 600 rifles and shotguns that were explicitly *not* banned. New ammunition

of the United States to the Fifth National Meeting on Crime and Drugs of the U.S Conference of Mayors, Wash., D.C., Apr. 23, 1991. The exclusionary rule, created by Supreme Court decisions starting in 1914, prevents the courtroom use of evidence that is obtained through illegal police conduct. *Weeks v. United States*, 232 U.S. 383 (1914). The Bush proposal would have allowed government agents to enter someone's home with no warrant, no probable cause, and no exigent circumstances, and use a seized firearm in court.

⁵³ The Virginia law would be repealed in 2012.

magazines holding more than ten rounds also were banned. 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. The bill's title reflected the views of the gun control lobbies that recreational long guns were legitimate, but handguns and defensive gun ownership were not.

The bill passed the Senate 56-43 in November 1993, and the stage was set for a showdown in the House. Because the Clinton White House committed its full resources, the "assault weapon" ban passed the House by a single vote in May 1994. The ban was part of a comprehensive crime bill, intended to be the signature achievement of the new President. The ban included distinctions that illustrate the demands of politics. For example, included in the "recreational" guns explicitly exempted from the ban was the Ruger Mini-14. The Ruger was functionally the same as banned guns like the AR-15. But at the time, it had a much larger base of owners than any other "assault weapon."

On close inspection, the "assault weapon" ban was mostly about appearances. The generic definition focused on accessories such as bayonet lugs and adjustable stocks. So manufacturers simply removed the prohibited features, renamed the guns, and were soon selling firearms that were mechanically identical to the banned guns. On the other hand, the ban on new magazines over ten rounds was real. For some guns of recent vintage, the price of grandfathered magazines increased tenfold. However, for many of the older model guns on the list, such as the semi-automatic AR-15 (first sold in 1964), the inventory of magazines was quite large.

Whatever the ban's practical impact, it had substantial political resonance. *Washington Post* columnist Charles Krauthammer, at the time 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."⁵⁴

There was a dramatic backlash 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 eight Senate seats and control of the Senate, and they lost 54 House seats, losing control of that chamber for the first time since 1952. President Clinton said several weeks later that "the NRA is the reason the Republicans control the House." *Cleveland Plain-Dealer*, Jan. 14, 1995, at 1A. All Democratic congressional incumbents endorsed by the NRA retained their seats. A study of U.S. House races in 1994 and 1996 concluded that NRA endorsement could shift between 1 percent and 5 percent of the vote, depending on the number of

⁵⁴ Charles Krauthammer, *Disarm the Citizenry. But Not Yet*, Wash. Post, Apr. 5, 1996 at A19.

NRA members in a district. NRA influence was most significant for endorsements of nonincumbents.⁵⁵

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 ended 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 20 or more guns or as little as \$50 worth of ammunition). H.R. 1321 and S. 631 (1995 Cong.).

The 1994 elections led to tremendous changes in state gun laws. State after state enacted shall issue licensing for handgun carry permits, added or strengthened preemption laws to eliminate local gun control, used instant checks to replace state-level waiting periods for handgun purchases, passed range protection bills to prevent noise nuisance suits against shooting ranges, and other gun rights measures.

At the NRA, Neal Knox was working his way back from his 1984 exile, and some of his allies were winning spots on the board of directors. Knox challenged Wayne LaPierre for Executive Vice President but lost. LaPierre counter-maneuvered to help the actor Charlton Heston win election to the board, and then to win three consecutive terms as NRA President. Heston was a popular actor who had marched on Washington with Martin Luther King and was an outspoken advocate for civil rights when many in Hollywood stayed on the sidelines. He was a powerful public face for the NRA. Neal Knox believed that the NRA could succeed through the power of gun owners to vote politicians in or out of office. While LaPierre and Heston acknowledged the importance of grassroots voters, they considered the electoral anxiety of politicians an incomplete and limited tool. LaPierre and Heston saw the broader fight as a contest for the hearts and minds of the American people.

