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# A Second Amendment Moment

## THE CONSTITUTIONAL POLITICS OF GUN CONTROL

*Nicholas J. Johnson*<sup>†</sup>

### I. INTRODUCTION

#### A. *Constitutional Politics*

Bruce Ackerman's claim that America's endorsement of Franklin Roosevelt's New Deal policies actually changed the United States Constitution to affirm an activist regulatory state, advances the idea that higher lawmaking on the same order as Article Five amendment can be attained through and discerned by attention to our "constitutional politics."<sup>1</sup> Ackerman's "Dualist" model requires that we distinguish between two types of politics.<sup>2</sup> In normal politics, organized interest groups try to influence democratically elected representatives while regular citizens get on with life.<sup>3</sup> In constitutional politics, the mass of citizens are energized to engage and debate matters of fundamental principle.<sup>4</sup> Our history is dominated by normal politics. But our tradition places a higher value on mobilized efforts to gain the consent of

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<sup>1</sup> Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 *YALE L.J.* 453, 459 (1989).

We use the revised description of Reconstruction to gain a new perspective on the next great constitutional transformation: the struggle between the Roosevelt Presidency and the Old Court that culminated in the legitimation of the activist regulatory state . . . Like the Reconstruction Republicans, the New Deal Democrats amended the Constitution by provoking a complex constitutional dialogue between the voters at large and institutions of the national government, a dialogue that ultimately substituted for the more federalistic processes of constitutional revision detailed in Article Five.

*Id.*

<sup>2</sup> *See id.* at 461.

<sup>3</sup> *See id.*

<sup>4</sup> *See id.* at 462.

the people to new governing principles. Within Dualism, the rare triumphs of constitutional politics are transformative. These changes may be procedurally suspect. But when ultimately validated by the people, they become part of our higher law.

Formalists balk that our Constitution establishes a strict and quite clear amendment process. But Ackerman counters that important constitutional changes have not been procedurally pristine. The Constitution itself emerged in a procedurally suspect way out of a gathering to amend the Articles of Confederation.<sup>5</sup> And the dramatic shift in national policy wrought by the Reconstruction Congress is equally problematic.<sup>6</sup>

Constitutional change skirting the formalities of Article Five is, then, nothing new. And if we are attentive, we can discern important political moments that yield grand constitutional messages and signal substantive changes in our

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<sup>5</sup> *Id.* at 456 (“Almost all modern lawyers recognize that, in proposing a new Constitution in the name of We the People, the Philadelphia Convention was acting illegally under the terms established by America’s first formal constitution—the Articles of Confederation solemnly ratified by all thirteen states only a few years before.”).

<sup>6</sup> *Id.* at 496.

The then-existing Southern governments rejected the Fourteenth Amendment when it was proposed . . . Congress responded by destroying these dissenting governments and gaining the assent of new ones to the Fourteenth Amendment; when these new Southern governments sought to withdraw their predecessors’ rejections, Secretary of State Seward first issued a Proclamation expressing “doubt and uncertainty” whether the Amendment had been ratified; and . . . it was only upon the express demand of Congress that Seward finally issued a second Proclamation unequivocally pronouncing the Amendment valid.

*Id.* Early on, the Court refused to affirm that the Reconstruction Republicans played by the rules. All the Court was willing to say was this:

This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

*Id.* at 497 (quoting *Coleman v. Miller*, 307 U.S. 433, 449-50 (1939)).

Constitution, even while the text of the document remains the same.<sup>7</sup>

Professor Ackerman tells an intriguing story of how the political conflict between the branches of government and the appeal to the people by the executive for support of its transformative agenda—the “Constitutional Politics” of the New Deal—signaled a moment of higher lawmaking. But it is possible to agree with Ackerman that these constitutional politics say something important about the Constitution and still reject his full basket of claims, particularly, the intricate formula of: Constitutional Impasse → Triggering Election → Challenge to Institutional Legitimacy → Switch In Time, which he argues verifies a broad-based, democratically legitimate endorsement of baseline constitutional change.<sup>8</sup>

Granting Ackerman’s characterization of the procedural flaws that afflict the Constitution and Reconstruction Amendments, it is still easy to conclude that the New Deal was different. It is the difference between a team that wins by cheating in the last inning and one that claims victory without ever showing up to play. Expanding the meeting agenda<sup>9</sup> or rough-handling the Article Five process,<sup>10</sup> is quite different from ignoring process altogether.<sup>11</sup>

Then there is the pragmatic objection. Dramatic change ought to be hard. And when it happens we need a solid record that it has occurred, if for no other reason than our future debates about further change require a stable platform on which to hold those conversations.

But Pragmatists, unwilling to surrender this foundation, are still left to wrestle with the fact that some political moments do seem more important, more dramatic,

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<sup>7</sup> The New Deal validated constitutional change the same way that the otherwise procedurally suspect Fourteenth Amendment was validated. Ackerman, *supra* note 1, at 459-60.

<sup>8</sup> *Id.* at 509-10:

It is this four part schema, more than the one sketched by the rules of Article Five, that structured the higher lawmaking process by which the American people defined, debated and ultimately legitimated the Republicans’ Fourteenth Amendment . . . . [T]he New Deal Democrats’ struggle to constitutionalize activist national government in the 1930’s tracked the four stage process through which Reconstruction Republicans constitutionalized the Fourteenth Amendment.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See *supra* note 6.

<sup>11</sup> See *supra* note 1.

than others. Certainly the New Deal was a bigger deal than some isolated piece of pork barrel legislation. And consequently, the Pragmatist is left to wonder, can we discern through Ackerman's model something less dramatic than constitutional amendment, but still more important than the signals released by an obscure piece of legislative pork? And for the Formalist, is it simply more palatable to credit the existence of grand constitutional moments, but conclude that they just do less work than Ackerman posits; that their appearance and perhaps also their absence, signals important things, but still something less than fundamental constitutional change? Can we, through attention to constitutional politics, gain something important by reaching for *less* than Ackerman claims is possible?

Imagine the Court facing an issue that divides the nation. Imagine rights-claimants with plausible historical and textual support for a right that has been only glancingly or ambiguously recognized by the Court. Imagine the right protecting something Americans in many circles find abhorrent. And let us say that the text and history is ambiguous and distant enough that opponents have viable claims that no such right exists. Maybe here, most plausibly, constitutional politics should guide our decision.

Granted, this may seem quite artificial as a start. Our Constitution is mature, you say. Our debates and constitutional controversies no longer involve such basic questions. We debate what is protected speech, not *whether* speech is protected. We debate the scope of privacy or freedom of conscience. But not whether those rights exist. We are beyond binary choices . . . except of course that we are not.

*B. Constitutional Politics and the Second Amendment Debate*

If the Second Amendment were a weather system we would not know whether we are wet or dry. Imagine that the answer to the question, "Does the Constitution prohibit warrantless searches and seizures within some range?" was "Well, we just don't know." On the question, "Do individual Americans have a right to keep and bear arms?," the Court's

efforts leave neutral observers not knowing whether it is night or day.<sup>12</sup>

So we have our binary choice. And it is here that Ackerman's constitutional politics does its most legitimate work. "We the people" most assuredly said something about arms in the Bill of Rights.<sup>13</sup> But much time has passed since then and it is arguably difficult to decipher the message.<sup>14</sup> Should we attempt to unravel it through some foundationalist exercise, studying the framers and their influences, the reams of scholarship on the importance of an armed citizenry, the make-up of the republican militia, or the perceived dangers of a state monopoly on the tools of violence? Is it better just to treat the matter as essentially political and leave the legislature free to implement whatever seems to be the will of the prevailing majority?

Both approaches are flawed according to Ackerman. It is by reference to these extremes that he builds the case for Dualism. He would criticize that, while leaving the issue to majority will would please the pure democrat (the "Burkean" in Ackerman's description, who would cede the field to the governing majority), it is precisely this capitulation to temporary majorities that is the weakness of the Burkean approach. And the other extreme, a foundationalist<sup>15</sup> determination made by reference to ancient texts, originalist political philosophies, or abstract normative speculations, is equally problematic, tethering us to ideas that simply might not work in our world.

It is here that Ackerman's Dualism presents its strongest claim for legitimacy. Dualism gives the Court the tools to engage the gun question in a way that avoids both

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<sup>12</sup> See discussion *infra* notes 331-36 of *United States v. Miller*, 307 U.S. 174 (1939).

<sup>13</sup> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

<sup>14</sup> Eugene Volokh argues that prefatory language like the subordinate clause "A well regulated militia" was common in the language of state constitutions at the time and was never interpreted as a strict limitation on the independent clause. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 794-95 (1998).

<sup>15</sup> A foundationalist set of principles would restrain (or the Burkean would say thwart) democratic will as manifested in the latest set of legislative commands. See Ackerman, *supra* note 1, at 466-67.

Foundationalist and Burkean snares in a place where they are serious impediments.<sup>16</sup>

Dualism of course does not promise certainty. The constitutional politics of gun rights might yield nothing or just an inconclusive draw. But that is the question. Is there any message in our constitutional politics about a right to keep and bear arms? What should Justices engaging the first really serious consideration of the Second Amendment in the modern era take as the sense of “We the People” about whether our current armed state is an unfortunate anachronism or a peculiar but core part of our Americanism?<sup>17</sup>

Some things can be said for certain. Over a wide range of controversies utilizing divergent constitutional models, we have erred in favor of rights and held rights reductionists to a higher burden. This suggests that as we scour our constitutional politics for signals about gun rights, the burden should fall on rights reductionists to show by some margin that America has embraced their agenda.<sup>18</sup>

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<sup>16</sup> How does one perform the foundationalist exercise where there seems to be such wide variation by region and over time about the range of plausible foundational rights? How sure can we be that we have it right if the right we preserve seems mainly relevant to people who lived twenty-five generations ago, or where there are vast and different views about the right as we move from an Upper West Side apartment to a ridge top cabin on the western border of Virginia? The Court had a chance to clarify the Second Amendment in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). See the discussion in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 251 (1983). Perhaps the Court was waiting for the people to speak. And if 10,000 other communities had followed Morton Grove, we might say that they had.