I. THE REEMERGENCE 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.”⁵⁶ To the chagrin of some and the delight of others, the Second Amendment by the mid-1990s had become a topic of serious academic debate.

⁵⁵ Christopher B. Kenny, Michael McBurnett & David J. Bordua, *Does the National Rifle Association Influence Federal Elections?*, Indep. Inst. Issue Paper No. 8-2006 (Dec. 2006).

⁵⁶ Charles J. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution*, at v (Ph.D. dissertation in History, Univ. of Michigan, 1974).

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. Among the first was Don Kates. After his armed sojourn in the South as a Yale law student during Freedom Summer in 1964, Kates went to work for the radical New York City lawyer William Kunstler, and later taught at St. Louis University Law School. Kates's pro-abortion stance was incompatible with his employer's Catholic mission and ultimately cost him his job. Kates left for private practice and continued his life as a scholar. He became a prolific legal commentator, focusing primarily on gun policy. One of his early works, a collection of pro-gun articles that he edited, *Restricting Handguns: The Liberal Skeptics Speak Out* (1979), featured a foreword by the liberal Senator Frank Church.

The late 1970s also saw the first legal scholarship from Stephen Halbrook, a philosophy professor at Howard University, who had left academia for private law practice. Halbrook and Kates were unabashed gun-rights advocates, and Halbrook would later represent the NRA as its outside counsel.⁵⁷ Halbrook and Kates both agreed that the Second Amendment prohibited gun bans, but Kates readily conceded the constitutionality of many forms of nonprohibitory controls.

In 1983, the *Michigan Law Review* published Kates's *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).⁵⁸ It was only the third time in history that a top-ten law review had published a serious article on the Second Amendment. The previous two were Feller & Gotting's 1966 *Northwestern* article, stating that the Second Amendment is only for the National Guard; and one from retired Maine Supreme Judicial Court Chief Justice Lucilius Emery, *The Constitutional Right to Keep and Bear Arms*, 28 Harv. L. Rev. 473 (1915). Emery had argued 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.

The *Michigan* article's impact within the legal academy was dramatic, but subdued. 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. Still, except for Yale's Akhil

⁵⁷ In the U.S. Supreme Court, Halbrook would compile a 3-0 record, presenting the oral argument for winning parties in *Castillo v. United States*, 530 U.S. 120 (2000) (defendant can only be sentenced for using a machine gun in a crime if the jury found that the gun was a machine gun); *Printz v. United States*, 521 U.S. 898 (1997) (Ch. 4.D.2) (Congress cannot compel state and local law enforcement officials to carry out federal checks on handgun buyers); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (kits capable of being assembled into a rifle or a handgun are not covered by the National Firearms Act) (Ch. 5.B.1).

⁵⁸ As a law review staffer, David Kopel helped cite check the article, which led to his involvement in the gun issue.

Amar, few law professors followed up on the paradigm-shifting arguments in Kates's *Michigan* article.

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 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.” Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). Levinson's eminence as a legal scholar and credentials as a political liberal are unquestioned. So when he acknowledged that the individual rights view was probably correct, and that the legal academy had been avoiding the issue for fear of what it would find, it spurred law professors to begin to engage the Second Amendment.

The trickle started by Kates and Halbrook became a flood as successive scholars analyzed the material for themselves and concluded that the Second Amendment really was an individual right. Even Harvard's Lawrence Tribe reevaluated and endorsed the individual rights view. Tribe's *American Constitutional Law* treatise defined liberal constitutionalism for a generation. Between the second edition (1987) and the third (1999), Tribe assessed the new scholarship and the third edition endorsed what was now called “the Standard Model” — a term coined by Professor Glenn Reynolds, who borrowed it from physics. The Standard Model understood the Second Amendment as an individual right, including the right to own and carry handguns for defense. The Standard Model also accepted that some controls were constitutionally permissible. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995).

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, declared in the *New York Review of Books* that only “crazy professors” believed in the individual right. The truth, according to Wills, was that the Second Amendment had no legal meaning, but was in fact a “clever trick” by James Madison.⁵⁹ More sedately, the American Bar Association adhered to its 1975

⁵⁹ Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 62. The *New York Review of Books* is not the same publication as the *New York Times*' weekly Book Review section. The *New York Review of Books* was for decades the flagship publication of New York's left intelligentsia. For Wills's previous remarks on gun owners, see Garry Wills, *John Lennon's War*, Chi. Sun-Times, Dec. 12, 1980, at 56 (people who own guns for self-defense are “traitors”); Garry Wills, *Gun Rules . . . or Worldwide Gun Control?*, Phil. Inq., May 17, 1981, 15, 8E (“the sordid race of gunsels”) (literally, a “gunsel” is the passive partner in male homosexual intercourse).

position: “It is doubtful that the founding fathers had any intent in mind with regard to the meaning of this amendment.”⁶⁰

The Wills/ABA view of a nihilist Second Amendment would soon be displaced by something far more plausible. The new path already had been cut by Dennis Henigan, who ranks with Halbrook and Kates as one of the most influential Second Amendment lawyers in the period between *Miller* and *Heller*. Henigan was a young corporate law partner in D.C. when he followed his ideals and went to work for the litigation arm of Handgun Control, Inc. Before Henigan, HCI had received pro bono help from some of the best D.C. law firms. Henigan developed this into an impressive network of pro bono support from 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.⁶¹ Although the strategy failed in the end, the lawsuits were the closest thing to a knockout punch ever devised by the gun control lobby.

Most important in the historical development of Second Amendment scholarship was Henigan’s pivot away from the “collective right” or the “state’s right” theories. Those terms were still commonly used in the lower federal courts in the 1990s, with little definition or purpose other than to perfunctorily dismiss individual right claims. But as close observers could see, the ground was shifting. The Supreme Court’s 1989 *Verdugo-Urquidez* decision said that “people” was a term of art in the Bill of Rights, and that it was used similarly in the First, Second, and Fourth Amendments. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Ch. 6.A Note 3). *Verdugo-Urquidez* made it difficult to claim that the right of the people in the Second Amendment was transformed by the militia clause into a right of the states, or into a “collective right” that no people could exercise.

Henigan acknowledged an individual right: “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.” Further, Henigan suggested that the collective rights and state’s right cases should actually be considered as endorsing a narrow individual right that existed for the state or collective purpose of the militia.⁶²

⁶⁰ Ben R. Miller, *The Legal Basis for Firearms Controls*, 100 Ann. Rep. A.B.A. 1052, 1078 (1975).

⁶¹ Peter J. Boyer, *Big Guns*, New Yorker, May 17, 1999, p. 54. The suits and the legislative responses are detailed in Part E.

⁶² 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 (1989).

Toward the end of the 1990s, scholars sympathetic to gun control took Henigan's thesis and elaborated it. The theory is well presented in H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (2002) (Ch. 14.D.2 Note 5).

From the late 1990s until *Heller*, the proponents of the Standard Model and the narrow individual right battled in journals and books. That debate was conducted mainly on originalist grounds. The *Heller* decision showed that advocates on both sides of the issue, including Halbrook, Kates, and Henigan, had succeeded in their own ways. Halbrook and Kates had brought the Second Amendment back into the realm of respectable discussion about the Constitution by explaining the original understanding of the Constitution and by constructing the foundation for the Standard Model. Henigan succeeded in offering a coherent but tightly bounded theory of the Second Amendment that would appeal to one wing of the Supreme Court. 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 had long dominated lower federal court decisions was rejected 9-0 by the Court. Justice Stevens said that the Court had always considered the Second Amendment "a right that can be enforced by individuals." The only dispute was over the scope. The dissenters' arguments and the 9-0 rejection of states/collective rights came from the intellectual foundation constructed by Dennis Henigan.