<sup>17</sup> A problematic thing about constitutional moments is that they are more loosely defined than formal constitutional amendments. They appear most clearly in the eye of the beholder. It is a bit too exclusive to say that only the constitutional priesthood can, or should be allowed to identify them. This view is elitist and undemocratic. But it is messy and unpredictable to permit just any old citizen to start mining for constitutional moments. That, however, appears to be an inevitable characteristic of the theory. Somewhere, someone will see it as a vehicle to do something its developers dislike. How the developers react is a test of whether we should take the theory seriously.

<sup>18</sup> Judge Cummings makes the point in context, in an opinion that led the Fifth Circuit to break ranks and declare that the Second Amendment guarantees an individual right.

As Professor Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. Protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights has significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—consequences which we take for granted in defending the Bill of Rights. This mind-set changes, however, when the Second Amendment is concerned. “Cost-benefit” analysis, rightly or wrongly, has become viewed as a “conservative” weapon to attack liberal rights. Yet the tables are strikingly

This of course ignores a complicated reality. Many of us reject the commitment to rights expansion when it comes to gun rights.<sup>19</sup> Many believe guns are just different; that their costs are too high and that the prefatory language in the Second Amendment makes it unique. But that is too simplistic.

Both the Framing and the Reconstruction offer more than plausible evidence that an individual right has been protected explicitly through the Second Amendment.<sup>20</sup> These claims are not burdened by process objections and thus, while contestable, are still less controversial than Ackerman's claim about the constitutional implications of the New Deal. A great deal of the "standard model"<sup>21</sup> scholarship on the Second Amendment is grounded on the evidence from these two periods.<sup>22</sup> This scholarship has even convinced some longtime

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turned when the Second Amendment comes into play. Here "conservatives" argue in effect that social costs are irrelevant and "liberals" argue for a notion of the "living Constitution" and "changed circumstances" that would have the practical consequence of erasing the Second Amendment from the Constitution.

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Thus, concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights in the Constitution. The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights.

United States v. Emerson, 46 F. Supp. 2d 598, 609-10 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001). See also Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments*, 57 OHIO ST. L.J. 1555, 1580-83 (1996).

<sup>19</sup> Former ACLU national board member Alan Dershowitz, who admits that he "hates" guns and wishes to see the Second Amendment repealed, nevertheless warns:

Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard don't see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like.

Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995) (quoting telephone interviews with Alan Dershowitz, Law Professor at Harvard University (May 3-4, 1994)).

<sup>20</sup> See *infra* note 22.

<sup>21</sup> Glenn Reynolds elaborates the "standard model" in Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-88 (1995).

<sup>22</sup> See, e.g., Office of Legal Counsel, Dep't of Justice, *Memorandum Opinion for the Att'y Gen.: Whether the Second Amendment Secures an Individual Right* 48, 99-101 (Aug. 24, 2004), <http://www.usdoj.gov/olc/secondamendment2.pdf> [hereinafter DOJ Memorandum].



skeptics<sup>23</sup> that the Second Amendment was intended to protect an individual right. The United States Government, based substantially on this scholarship, also has concluded that the Second Amendment guarantees an individual right.<sup>24</sup>

True, there is opposition to the standard model. The lower federal courts, with a few exceptions,<sup>25</sup> have advanced collective rights views that basically ignore both sides of the scholarly debate.<sup>26</sup> It is for exactly this reason that some will object it is error to place the burden of proof, so to speak, on the rights reductionists.

But before we get mired down over allocating the burden, let us consider for a moment what kind of story might satisfy it. Consider how Americans might speak in support of rights reduction.

Suppose Congress voted in a gun ban that was resisted by conservatives whose obstructionism got them voted out of office and caused them to lose control of the House. Suppose states started to amend their constitutions to permit legislation barring private possession of firearms. Suppose that state after state also started to enact legislation that banned the possession of the type of firearms most used in crime, handguns.<sup>27</sup> Layer it with detail and have it proceed over a generation or so and this starts to compete with Ackerman's

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<sup>23</sup> For a critique of Laurence Tribe's shift of opinion, see Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 441-42 (2001). See also Akhil Reed Amar & Laurence H. Tribe, Op-Ed., *Well Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31; Collin Levey, *Rule of Law: Liberals Have Second Thoughts on the Second Amendment*, WALL ST. J., Nov. 22, 1999, at A23.

<sup>24</sup> See DOJ Memorandum, *supra* note 22, at 105.

<sup>25</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1065-66, 1068 nn.19-23, 1069 & n.24, 1070, 1071 & n.27, 1072 (9th Cir. 2002) (cert. denied, 540 U.S. 1046 (2003) (using collective rights scholarship to reject the individual rights view); *United States v. Emerson*, 270 F.3d 203, 220-221, 220 n.12, 255-59 (5th Cir. 2001) (using standard model scholarship to endorse individual rights view).

<sup>26</sup> See, e.g., *Silveira*, 312 F.3d at 1063-64.

Like the other courts, we reached our [earlier] conclusion regarding the Second Amendment's scope largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate . . . *Miller*, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion.

*Id.*

<sup>27</sup> This is the open agenda of the Coalition to Ban Handguns. The coalition includes numerous national organizations like the ACLU, numerous religious groups and the YWCA. See, e.g., MICHAEL K. BEARD & SAMUEL S. FIELDS, NAT'L COAL. TO BAN HANDGUNS, STATEMENT ON THE SECOND AMENDMENT, S. REP. NO. 88-618, at 27 (2d Sess. 1982), available at <http://www.constitution.org/mil/rkba1982.htm>.

story of a transformative New Deal. With this much done, many of us, and the Court especially might fairly say, that on the question of guns, America had said something important and perhaps decisive.

It turns out in any case, that the rights reductionists cannot satisfy this burden. What I have sketched here is the story of rights affirmation that I will elaborate in three parts. First, Section II will track the development of gun rights in forty-four state constitutions. Section III will present the recent wave of state legislation mandating nondiscretionary licenses to carry concealed firearms. Section IV will offer a short history of our modern debate about private firearms with attention to the rise and fall of the handgun prohibition movement.

## II. STATE CONSTITUTIONS: A NATIONAL REFERENDUM ON THE INDIVIDUAL RIGHT TO ARMS?

Before it was uncovered that he fabricated some of his data,<sup>28</sup> Michael Bellesiles won a Bancroft prize with a book<sup>29</sup> that supported what many in the academy and elsewhere earnestly believe: that the whole notion of an individual right to arms is a recent creation of the NRA;<sup>30</sup> that historically the connection between Americans and their guns is more fiction than fact.<sup>31</sup> Bellesiles claimed Americans never really had a lot of private firearms and the ones they had didn't work very well.<sup>32</sup> This implied no strong expectation of an individual right to have them. The theory stalled because some of the records Bellesiles claimed to have examined were destroyed

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<sup>28</sup> Writing for the San Francisco Chronicle, Sam McManis captures the story. Sam McManis, *A History Lesson for Historian: Archivist Refutes Claim of Prize-Winning Author*, S.F. CHRON., March 2, 2002, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/03/02/MN13172.DTL>. See also Wikipedia, Michael A. Bellesiles, [http://en.wikipedia.org/wiki/Michael\\_Bellesiles](http://en.wikipedia.org/wiki/Michael_Bellesiles) (last visited Feb. 8, 2006) (licensing information available at <http://www.gnu.org/copyleft/fdl.html>).

<sup>29</sup> MICHAEL BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* 9 (1st ed. 2000).

<sup>30</sup> *Id.* at 9. Sam McManis provides a quote from the *New York Review of Books* that reflects some of the sentiment. "Bellesiles will have done us all a service if his book reduces the credibility of the fanatics who endow the Founding Fathers with posthumous membership in what has become a cult of the gun." McManis, *supra* note 28 (quoting Edmund S. Morgan, *In Love with Guns*, N.Y. REV. BOOKS, Oct. 19, 2000, at 30).

<sup>31</sup> Bellesiles, *supra* note 29, at 5.

<sup>32</sup> *Id.* at 10-14.

before he was born.<sup>33</sup> But for a quick moment his claim resonated strongly.

If we were seeking a glimpse into the shadowy past, trying to shed light on some mysterious but long expired fever for private firearms, the fascination with Bellesiles would be easier to explain. But why put such stock in what seems missing from musty estate records (fabricated or not) in the face of a solid two centuries of state constitutional activity enshrining an individual right to arms in language that brooks no debate.

Our forty-four state constitutional arms guarantees have several implications.<sup>34</sup> They say something about what the framers of the Second Amendment might have intended. Many state constitutions use language similar or identical to the federal Second Amendment, in a context where it is not plausible to say that the right of the people really means the right of the states.<sup>35</sup> Eugene Volokh argues that the prefatory language of the Amendment, was a quite common form at the time of the Framing and shows how similar language appears in various state constitutions.<sup>36</sup> But within Ackerman's Dualism, the state constitutions do something more. They answer the criticism that the Second Amendment is an anachronism<sup>37</sup> at a level that transcends interminable policy debate.

I will examine four eras of state constitutional enactments. First, the era of the Framing. Second, the nineteenth century before the civil war—post revolutionary enactments that suggest something about the common understanding of the Second Amendment by citizens one or two generations removed from its drafting. Third, the nineteenth century post civil war. And last, the modern era from the turn of the twentieth century forward.

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<sup>33</sup> Jon Wiener, *Fire at Will*, NATION, Nov. 4, 2002, at 28, available at <http://www.thenation.com/docprint.mhtml?i=20021104&s=wiener>.

<sup>34</sup> NRA-ILA, Issues, Did You Know?, *State Constitutions And The Right To Keep And Bear Arms*, <http://www.nraila.org/Issues/DidYouKnow/Default.aspx?ID=20> [hereinafter NRA State Rights] (last visited Feb. 8, 2006).

<sup>35</sup> The fullest and most recent exposition of the states' rights view of the Second Amendment appears in *Silveira*, 312 F.3d at 1075-87.

<sup>36</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793-95, 814-21 (1998).

<sup>37</sup> See, e.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 554 (1991).

One thing that distinguishes the state constitutions from Ackerman's New Deal signals is they are not exigent acts. The New Deal may have been transformative. But was the affirmation of FDR's policies an exercise of considered judgment by the polity? Or was it a floundering grasp by voters who were hungry, desperate and afraid? In contract law the concept of duress invalidates decisions made under such pressure. Politics is different naturally. But in a theory that openly dismisses the procedural safeguards of formalism, exigency is one more thing to worry about.

Constitutional politics in reaction to crisis defines Ackerman's New Deal narrative. The state right to arms provisions stand in stark contrast. They offer the safeguards of formalism through compliance with the state amendment process and their span of implementation presents more or less continuous consideration of the private firearms question. A practical advantage is that the Court already has demonstrated its willingness to use state constitutional provisions to illuminate federal constitutional questions.<sup>38</sup>

Of the forty-four state constitutional provisions currently guaranteeing a right to arms of some sort, only three are products exclusively of the eighteenth century. From the beginning of the republic, continuously through to today, the right to arms has been affirmed in state constitutions. The counter trend, flat gun prohibition, is rare, appearing sporadically at the municipal level<sup>39</sup> and in discrete ways mainly in the few states whose constitutions do not protect a right to private firearms.<sup>40</sup>

For the most part I will proceed chronologically. However, to start, I will present in some detail the most recent of the state guarantees: Wisconsin's 1998 Constitutional Amendment declaring, "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."<sup>41</sup>

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<sup>38</sup> See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (state constitutions used in interpretation of cruel and unusual punishment); *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (state constitutions used to interpret guarantee against double jeopardy).

<sup>39</sup> See *infra* notes 365-66.

<sup>40</sup> See *infra* notes 370-71.

<sup>41</sup> WIS. CONST. art. I, § 25.

A. *The Case of Wisconsin*

Maybe it is no surprise that on the threshold of the twenty-first century the wild and open state of Alaska adopted a state constitutional right to arms.<sup>42</sup> The same insight might explain West Virginia's enactment of a similar guarantee in 1986.<sup>43</sup> More on these two later. But how to explain Wisconsin—home to some of the most liberal enclaves in America and a center of progressive politics, the college town of Madison?

Indeed it was in Madison that we find the catalyst for it all—a 1993 ballot referendum that asked voters whether handguns should be banned.<sup>44</sup> It was the beginning of a story that might affirm the instincts of a Justice sitting in Washington, finding ambiguity in the Second Amendment, and wondering whether America has spoken loudly enough in favor of gun prohibition that arguments about an individual right to arms can be tossed confidently onto the scrap heap.

And what if it caught on? Madison times a thousand. “Madison” moving through the state legislatures—ten, twenty, forty and more states rejecting as arcane their dated right to arms guarantees and banning private ownership of some or all classes of firearms. It would be a powerful constitutional moment. And it might allow our pensive Justice to reject individual rights claims with the confidence that her decision reflected the values and tacit consent of a comfortable majority of Americans. Within Ackerman's model, it would make her decision closer to being right.

So it is telling that the story of the Madison referendum spins out quite differently. Madison voters (yes even Madison voters) rejected the prohibitionists' agenda. The handgun ban was voted down in one of the most “progressive” places in the country.<sup>45</sup>

The people were obviously misguided, or so thought the Madison Common Council who within the next year enacted by a one vote margin, an ordinance that outlawed handguns with

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<sup>42</sup> ALASKA CONST. art. I, § 19.

<sup>43</sup> W. VA. CONST. art. III, § 22.

<sup>44</sup> See Christopher R. McFadden, *The Wisconsin Bear Arms Amendment and the Case Against an Absolute Prohibition on Carrying Concealed Weapons*, 19 N. ILL. U. L. REV. 709, 714 (1999).

<sup>45</sup> *Id.* See also Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249, 300 & n.276 (2001).

barrels of less than four inches and required all other guns to be locked-up in a way that eliminated their utility for self defense.<sup>46</sup> Several other municipalities around the state proposed similar provisions.<sup>47</sup> Referendum failure or not, the ball was rolling . . . right up to the crest of the first small hill and then swiftly back the other way.

The Madison-style restrictions touched off a firestorm of opposition. In 1994, “elections swept into the legislature numerous pro-gun candidates who were angered and emboldened by various cities’ attempts to prohibit citizens from keeping or carrying handguns completely.”<sup>48</sup> The next session saw the introduction of a constitutional amendment protecting the right to keep and bear arms.

Wisconsin constitutional amendments must be approved in two consecutive legislative sessions before being submitted to the electorate. In 1995 and 1997, the Wisconsin legislature twice approved an amendment protecting an individual right to bear arms.<sup>49</sup> In 1998 Wisconsin voters were asked to adopt or reject a state constitutional protection of private firearms. On November 3, 1998, the people of Wisconsin expanded their Constitution’s Declaration of Rights—something they have done only three times before.<sup>50</sup> Both in the legislature and the voting booth, support for the amendment was resounding.<sup>51</sup> When the dust settled, seventy-four percent of Wisconsin voters had approved the Amendment establishing a constitutional right to keep and bear arms.<sup>52</sup>

Prohibitionists failed to make their case in Wisconsin, indeed they suffered a bit of a setback. “We the people,” at least a clutch of them in the upper Midwest, voted to affirm

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<sup>46</sup> McFadden, *supra* note 44, at 714.

<sup>47</sup> *Id.* (citing *Keeping the Gun Lobby in Check*, MILWAUKEE J. & SENTINEL, Nov. 14, 1994, at A6). Binding referenda banning handguns was defeated in Milwaukee and Kenosha. *Id.* at 714 n.26. An advisory referenda was approved in Shorwood. *Id.*

<sup>48</sup> *Id.* at 709.

<sup>49</sup> Monks, *supra* note 45, at 250 n.10.

<sup>50</sup> *Id.* at 249.

<sup>51</sup> *See id.* at 250 n.10. Jeffrey Monks gives the details:

In the first legislative session, the Assembly approved the proposal 79-19 and the Senate approved it 28-5. During the next session, the Assembly voted to approve the amendment 84-13 and the Senate voted 28-4 in favor. The voters similarly approved the amendment by a wide margin. The final vote on the amendment was: “YES” - 1,196,622 (74%); “NO” - 415,911 (26%).

*Id.* at 250 n.10 (citations omitted).

<sup>52</sup> McFadden, *supra* note 44, at 709.

gun rights. Our tired old Justice sitting in Washington now has a bit of data. But there is more.

*B. The Other Forty-Three*

The message of Wisconsin is repeated again and again<sup>53</sup> across the nation as Americans vote in every era, under every circumstance, against a government monopoly on arms and in favor (costs and all) of private firearms.<sup>54</sup>

Two revolutionary era constitutions are quite clear articulations of an individual right to arms. They tempt the conclusion that our modern debate about the meaning and mystery of the Second Amendment is merely an accident of semantics. Instead of prefatory language referencing the militia, followed by recognition of the right of the people, Madison would have saved us much trouble by offering something simple like Pennsylvania's "The right of the citizens to bear arms in defence of themselves, and the State shall not be questioned."<sup>55</sup>

Least we conclude that Pennsylvanians of the era were confused or not seriously thinking about the whole militia/people/states-rights puzzle, there is the 1776 Pennsylvania Declaration of Rights that is less concise than the 1790 Constitution, but richer in detail.

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.<sup>56</sup>

This is less poetic, less intriguing than Madison's language, but workman-like and clear about the people's right to arms for defense of themselves.

Vermont's Constitution tracks the Pennsylvania Declaration of Rights in all respects except punctuation.

That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace

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<sup>53</sup> Two states, Massachusetts and Kansas fall out of the count. *See infra* notes 58-72 and accompanying text.

<sup>54</sup> The Massachusetts and Kansas Constitutions discuss a right to arms, but their courts have concluded the right does not extend to individual citizens. *See infra* notes 58-72 and accompanying text.

<sup>55</sup> PA. CONST. of 1790, art. IX, § 21.

<sup>56</sup> PA. CONST. of 1776, Declaration of Rights, art. XIII.

are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.<sup>57</sup>

Massachusetts followed in 1780 with similar language and a notable change. Rather than a right to arms for defense of themselves and the state, Massachusetts declares,

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.<sup>58</sup>

In the nineteenth century, this language was interpreted at least twice to guarantee an individual right.<sup>59</sup> But in 1976, the Massachusetts Supreme Court took a different view, ruling that the language was basically superfluous, just an affirmation of the state's militia powers.<sup>60</sup> Of the forty-four state constitutional arms guarantees,<sup>61</sup> Massachusetts joins one other state, Kansas, in construing its arms guarantee to protect less than an individual right.

The collective rights interpretation in Kansas is notable because many claim it is the first appearance of the "collective rights" interpretation in a judicial decision.<sup>62</sup> The Kansas right to arms provision was adopted in 1859: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."<sup>63</sup>

In 1905 the Kansas Supreme court, in *City of Salina v. Blaksley*,<sup>64</sup> rejected a challenge to an ordinance that punished

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<sup>57</sup> VT. CONST. of 1777, ch. I, art. 15.

<sup>58</sup> MASS. CONST. of 1780, pt. 1, art. 17.

<sup>59</sup> *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825) (right to arms is individual); *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) (right applies to ordinary citizens but does not protect armed parades).

<sup>60</sup> *Commonwealth v. Davis*, 343 N.E. 2d 847, 889 (Mass. 1976). Outside the federal constitutional context, a collective rights interpretation posits the state's protection of the state's right to arms from the state. This seems like an absurdity but in Massachusetts it is a reality.

<sup>61</sup> NRA State Rights, *supra* note 34.

<sup>62</sup> See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1510-12 (1998).

<sup>63</sup> KAN. CONST. Bill of Rights, § 4.