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 originalism but in living constitutionalism.

J. COLUMBINE AND THE 2000 ELECTION

At the federal level, gun control in 1995-98 was less of an issue than it had been in the previous several years. One side had the Presidency, the other had the Congress. 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 58 more long gun models in 1998.⁶³

⁶³ See *Springfield, Inc. v. Buckles*, 292 F.3d 813 (D.C. Cir. 2002) (upholding the import ban by relying on deference to the ATF's definition that "sporting" includes only what hunting guides recommend for their clients).

The Columbine High School murders in April 1999 changed everything. Twelve students and one teacher were murdered by two students who had planned their crime for over a year.

One change that resulted from Columbine was police tactics. Although the Columbine murders began while a sheriff's deputy was on the campus, and another deputy arrived almost instantly, neither entered the school building to pursue the killers. Most of the killing happened in the school library, where students were methodically murdered while dozens of police officers were just a few yards away and could have entered from a door that opened to the outside. Post-Columbine, police tactics changed to emphasize immediate action against active shooters, rather than waiting for a SWAT team to assemble and then clear rooms one at time.⁶⁴

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-point gun control program that was rejected by the state legislature the next year. Colorado and Oregon (where a school shooting had taken place in 1998) both passed ballot initiatives requiring private sellers to conduct background checks on buyers at gun shows.

Three of the four Columbine murder weapons came from another student, who bought them for the shooters at a gun show. This transformed gun shows into a major national issue. A few weeks after Columbine, Vice President Al Gore cast the tie-breaking vote in the U.S. Senate for a bill that would have given the ATF the administrative power to shut down any or all gun shows in the United States. 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 licensed dealers. The bill also would have repealed the D.C. handgun ban.

None of the bills were enacted. 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. The Republican leadership and the NRA wanted to let the sale go ahead after 24 hours. 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. 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 favored keeping the issue active for the upcoming 2000 election.

⁶⁴ The new tactical approach did not become universal; in July 2011, a man spent 90 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, 45 miles away. The killer surrendered the moment he saw a police officer.

On Mother's Day 2000, more than 100,000 people participated in a gun control rally at the National Mall in Washington. Many others participated in smaller rallies around the country. This "Million Mom March" was organized by Donna Dees-Thomases, a former Democratic Senate staffer and the sister-in-law of Hillary Clinton's best friend. The Office of the First Lady provided substantial support to the organizers. The hope was that angry mothers would change the politics of gun control in the United States. Their most prominent supporter was television host Rosie O'Donnell, who urged that all guns be banned and anyone who possessed a gun serve a mandatory sentence.

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 be absorbed into HCI. 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." Cosmo Macero, Jr., *Gore Dependent on Strong Turnout by Pennsylvanians*, Boston Herald, Nov. 3, 2000, at 5.

In litigation in the spring of 2000, the Clinton Department of Justice argued that the Second Amendment protected no individual right. 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." 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.'" Letter from Seth Waxman, Aug. 22, 2000. The NRA put Waxman's "take guns" quote on billboards in swing states.

George W. Bush won Florida by a few hundred votes, and thus the election by two electoral votes. 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 presidential election for the first time in a century), Gore's home state of Tennessee, Clinton's home state of Arkansas, and Florida. President Clinton later wrote that the NRA had been the decisive reason that Gore had lost. Bill Clinton, *My Life* 928 (2004).

K. THE YEARS PRECEDING HELLER AND MCDONALD

For the next decade, very little went right for gun control advocates. Attorney General John Ashcroft repudiated the Johnson-Nixon era DOJ position on the Second Amendment and accepted the Standard Model.⁶⁵

⁶⁵ See Memorandum for the Attorney General, Office of Legal Counsel, Re: Whether the Second Amendment Secures an Individual Right (Aug. 24, 2004); Memorandum for All United States' Attorneys from the Attorney General, Re: United States v. Emerson (Nov. 9, 2001).