<sup>64</sup> 83 P. 619 (Kan. 1905); Robert Dowlut argues in detail that the reasoning of *Blaksley* is flawed and not supported by the cited sources. See Robert Dowlut & Janet



carrying of deadly weapons, ruling that the state right to arms “refers to the people as a collective body. . . . Individual rights are not considered in this section.”<sup>65</sup>

Compared to *Blaksley*, the Massachusetts reinterpretation is easier to criticize. The *Blaksley* Court might well have been pulled away from an individual rights interpretation by an institutional memory of “Bleeding Kansas,”<sup>66</sup> and in any case was not stepping on precedent. The Massachusetts Court, however, had to overrule prior individual rights interpretations that were rendered during the same era the constitutional language was passed.

Still, if the Massachusetts-style reinterpretation or the Kansas result had been achieved legislatively or by referendum and repeated in forty or so other states, in the midst of public outrage over the costs of an armed citizenry, it would be powerful evidence of a sea change in the constitutional politics of gun rights. Our Washington jurist with her ear to the ground might fairly detect that the people had said something decidedly unfriendly about private firearms. But within the Dualist model, without more, these two efforts suggest nothing more than the preferences of a few dozen old lawyers.

True the citizens of Kansas and Massachusetts did not rise up and clarify things as Mainers did in response to a similar attempt by some of their judges.<sup>67</sup> And as we will see later, Massachusetts joins the handful of states without right to arms provisions, in enacting some of the most stringent gun control measures in the country. But even those efforts fall short of the program of prohibition to which a robust Second Amendment would be the only barrier and generally square with the sentiment of most Americans that they have a Constitutional right to keep and bear arms.<sup>68</sup>

Kentucky addressed the gun question four times over the course of a century, starting with the 1792 declaration, “The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.”<sup>69</sup> This

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A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 187-191 (1982).

<sup>65</sup> *Id.* at 620.

<sup>66</sup> See generally JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 145-69 (1988) (describing the bloodletting over whether Kansas would be slave or free).

<sup>67</sup> See *infra* notes 111-14.

<sup>68</sup> See *infra* note 394.

<sup>69</sup> KY. CONST. of 1792, art. XII, § 23.

language was adopted again in 1799.<sup>70</sup> By 1850 a provision was added permitting the General Assembly to enact laws to prevent carrying of concealed weapons.<sup>71</sup> The current version reads:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties . . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.<sup>72</sup>

Tennessee closed the eighteenth century declaring in 1796, “That the freemen of this State have a right to keep and bear arms for their common defence.”<sup>73</sup> The current provision, enacted in 1870 holds, “that the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.”<sup>74</sup> The “common defence” language was interpreted in 1840 to mean that the keeping of arms was for militia purposes.<sup>75</sup> In later elaborations Tennessee courts held that the militia purpose was consistent with the right of citizens to have ordinary firearms for non-militia purposes.<sup>76</sup> And in 1866 a statute permitting confiscation of individual firearms was deemed a violation of the Tennessee guarantee.<sup>77</sup>

Enjoying both hindsight and firsthand knowledge of the founding era, citizens of the early nineteenth century began to fashion their state constitutions to guarantee an armed citizenry. Connecticut’s “[e]very citizen has a right to bear arms in defense of himself and the State,”<sup>78</sup> leaves little room for the collective rights arguments that afflict the modern debate about the Second Amendment. Connecticut it seems,

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<sup>70</sup> KY. CONST. of 1799, art. X, § 23.

<sup>71</sup> KY. CONST. of 1850, art. X, § 23.

<sup>72</sup> KY. CONST. Bill of Rights, § 1.

<sup>73</sup> TENN. CONST. of 1796, art. XI, § 26.

<sup>74</sup> TENN. CONST. of 1870, art. I, §26.

<sup>75</sup> *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 157 (1840).

<sup>76</sup> *See Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178-79 (1871) (the right to arms includes the right to purchase and maintain them and thus carry to and from home; the right to keep includes the right to use for ordinary purposes “usual in the country . . . limited by the duties of a good citizen in times of peace;” specifically protecting “the rifle of all descriptions, the shot gun, the musket, and repeater”).

<sup>77</sup> *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 218 (1866).

<sup>78</sup> CONN. CONST. art. I, § 15.

borrowed from Mississippi, which used duplicate language in its guarantee of an individual right to arms, first in 1817 and again in 1832. By 1868, it became an entirely individual right with the reference to “defense of the state” dropped.<sup>79</sup> The current version, enacted in 1890, declares: “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.”<sup>80</sup>

Indiana’s original provision was adopted in 1816.<sup>81</sup> The current version, enacted in 1851, proclaims, “The people shall have a right to bear arms, for the defense of themselves and the State.”<sup>82</sup> Alabama recognized a right to arms in 1819, declaring, “Every citizen has a right to bear arms in defence of himself and the State.”<sup>83</sup> Michigan is equally straightforward: “Every person has a right to bear arms for the defence of himself and the state.”<sup>84</sup> Missouri followed in 1820 with language that bundles a right to arms within the basic rights of citizenship.

That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms, in defense of themselves and of the state, cannot be questioned.<sup>85</sup>

Toward the middle of the nineteenth century, Rhode Island’s Constitution tracks almost exactly the parodied version of the federal Second Amendment. In a cartoon that periodically reappears, a bumpkin wearing an NRA cap is sitting on a stool at the eye doctor’s office. The full text of the

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<sup>79</sup> 1817: “Every citizen has a right to bear arms in defence of himself and the State.” MISS. CONST. of 1817, art. I, § 23. 1832: “Every citizen has a right to bear arms in defence of himself and of the state.” MISS. CONST. of 1832, art. I, § 23. 1868: “All persons shall have a right to keep and bear arms for their defence.” MISS. CONST. of 1868, art. I, § 15.

<sup>80</sup> MISS. CONST. art. III, § 12.

<sup>81</sup> “That the people have a right to bear arms for the defence of themselves, and the state; and that the military shall be kept in strict subordination to the civil power.” IND. CONST. of 1816, art. I, § 20.

<sup>82</sup> IND. CONST. art. I, § 32.

<sup>83</sup> ALA. CONST. of 1819, art. I, § 23. The spelling of “defence” was changed to “defense” in 1901.

<sup>84</sup> MICH. CONST. of 1835, art. I, § 6.

<sup>85</sup> MO. CONST. of 1820, art. XIII, § 3.

Second Amendment<sup>86</sup> is on the chart in front of him. Wide-eyed, he confesses to the doc, “I can only see the second part.”<sup>87</sup> That second part reads exactly like Rhode Island’s 1842 guarantee: “The right of the people to keep and bear arms shall not be infringed.”<sup>88</sup>

Now well beyond the hot-blooded revolutionary era, but on the cusp of the civil war, Americans continued to enshrine arms guarantees in their constitutions. Ohio in 1851,<sup>89</sup> Oregon in 1857,<sup>90</sup> Kansas in 1859<sup>91</sup> (interpreted as a collective right in 1901).<sup>92</sup>

A bloody civil war, renegade rebel bands, dramatic changes in the federal Constitution and enduring bitterness prefigured America’s move into the modern era. The last third of the nineteenth century brought dramatic adjustment of the American social contract. Changes were made to the Constitution. New rights were established for freedmen. Federal power expanded. It was a prime opportunity to reassess the distribution of the machinery of violence. It was a period when legislators and commentators made clear their views that the federal Constitution guaranteed an individual right to arms.<sup>93</sup> And one when states continued to establish,

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<sup>86</sup> “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>87</sup> Cartoon on file with author.

<sup>88</sup> R.I. CONST. art. I, § 22.

<sup>89</sup> “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” OHIO CONST. of 1851, art. I, § 4.

This affirms and modifies slightly the 1802 rendition which reads: “That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power.” OHIO CONST. of 1802, art. VIII, § 20.

<sup>90</sup> “The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” OR. CONST. art. I, § 27.

<sup>91</sup> “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.” KAN. CONST. art. I, § 4 (adopted 1859).

<sup>92</sup> See *City of Salina v. Blaksley*, 83 P. 619, 620 (1905), for a discussion of the collective rights interpretation.

<sup>93</sup> See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-06 (1992); Stephen Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 432-34 (1995); David B.

reaffirm or strengthen their constitutional protections of an armed citizenry.

Arkansas stripped the racist and sexist limitations from its original guarantee and nominally extended the right to all citizens in 1868.<sup>94</sup> In 1870 Tennessee reaffirmed a guarantee that originated in the eighteenth century.<sup>95</sup> Texas considered the question four times in the nineteenth century, establishing its current provision in 1876.<sup>96</sup> Colorado's guarantee appeared the same year.<sup>97</sup> Georgia's current guarantee dates to 1877 and establishes an individual right using operative language that tracks exactly the federal Second Amendment.<sup>98</sup> In 1890 Mississippi reaffirmed an arms guarantee that originated in the early nineteenth century.<sup>99</sup> In 1895, South Carolina

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Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1433-47 (1998).

<sup>94</sup> "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. of 1868, art. I, § 5. This replaced the commitment "that the free white men of this State shall have a right to keep and to bear arms for their common defense." ARK. CONST. of 1836, art. II, § 21.

<sup>95</sup> "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

This language modifies the earlier guarantee enacted first in 1796 and affirmed in 1834, "That the free white men of this State have a right to keep and bear arms for their common defence." TENN. CONST. of 1796, art. XI, § 26, *available at* <http://hclp.org/1796.html>; TENN. CONST. of 1834, art. I, § 26, *available at* <http://hclp.org/1835.html>.

<sup>96</sup> "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23. This was preceded by similar provisions in 1836, 1845 and 1868. TEX. CONST. of 1868, art. I, § 13, *available at* <http://tarlton.law.utexas.edu/constitutions/text/hART01.html>; TEX. CONST. OF 1845, art. I, § 13, *available at* <http://tarlton.law.utexas.edu/constitutions/text/DART01.html>; TEX. CONST. OF 1836, Declaration of Rights, art. XIV, *available at* <http://tarlton.law.utexas.edu/constitutions/text/ccRights.html>.

<sup>97</sup> "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.