The Clinton administration had been working for years with allies at the United Nations toward an international gun control treaty. But the July 2001 UN gun control conference ended with only a nonbinding Programme of Action. Even that was watered down at the insistence of the U.S. delegation. 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, previously, the Americans of 1775-83). (For more on the UN Programme of Action, see online Chapter 18.A.3.)

September 11, 2001, led to wave of gun-buying by Americans, as did the inept government response to Hurricane Katrina in 2005. “Shall issue” concealed carry laws continued to advance state by state. In the early 1990s, gun control advocates had planned “to do to handguns” what other advocates had “done to cigarettes . . . turn gun ownership from a personal-choice issue to a repulsive, antisocial health hazard.”⁶⁶ Now, public carrying of concealed handguns was the norm.

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 success in communications and organization. Ever since gun control became an important national issue in the 1960s, gun control advocates had enjoyed strong support in what is sometimes called “the mainstream media” (MSM). Not all MSM stories were biased, but when there was bias, it almost always tilted pro-control. 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.⁶⁷

In the late 1960s and early 1970s, the NRA was one of the first organizations to use direct mail. 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. For a while, the NRA’s sophisticated program made it unusually effective when compared to other interest groups.

⁶⁶ Harold Henderson, *Guns ’n Poses*, Chi. Reader, Dec. 16, 1994, at 8, 24 (interview with gun control advocate Dr. Robert Tanz). Or as the head of the Centers for Disease Control’s National Center for Injury Prevention and Control put it, “We need to revolutionize the way we look at guns, like we did with cigarettes. It used to be that smoking was a glamour symbol, cool, sexy, macho. Now it is dirty, deadly and banned.” Fox Butterfield, *New Tactics Urged in Fight Against Crime*, N.Y. Times, Oct. 16, 1994, at 25. Dr. Katherine Christoffel, head of the CDC-funded Handgun Epidemic Lowering Plan, told the American Medical News, “guns are a virus that must be eradicated. . .” Janice Somerville, *Gun Control as Immunization*, Am. Med. News, Jan. 3, 1994, at 9.

⁶⁷ See Brian Anse Patrick, *The National Rifle Association and the Media: The Motivating Effects of Negative Coverage* (2002).

By the early 1990s, the proliferation of fax machines and computer modems provided a vast boost to local gun rights groups. Later in the 1990s, the national and local gun groups moved quickly to use 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. Whatever the underlying reasons, the growing ability of gun rights activists to disseminate their own information and viewpoint is one important reason for their political success.⁶⁸

In 2004, the federal “assault weapon” ban sunset pursuant to its own terms. HCI had changed its name to The Brady Campaign, but the political slide continued. “We’ve hit rock bottom,” Sarah Brady told a friendly interviewer. Arnold Grossman, *One Nation Under Guns* 48 (2006).

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. 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 voted to ban. The NRA chided Kerry in ads featuring an exquisitely coiffed French poodle and the headline “This dog won’t hunt.” In smaller text, the ads detailed Kerry’s gun votes as a Senator.

By the time *Heller* arrived at the Supreme Court, 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. 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. Americans wanted gun rights *and* gun control. That is what the political system provided, and what the Supreme Court in *Heller* and *McDonald* would affirm.⁶⁹

⁶⁸ See, e.g., Brian Anse Patrick, *Rise of the Anti-Media: Informing America’s Concealed Weapon Carry Movement* (2009).

⁶⁹ See Adam Winkler, *Gunfight* (2011) (viewing *Heller* as the triumph of the majority’s belief that gun rights and gun control can coexist); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246 (2008) (*Heller* is comparable to *Brown v. 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 (2008) (*Heller* is the result of a successful social movement); David B. Kopel, *The Right to Arms in the Living Constitution*, 2009 Cardozo L. Rev. de-novo 99 (applying the living constitutionalism theories of Jack Balkin and Bruce Ackerman to post-ratification history of the Second Amendment).