<sup>98</sup> "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, ¶ VIII. This was preceded by a provision in 1865 that is identical to the federal Second Amendment and another in 1868 that also tracks the Second Amendment but adds, "but the general assembly shall have power to prescribe by law the manner in which arms may be borne." GA. CONST. of 1865, art. I, § 4, *available at* <http://www.cviog.uga.edu/Projects/gainfo/con1865.htm>; GA. CONST. of 1868, art. I, § 14, *available at* <http://www.cviog.uga.edu/Projects/gainfo/con1868.htm>.

<sup>99</sup> "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. 3, § 12. The earliest rendition of the Mississippi guarantee dates to 1817: "Every citizen has a right to bear arms in defence of himself

reaffirmed its reconstruction-era guarantee.<sup>100</sup> Montana,<sup>101</sup> South Dakota,<sup>102</sup> Wyoming<sup>103</sup> and Washington<sup>104</sup> closed the century, all establishing arms guarantees in 1889.

It is not, then, from thin air that the United States Supreme Court in the 1890s found and delineated a constitutional privilege of self defense in twelve cases that center on citizens using firearms to thwart attackers. The idea was all around them.<sup>105</sup>

So far, we still are talking about constitutional enactments at least a century old. As we will see, their currency has been tested and their protections rendered vital in contemporary debates about concealed carry licensing.<sup>106</sup> But there is more. The anachronism argument deflates entirely as we approach the state constitutional provisions guaranteeing an individual right to arms in the modern era.

But there is something to consider first. Notable by its absence is any state action the other way. If the individual arms guarantees mentioned so far were indeed considered arcane throwbacks, part of the cause of avoidable carnage, then

and the State.” MISS. CONST. of 1817, art. I, § 23, *available at* <http://mshistory.k12.ms.us/features/feature3/1817constitution.html>. This is reaffirmed in 1832. In 1868, the language is changed to, “All persons shall have a right to keep and bear arms for their defence.” MISS. CONST. of 1868, art. I, § 15, *available at* [http://mshistory.k12.ms.us/features/feature8/1868\\_state\\_constitution.html](http://mshistory.k12.ms.us/features/feature8/1868_state_constitution.html).

<sup>100</sup> “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it.” S.C. CONST. of 1895, art. I, § 26. The latter part duplicates the earlier version from 1868. S.C. CONST. of 1868, art. I, § 28.

<sup>101</sup> “The right of any person to keep or bear arms in defense of his own home, person and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.” MONT. CONST. of 1889, art. III, § 13.

<sup>102</sup> “The right of the citizens to bear arms in defense of themselves and the state shall not be denied.” S. D. CONST. art. VI, § 24.

<sup>103</sup> “The right of citizens to bear arms in defense of themselves and of the state shall not be denied.” WYO. CONST. art. I, § 24.

<sup>104</sup> “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.” WASH. CONST. art. I, §24.

<sup>105</sup> *See, e.g.,* Beard v. United States, 158 U.S. 550, 564 (1895) (A victim of violent crime “[is] entitled to stand his ground and meet any attack made upon him with a deadly weapon.”). *See generally* David B. Kopel, *The Self-Defense Cases: How the Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293 (2000).

<sup>106</sup> *See supra* Section II.A.

we might expect modern states to begin removing these vestigial provisions or at least having serious conversations about it. State constitutional amendments removing outdated arms guarantees would suggest resolve to curtail individual access to firearms. And similarly, modern amendments plainly establishing and protecting an individual right to arms, appearing in state after state, more or less continuously since the beginning of the republic, show an affirmation of the right. Quite a long moment indeed.

We already have discussed Wisconsin's 1998 constitutional amendment.<sup>107</sup> It replaced Alaska's as the most recent of the modern arms guarantees. Alaska amended its original 1959 guarantee in 1994. The first sentence of Alaska's 1959 enactment duplicated the federal guarantee.<sup>108</sup> The provision was amended in 1994 to add, "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."<sup>109</sup> Preceding Alaska was Nebraska in 1988, with language that seems to anticipate and dispense with every possible collective rights interpretation:

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.<sup>110</sup>

The over-engineered Nebraska provision perhaps anticipated the difficulty that prompted Mainers in 1987 to amend their constitution. Maine's original guarantee, enacted in 1819, provided, "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."<sup>111</sup> In an environment where the "right of the people" is construed by lower federal courts as the right of

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<sup>107</sup> See *supra* text accompanying notes 44-52.

<sup>108</sup> "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." ALASKA CONST. art. I, § 19 (amended 1994).

<sup>109</sup> ALASKA CONST. art. I, § 19.

<sup>110</sup> NEB. CONST. art. I, § 1.

<sup>111</sup> ME. CONST. art. I, § 16 (amended 1987).

states,<sup>112</sup> it should not be surprising that judges in Maine interpreted the “for the common defense language” to connote a collective right and thus no right at all to anyone in particular.<sup>113</sup> Mainers reacted with Yankee efficiency and in 1987 amended the language to read simply, “Every citizen has a right to keep and bear arms and this right shall never be questioned.”<sup>114</sup>

Alaska, Nebraska and Maine. Not exactly centers of urban sophistication. There is the temptation to dismiss these modern guarantees as the work of rural, fly-over states whose wide horizons give them the flexibility to make such mistakes. This theory is confounded when we consider Delaware’s 1987 enactment. “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.”<sup>115</sup>

Introduce Florida, one of our fastest growing and most populous states, and the fly-over dismissal becomes impossible to sustain. Florida is instructive because it first granted constitutional protection of private firearms in 1838 and last visited the issue in 1990. In the interim Floridians amended their constitutional right to arms language four times.

The original provision was explicitly racist: “That free white men of this State, shall have a right to keep and bear arms, for their common defence.”<sup>116</sup> We might argue in the abstract whether this was an individual rights guarantee. Recall how “common defense” language fueled a collective rights interpretation in Maine. But there was no similar judicial interpretation of Florida’s 1838 provision.

The arms provision dropped out of the Florida Constitution in 1865 and a new one was added in 1868 guaranteeing, “The people shall have the right to bear arms in defence of themselves and the lawful authority of the State.”<sup>117</sup>

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<sup>112</sup> The Ninth Circuit decision in *Silveira v. Lockyer*, 312 F3d. 1052 (9th Cir. 2002) is emblematic of these decisions and one of the only such cases to offer a detailed analysis of the issue.

<sup>113</sup> *State v. Friel*, 508 A.2d 123, 125 (Me. 1986).

<sup>114</sup> ME. CONST. art. I, § 16.

<sup>115</sup> DEL. CONST. art. I, § 20.

<sup>116</sup> FLA. CONST. of 1838, art. I, § 21. The 1865 constitution removed the guarantee. FLA. CONST. of 1865. It reappears and is reaffirmed in 1868, 1885, and 1968. FLA. CONST. art. I, § 8 (amended 1990); FLA. CONST. of 1885, art. I, § 20; FLA. CONST. of 1868, art. I, § 22. The basic right of the people “to bear arms in defence of themselves and of the lawful authority of the state” is established in 1868 with embellishment continuing through to the current form. *Id.*; FLA. CONST. art. I, § 8(a).

<sup>117</sup> FLA. CONST. of 1868, art. I, § 22; FLA. CONST. of 1865.



The next change clarified that the right was not absolute. “The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may proscribe the manner in which they may be borne.”<sup>118</sup> This language governed until 1968 when the qualifying language was changed slightly. “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law.*”<sup>119</sup> In 1990 this language was carried forward as Section (a) and joined by three new sections dealing with handgun purchases and concealed weapons permits.<sup>120</sup>

New Mexico has addressed the issue twice in the modern era. In 1986 it affirmed and supplemented its 1971 enactment, to add a second sentence. The full passage now provides:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.<sup>121</sup>

West Virginia’s 1986 provision is simple but clear. “A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.”<sup>122</sup>

Then there is Utah two years earlier. Utah is doubly useful. Its original right to arms guarantee was enacted in 1896 in language that if read through the same lense many use to interpret the federal constitution might be deemed an ambiguous guarantee of individual rights. “The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.”<sup>123</sup> Most federal courts are steadfast that “people” in the Second

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<sup>118</sup> FLA. CONST. of 1885, art. I, § 20.

<sup>119</sup> FLA. CONST. art. I, § 8 (amended 1990) (emphasis added).

<sup>120</sup> FLA. CONST. art. I, § 8.

<sup>121</sup> N.M. CONST. art. II, § 6. The 1971 enactment replaced the 1911 provision which read, “The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.” *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971); *State v. Montoya*, 572 P.2d 1270, 1273 (N.M. Ct. App. 1977).

<sup>122</sup> W. VA. CONST. art. III, § 22.

<sup>123</sup> UTAH CONST. art. I, § 6 (amended 1984).

Amendment actually means some sort of governmental unit.<sup>124</sup> Utah's original guarantee might be construed by similar alchemy as protecting less than an individual right. The 1984 amendment eliminates this possibility:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.<sup>125</sup>

Also in 1984, North Dakotans enshrined an individual right to arms in language very similar to the elaborate articulation adopted by Nebraskans in 1988:<sup>126</sup>

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family property and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.<sup>127</sup>

Completing the list of 1980s enactments, Nevada and New Hampshire both established right to arms provisions that unequivocally guaranteed individual rights. The Nevada constitution declares, "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes."<sup>128</sup> New Hampshire makes the same point slightly differently. "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."<sup>129</sup>

State constitutional enactments of the 1970s and earlier will strike different people differently. For newly minted adults, the seventies are part of that obscure period of pre-personal history. But anyone old enough and attentive enough in the 1970s witnessed firsthand an important development in the politics of gun rights.

By the mid-1970s gun prohibition was a bona fide political movement.<sup>130</sup> Just a few years earlier, Democrat

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<sup>124</sup> See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060-61 (9th Cir. 2002).

<sup>125</sup> UTAH CONST. art. I, § 6.

<sup>126</sup> NEB. CONST. art. I, § 1.

<sup>127</sup> N.D. CONST. art. I, § 1.

<sup>128</sup> NEV. CONST. art. I, § 11(1).

<sup>129</sup> N.H. CONST. pt. 1, art. 2-a.

<sup>130</sup> See *infra* Section IV.

candidates for president had joined the National Rifle Association. John F. Kennedy, maybe just for show, was a member.<sup>131</sup> In 1960 candidate Hubert Humphrey courted gun owners citing his personal commitment to the Second Amendment in *Guns* magazine:

Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of the citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, and one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.<sup>132</sup>

We were on the threshold of conversations raising serious threats to gun possession.<sup>133</sup> We were about to endure race riots, the assassinations of two Kennedys and Martin Luther King, Jr. By 1970 we had suffered these collective traumas and had become smart enough to talk about root causes of crime and assign blame broadly.

And still, the 1970s gave us more state constitutional amendments guaranteeing an individual right to arms. The decade started with Illinois' 1970 declaration that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."<sup>134</sup>

In 1971 North Carolina reenacted language as old as the republic and tracking roughly its 1776 Bill of Rights provision.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed

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<sup>131</sup> See Letter from President Kennedy accepting an NRA life membership (Mar. 20, 1961), <http://www.nramemberscouncils.com/jfk-nra1c.shtml>.

<sup>132</sup> Robert J. Cottrol & Raymond T. Diamond, *The Fifth and Auxiliary Right*, 104 YALE L.J. 995, 998 n.10 (1995) (quoting Hubert Humphrey, *Know Your Lawmakers*, GUNS, Feb. 1960, at 4).

<sup>133</sup> See *infra* Section IV.

<sup>134</sup> ILL. CONST. art I, § 22.

weapons, or prevent the General Assembly from enacting penal statutes against that practice.<sup>135</sup>

A growing state with burgeoning urban centers, North Carolina again confounds the fly-over theory. But more than that, it suggests something about the interpretation of the Second Amendment in the Federal Constitution. Deadly weapons were at the center of North Carolina's 1776 Bill of Rights Guarantee:

That the people have a right to bear arms, for defence of the State; and as standing armies in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.<sup>136</sup>

In 1868 this idea was enshrined into Article I of the state's constitution using language obviously borrowed from the Federal Constitution:

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power.<sup>137</sup>

The familiar first clause, say many lower federal courts, is a recipe for protecting states rights.<sup>138</sup> All of the talk about militia's and standing armies suggests a peculiarly military connotation to bearing arms (keeping arms remains a mystery that we must just live with).<sup>139</sup> It is instructive then that in 1875 (and carried through to 1971) North Carolina amended this language to add, "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."<sup>140</sup> Important people evidently thought, even with the militia preface, "right of the people to keep and bear arms"

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<sup>135</sup> N.C. CONST. art I, § 30. *State v. Dawson*, 159 S.E.2d 1, 9 (N.C. 1968) (discussing the history of the enactment).

<sup>136</sup> N.C. CONST. of 1776, A Declaration of Rights, art. XVII.

<sup>137</sup> N.C. CONST. of 1868, art. I, § 24.

<sup>138</sup> See Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 985 (1996).

<sup>139</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1072-73 (9th Cir. 2002).

<sup>140</sup> N.C. CONST. of 1868, art. I, § 24 (1875). The only change wrought by the 1971 constitution was that "General Assembly" replaced "Legislature." N.C. CONST. art. I, § 30.

actually meant individual citizens with their own guns and decided that keeping and bearing should not automatically extend to toting guns concealed. Of course it is also harder at the state level even to suggest as the federal courts have that “people” really means “states.” Odd indeed for a state to protect itself from being disarmed by itself.

Virginia also guaranteed a right to arms in 1971. The guarantee was added to a provision originally enacted in 1776. The eighteenth century language echoed the federal Second Amendment theme, but did not contain an explicit right to arms:

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>141</sup>

The Louisiana Constitution offers a lesson already familiar from our assessment of North Carolina. Its latest enactment was in 1974. “The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.”<sup>142</sup> This language amended the original provision, which tracked the federal guarantee and finished with a qualifier that the individual right did not prevent the legislature from criminalizing carrying of concealed weapons. “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.”<sup>143</sup>

Rounding out the 1970s is Idaho, home of Senator Larry Craig who also sits on the Board of the National Rifle Association. Idaho’s 1978 constitutional enactment (amending the 1889 version)<sup>144</sup> is not surprisingly unambiguous in its protection of individual firearms and quite detailed regarding the legislature’s powers.

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<sup>141</sup> VA. CONST. of 1776, art I, § 13. Virginia’s 1971 constitution added that “the right of the people to keep and bear arms shall not be infringed.” VA. CONST. art. I, § 13.

<sup>142</sup> LA. CONST. art I, § 11.

<sup>143</sup> LA. CONST. of 1879, art. III.

<sup>144</sup> “The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law.” IDAHO CONST. art. I, §11 (amended 1978).

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.<sup>145</sup>

The remaining guarantees span the period from 1907 through 1950. Oklahoma's was the first twentieth century guarantee. Its 1907 enactment, still appearing before the first major federal gun regulation,<sup>146</sup> and well before anyone had charged that the concept of an individual right to arms was a fabrication of the gun lobby.<sup>147</sup> "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."<sup>148</sup>

Arizona's 1912 guarantee was long construed as authorizing open carry of sidearms, a practice that is less prevalent in the state now that concealed carry licenses are easily available.<sup>149</sup> "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."<sup>150</sup>

Missouri last addressed the right to arms in 1945, after first establishing the right in 1820<sup>151</sup> tinkering with the

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<sup>145</sup> IDAHO CONST. art. I, §11.

<sup>146</sup> The National Firearms Act of 1934 is discussed *infra* Section IV.A.

<sup>147</sup> Warren Burger's charge that the individual rights view of the Second Amendment is a "fraud" on the American people perpetrated by the gun lobby is quoted in *Silveira v. Lockyer*, 312 F3d 1052, 1063 (9th Cir. 2002) (quoting Warren E. Burger, *The Right to Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990, at 4).

<sup>148</sup> OKLA. CONST. art. II, § 26.

<sup>149</sup> See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1535-36 (1998); ARIZ. REV. STAT. ANN. § 13-3112 (2001) ("The department of public safety shall issue a permit to carry a concealed weapon to a person who is qualified under this section.")

<sup>150</sup> ARIZ. CONST. art. II, § 26.

<sup>151</sup> "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of

language in 1865<sup>152</sup> and again in 1875.<sup>153</sup> The current guarantee reads: “That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify wearing of concealed weapons.”<sup>154</sup>

Finally, Hawaii, whose modern gun laws are relatively strict,<sup>155</sup> models the federal guarantee: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”<sup>156</sup> In *State v. Mendoza*, the Hawaii Supreme Court explained that interpreting this as both an individual and an collective right would be consistent with other state constitutional provisions.<sup>157</sup>

The modern era constitutions prevent us from dismissing the eighteenth century guarantees as archaic. They are also solid evidence of the currency of the right to arms.<sup>158</sup> Constitutional amendment is hard. Easier of course at the state than at the federal level. But still one of the most difficult things to carry off in a democracy. Indeed, it may be the difficulty of constitutional amendment that fuels Ackerman’s effort to validate the modern regulatory state in the absence of an explicit amendment granting Congress

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grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned.” MO. CONST. of 1820, art. XIII, § 3.

<sup>152</sup> The only change in 1865 from the 1820 rendition is that “lawful authority of the State” replaced “State.” MO. CONST. of 1865, art. I, § 8.

<sup>153</sup> “That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” MO. CONST. of 1875, art. II, § 17.

<sup>154</sup> MO. CONST. art. I, § 23.

<sup>155</sup> For example, Hawaii is one of a handful of states with legislation restricting certain semiautomatic firearms, what it calls “assault pistols,” but not traditional rifles. HAW. REV. STAT. §§ 134-1, 134-8 (1993). The Legal Community Against Violence lists California, Connecticut, Massachusetts, Maryland, Hawaii, New Jersey and New York as having some type of restriction on “assault weapons.” Legal Community Against Violence, Master List of Firearms Policies, <http://www.firearmslawcenter.org/content/masterlist.asp> (last visited Feb. 8, 2006).

<sup>156</sup> HAW. CONST. art. I, § 17.

<sup>157</sup> 920 P.2d 357, 363 n.9 (Haw. 1996).

<sup>158</sup> Over the years these state guarantees have been used to declare a variety of gun restrictions unconstitutional. See, e.g., David B. Kopel, Clayton E. Cramer & Schott G. Hatrup, *A Tale of Three Cities and the Right to Bear Arms in State Courts*, 68 TEMP. L. REV. 1177, 1180 n.12 (1995) (listing twenty cases from the 1820s until the 1980s where various gun control laws were struck down on state constitutional grounds).

authority that seems inconsistent with the idea of limited federal power still enshrined in the text.

Professor Ackerman tells a complex story of a transformative New Deal that ordinary citizens will find difficult to follow. His claim certainly would be stronger had there been some plain language validation of this transformation through state referenda or constitutional amendments in language comprehensible to those outside the constitutional priesthood. So what does it say to our modern Justice, looking honestly for constitutional moments, that seventeen states in the modern era have amended their constitutions to enshrine an individual right to arms in language beyond cavil?

Federal courts and commentators have emptied the corners raising doubts about a federal guarantee to private firearms.<sup>159</sup> It is peculiar that so many work so hard to fashion and expand other individual liberties from the meager constitutional text and when it comes to this one, work just as hard to contract and eviscerate. Chief Justice Burger characterized the individual rights view as a “fraud,” and the popular support for it as testament to dishonest but successful lobbying.<sup>160</sup> But declarations of rights in state constitutions take much more than lobbying. Most of these provisions were enacted long before the NRA came into existence<sup>161</sup> and more of them were enacted before it morphed into a lobbying organization.<sup>162</sup>

Warren Burger’s screed appeared in a *Parade Magazine* interview without citations. Did he truly believe Americans had been duped in to believing they had an individual right to arms? Did he realize they had been enshrining that very thing in their state constitutions more or less continuously since the beginning of the republic? And what of those scholars searching earnestly for constitutional moments. Is all of this state constitutional activity worthy of consideration? Or is it

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<sup>159</sup> See, e.g., Denning, *supra* note 138, at 998-1004; Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4-5 (2000).

<sup>160</sup> Holding forth in *Parade Magazine*, Warren Burger claimed the individual rights view is a fraud. *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002) (quoting Burger, *supra* note 147).

<sup>161</sup> See National Rifle Association, A Brief History of the NRA, <http://www.nrahq.org/history.asp> [hereinafter Brief History of NRA] (last visited Feb. 8, 2006).

<sup>162</sup> See *infra* Section IV.



flawed in some way that only can be detected by the elders of Dualist theory?

Six states, Iowa, Maryland, New Jersey, New York, Minnesota and California, have no constitutional right to arms provisions (although New York has a statutory guarantee and as discussed below Minnesota has enacted the expansive “shall issue” style of license to carry concealed firearms, and Iowa has a liberally administered discretionary concealed carry scheme).<sup>163</sup> Of these, California, Maryland, and New Jersey along with Massachusetts and the District of Columbia have enacted some of the toughest gun control measures in the country.<sup>164</sup> And still these provisions are relatively benign. Washington D.C., Chicago and four of its suburbs, actually prohibit a broad class of firearms.<sup>165</sup> California,<sup>166</sup> Connecticut,<sup>167</sup> Hawaii,<sup>168</sup> Maryland, New Jersey,<sup>169</sup> New York,<sup>170</sup> and Massachusetts<sup>171</sup>—have restrictions on “assault rifles” or “assault pistols” that have invited much tinkering and modification of these obscure machines to meet regulatory guidelines.<sup>172</sup> But practically speaking, with the exception of Washington D.C. and a few Illinois municipalities, the right to arms thrives.<sup>173</sup>

Through war, economic crisis, domestic upheaval, someplace in every generation, Americans have affirmed the right of citizens to keep and bear their private firearms. Franklin Roosevelt won four terms as President and changed the political landscape. But what is a stronger signal, votes for

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<sup>163</sup> See *infra* Section III. Iowa permits concealed carry but retains nominal discretion over whether the permit is issued. *Id.* Minnesota also recently added the right of “hunting and fishing” to its constitution. MINN. CONST. art. 13, § 12. For New York’s statutory guarantee see N.Y. CIV. RIGHTS LAW § 4 (McKinney 2005).

<sup>164</sup> Open Society Institute et al., Gun Control in the United States: A Comparative Survey of State Firearm Laws, 3 (2000) [http://www.soros.org/initiatives/justice/articles\\_publications/publications/gun\\_report\\_20000401/GunReport.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/gun_report_20000401/GunReport.pdf).

<sup>165</sup> D.C. CODE § 7-2502.02(4) (2001) (banning ownership or possession of handguns by any citizen who did not register a handgun by September 24, 1976).

<sup>166</sup> Roberti-Roos Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004, CAL. PENAL CODE §§ 12275-12290 (2005).

<sup>167</sup> Act of June 8, 1993, Pub. Act No. 93-306, 1993 Conn. Acts 306 (Reg. Sess.).

<sup>168</sup> HAW. REV. STAT. §§ 134-1, -4, -8 (1993).

<sup>169</sup> N.J. STAT. ANN. §§ 2C:39-1 to -15, 43-6 to -7; 58-5 to -14 (2005).

<sup>170</sup> Act of Aug. 8, 2000, ch. 189, 1999 N.Y. Laws 189.

<sup>171</sup> Massachusetts Gun Control Act of 1998, MASS GEN. LAWS ch. 140, §§ 121-131P (2005).

<sup>172</sup> See *supra* note 155.

<sup>173</sup> See *infra* notes 369-70 (discussing municipal handgun bans in Chicago and its suburbs). See also *supra* note 165.

president or state constitutional amendments? What does it mean that these constitutional enactments have occurred continuously across the generations? And how to weigh them against the fact that infringements of the right to arms on the other hand have been meager, not really prohibitions at all.<sup>174</sup>

Ackerman offers no good protocol for weighing such things. All one really can hope is that serious people will ask these questions for themselves and unlatch from their preferences enough to answer honestly.

### III. CONCEALED CARRY, STATE ACTION SIGNALS AND THE PROHIBITIONIST MOVEMENT

By 1987, ten states had granted ordinary citizens licenses to carry concealed firearms for self-defense.<sup>175</sup> Since then twenty-eight more states have enacted laws permitting citizens to carry concealed firearms.<sup>176</sup> Most Americans, by a margin of 64 to 36 percent live in Right to Carry (“RTC”) states.<sup>177</sup>

RTC laws differ by degree. Two states, Vermont and Alaska, provide the broadest right to carry, simply by not prohibiting it.<sup>178</sup> Alaska has a statute that has been interpreted to mean that no permit is required.<sup>179</sup> In Vermont,

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<sup>174</sup> With the exception of the Assault Weapons ban of 1994, whose story and aftermath add texture to our enduring Second Amendment moment, *see infra* text accompanying notes 375-89, actual gun prohibition has not appeared at the federal level.

<sup>175</sup> NRA-ILA, Issues, Fact Sheets, Right-to-Carry, <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18> [hereinafter NRA Fact Sheet] (last visited Feb. 8, 2006).

<sup>176</sup> *Id.*

<sup>177</sup> *See id.* Compare the margin of victory Ackerman claims showed broad endorsement of constitutional transformation through the New Deal. A middle schooler serious enough about his coming duties as a citizen, grappling with the idea of unlisted constitutional amendments might go to <http://www.spartacus.schoolnet.co.uk/USARooseveltF.htm> (last visited Feb. 8, 2006) and learn that, “At Philadelphia in 1940 the Republican Party chose Wendell Willkie their presidential candidate. During the campaign Willkie attacked the New Deal as being inefficient and wasteful. Although he did better than expected, Franklin D. Roosevelt beat Willkie by 27,244,160 votes to 22,305,198,” or 55 - 45%. Our precocious teen might well conclude that 64 to 36% is a stronger signal.

<sup>178</sup> NRA Fact Sheet, *supra* note 175.

<sup>179</sup> ALASKA STAT. § 11.61.220 (2004); Alaska Department of Public Safety, Alaska Concealed Handgun Permits, <http://www.dps.state.ak.us/PermitsLicensing/achp/> (last visited Feb. 8, 2006).

no permit is required to carry concealed weapons because no law prohibits it.<sup>180</sup>

Alaska and Vermont are unusual. The dominant model of RTC legislation has been dubbed “shall issue.”<sup>181</sup> Under shall issue legislation, a citizen must be granted a permit to carry unless the state can show a particular reason (e.g., criminal record or mental instability) why she should be denied.<sup>182</sup> Thirty-five states have shall issue laws.<sup>183</sup> Three states have liberally administered discretionary schemes that operate in effect like shall issue statutes.<sup>184</sup> Eight other states administer restrictive schemes that give the state basically plenary discretion to deny a permit.<sup>185</sup> Some of these plenary discretion schemes have been afflicted with bias and cronyism—defects that prompted some of the movement toward shall issue laws.<sup>186</sup>

<sup>180</sup> Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 682 (1995).

<sup>181</sup> NRA Fact Sheet, *supra* note 175.

<sup>182</sup> Cramer & Kopel, *supra* note 180, at 680, 690-91.

<sup>183</sup> NRA-ILA, GUIDE TO RIGHT-TO-CARRY RECIPROCITY AND RECOGNITION 2-18 (2006), <http://www.nraila.org/recmap/recguide.pdf> [hereinafter NRA RIGHT-TO-CARRY GUIDE].

<sup>184</sup> *Id.*; NRA Fact Sheet, *supra* note 174 (Alabama, Connecticut, and Iowa).

<sup>185</sup> See NRA RIGHT-TO-CARRY GUIDE, *supra* note 182; NRA Fact Sheet, *supra* note 174 (California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Rhode Island).

<sup>186</sup> See Cramer & Kopel, *supra* note 180, at 682-85.

Because we are generalizing about state laws that are not uniform, there is disagreement at the margins about precisely how to characterize every state. Ian Ayres and John J. Donohue III criticize that John Lott has classified Alabama and Connecticut as “shall issue” states while Handgun Control Inc., calls them “may issue.” Ian Ayres & John J. Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy*, 1 AM. L. ECON. REV. 436, 437 n.2 (1999) (reviewing JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (1st ed. 1998)), available at <http://islandia.law.yale.edu/ayers/pdf/lottreview.pdf>.

The basic distinction for our purposes is states where an ordinary citizen can obtain a license to carry without any special showing other than a general interest in self-defense. Thirty-five state laws are explicitly non-discretionary (“shall issue”). NRA Fact Sheet, *supra* note 175. Alabama is technically discretionary, but is essentially shall issue in practice. Applicants denied a permit in Alabama would likely be denied one in a shall-issue state for the same reason. The NRA has called this “reasonable may issue.” See NRA-ILA, Issues, Interstate Reciprocity and Recognition, <http://www.nraila.org/recmap/usrecmap.htm> (last visited Feb. 8, 2006) [hereinafter NRA Right-to-Carry Map] (click on desired state to view summary of right-to-carry status). Connecticut and Iowa operate a similar liberal discretionary or “reasonable may issue” schemes. *Id.*

The NRA generally excludes states like New Jersey from the list of right to carry states, even though New Jersey for example grants a limited number (about 1,000 in 1995 mainly to security guards) of permits. See Abby Goodnough, *N.J. Law; Concealed Weapons: A Senator Says Their Time has Come*, N.Y. TIMES, May 19, 1996, §

Commentators have designed intricate arguments that even if the Second Amendment was intended to protect an individual right, modern conditions are such that it can be fairly dismissed as archaic.<sup>187</sup> This reflects a commonplace objection that America has outgrown the armed citizenry. We have police now. The militia is moribund and never was terribly effective. Modern arms are way more dangerous than the eighteenth century flintlock. And so on.

So what are we to make of the fact that the concealed carry revolution, largely a phenomenon of the last twenty years, represents an *expansion* of gun rights beyond what was typical during most of the last century?<sup>188</sup> Even before the Civil War, the few states that addressed the issue of concealed carry, did so by prohibiting it.<sup>189</sup> One explanation is that open carry was legal and socially common.<sup>190</sup> But that is not the entire story.

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13NJ, at 8. The full list of states with restrictive permitting systems are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York and Rhode Island. *See supra* NRA Right-to Carry Map, *supra*.

The four absolutely non issue states technically are Nebraska, Kansas, Illinois and Wisconsin. *Id.* However, Wisconsin's inclusion on this list is now controversial since the Wisconsin Supreme Court has ruled that in some circumstances, the statute barring concealed carry must yield to "reasonable exercise of the [vintage 1998] constitutional right to keep and bear arms for security." *State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003). In 2004, the Wisconsin legislature came within one vote of overriding the governor's veto of a shall issue concealed carry bill. *See infra* notes 277-79.

For purposes of our count, I will start with the classification used by the gun control group Join Together Online.

With the recent passage of a "shall issue" handgun law in Ohio, the number of states that have eased restrictions on concealed gun carrying has risen to 35 [shall issue states]. But in the face of this onslaught, four heartland states are holding fast to their long-time laws that prohibit the carrying of concealed guns by people other than police officers. [These four,] Illinois, Kansas, Nebraska, and Wisconsin . . . stand apart not only from the shall-issue states but from the 11 "may issue" states . . .

Dick Dahl, *Four States Holding to 'No Issue' Handgun Laws*, JOIN TOGETHER ONLINE, June 28, 2004, <http://www.jointogether.org/z/0,2522,572284,00.html>.

Adding the liberal, reasonable may issue/effectively shall issue states Alabama, Iowa and Connecticut yields the NRA's thirty-eight right to carry states and the claim that "Sixty-four percent of Americans live in RTC states." *See* NRA Fact Sheet, *supra* note 175.

<sup>187</sup> *See generally* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L. J. 551, 555-56 (1991).

<sup>188</sup> *See infra* notes 313-14 (describing the commonplace restrictions on concealed carry at the turn of the twentieth century).

<sup>189</sup> *See* Cramer & Kopel, *supra* note 180, at 681.

<sup>190</sup> *Id.* Other objections to concealed carry seem to have a more interesting source.

Beginning in the 1920s many states adopted model legislation based on the Uniform Revolver Act.<sup>191</sup> Jeffrey Snyder details how the National Rifle Association endorsed the Revolver Act as an alternative to handgun regulations tracking New York's more restrictive Sullivan Law.<sup>192</sup> The Uniform Revolver Act prohibited concealed carry by unlicensed individuals.<sup>193</sup> It was less restrictive than the Sullivan Law, which required a license for mere possession.<sup>194</sup> Discretionary licensing schemes were built around the Revolver Act and that system explains a good deal about how we have thought about concealed carry historically.<sup>195</sup>

The problem with discretionary licensing was that it fed cronyism, corruption, and class and race discrimination.<sup>196</sup> Often permittees were limited to the rich, famous, politically connected and white, even though more common citizens seemed to have equally or more compelling needs for self protection.<sup>197</sup>

Early endorsement of concealed carry appeared in Vermont in 1903. The source was not legislative but judicial. In *State v. Rosenthal*,<sup>198</sup> the Vermont Supreme Court ruled that a Rutland ordinance barring concealed firearms was a violation

<sup>191</sup> Cramer & Kopel, *supra* note 180, at 681. See also David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 589-90 (1987).

<sup>192</sup> Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun*, POL'Y ANALYSIS, Oct. 22, 1997, at 6-8, available at [http://www.cato.org/pub\\_display.php?pub\\_id=1143&full=1](http://www.cato.org/pub_display.php?pub_id=1143&full=1). See also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 209-10 (1983). New York's Sullivan Law gun restrictions appear today at section 400.00 of the New York Penal Law.

<sup>193</sup> Snyder, *supra* note 192, at 8.

<sup>194</sup> See *id.* at 6.

<sup>195</sup> See *id.* at 8.

<sup>196</sup> See *id.* at 9. Sometimes the courts were quite straight forward about the discriminatory intent of concealed carry restrictions. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially):

[T]he Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides . . . and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population . . . and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

<sup>197</sup> See Cramer & Kopel, *supra* note 180, at 682-85; Snyder, *supra* note 192, at 13-14.

<sup>198</sup> 55 A. 610 (Vt. 1903).

of the state constitutional right to keep and bear arms.<sup>199</sup> This is the foundation for Vermont's treatment of concealed carry today.<sup>200</sup> Vermont law does not prohibit concealed carry except "with the intent or avowed purpose of injuring a fellow man."<sup>201</sup>

Washington state was among the group of states that adopted the Revolver Act throughout the 1920s and 30s.<sup>202</sup> But in 1961 Washington switched to a shall issue structure.<sup>203</sup> Under Washington law, anyone who is allowed to own a handgun, also must be granted a permit to carry it.<sup>204</sup> By 1993 nearly a quarter of a million Washington residents held concealed carry licenses.<sup>205</sup>

But it was not until the 1980s that the modern wave of concealed carry statutes appeared. Many trace the impulse to Florida where in 1987 a shall issue law was debated under national scrutiny.<sup>206</sup> The groundwork for the Florida legislation started in the early 1980s as gun rights activists and groups, including the Florida Chiefs of Police Association, pressed for legislation reforming Florida's handgun laws.<sup>207</sup> One piece of the proposed change entitled citizens who passed a background check and gun safety classes to obtain a permit to carry concealed weapons.<sup>208</sup> Governor Bob Graham vetoed successive concealed carry bills.<sup>209</sup> Graham was succeeded by Bob Martinez who signed concealed carry into law in 1987.<sup>210</sup>

Florida settled in the minds of many some of the most contentious issues in the RTC debate.<sup>211</sup> As a matter of theory one might concede how concealed carry could be basically

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<sup>199</sup> *Id.* at 610-11.

<sup>200</sup> See Cramer & Kopel, *supra* note 180, at 682.

<sup>201</sup> VT. STAT. ANN. tit. 13, § 4003 (2005).

<sup>202</sup> See Cramer & Kopel *supra* note 159, at 687.

<sup>203</sup> *Id.*

<sup>204</sup> WASH. REV. CODE § 9.41.070 (2003).

<sup>205</sup> See Cramer & Kopel, *supra* note 180, at 689.

<sup>206</sup> See David Kopel, *The Untold Triumph of Concealed-Carry Permits*, POL'Y REV., July 1, 1996, at 1, 9, available at <http://www.policyreview.org/jul96/labs.html>; Cramer & Kopel, *supra* note 180, at 690; Snyder, *supra* note 192. For a detailed description of Florida's concealed carry laws prior to 1987, see Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U. L. REV. 751, 763-68 (1987).

<sup>207</sup> Kopel, *supra* note 206.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Snyder, *supra* note 192, at 1; NRA Fact Sheet, *supra* note 175.

harmless in some rural state with a homogeneous population. But surely it is a bad idea for urban melting pot states.

In the abstract, this is sound speculation. But the experience in Florida proved it wrong. A high crime state, with an often tense mix of ethnic groups, Florida had “all the ingredients for concealed carry disaster.”<sup>212</sup> Observers were alternately surprised, chagrined and gratified that concealed carry in Florida is at worst benign and if one is convinced by the work of John Lott and others, produces substantial net social and economic gains.<sup>213</sup>

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<sup>212</sup> Cramer and Kopel *supra* note 159, at 690.

<sup>213</sup> JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 11-12* (2d ed. 2000). John Lott writes:

Some evidence on whether concealed-handgun laws will lead to increased crimes is readily available. Between October 1, 1987, when Florida’s “concealed-carry” law took effect, and the end of 1996, over 380,000 licenses had been issued, and only 72 had been revoked because of crimes committed by license holders (most of which did not involve the permitted gun). . . .

In Virginia, “[n]ot a single Virginia permit-holder has been involved in violent crime.” In the first year following the enactment of concealed-carry legislation in Texas, more than 114,000 licenses were issued, and only 17 have so far been revoked by the Department of Public Safety (reasons not specified). After Nevada’s first year, “Law enforcement officials throughout the state could not document one case of a fatality that resulted from irresponsible gun use by someone who obtained a permit under the new law.” Speaking for the Kentucky Chiefs of Police Association, Lt. Col. Bill Dorsey, Covington assistant police chief, concluded that after the law had been in effect for nine months, “We haven’t seen any cases where a [concealed-carry] permit holder has committed an offense with a firearm.” In North Carolina, “Permit-holding gun owners have not had a single permit revoked as a result of use of a gun in a crime.” Similarly, for South Carolina, “only one person who has received a pistol permit since 1989 has been indicted on a felony charge . . . .

During state legislative hearings on concealed-handgun laws, the most commonly raised concerns involved fears that armed citizens would attack each other in the heat of the moment following car accidents or accidentally shoot a police officer. The evidence shows that such fears are unfounded . . . .

*Id.* Lott goes on to make the more controversial claim that concealed handgun laws actually dramatically reduce crime:

The difference is quite striking: violent crimes are 81 percent higher in states without nondiscretionary laws. For murder, states that ban the concealed carrying of guns have murder rates 127 percent higher than states with the most liberal concealed-carry laws. For property crimes, the difference is much smaller: 24 percent. States with nondiscretionary laws have less crime, but the primary difference appears in terms of violent crimes.

. . . .

. . . Criminals respond to the threat of being shot while committing such crimes as robbery by choosing to commit less risky crimes that involve minimal contact with the victim.

More broadly, Florida challenged the basic tenets of the prohibitionists, testing and refuting the Zimring hypothesis (that more gun possession automatically leads to more crime).<sup>214</sup> With Florida's refutation of the standard objections to RTC laws, the list of states adopting right to carry swelled. Currently shall issue right to carry is governing law in Alaska,<sup>215</sup> Alabama,<sup>216</sup> Arizona,<sup>217</sup> Arkansas,<sup>218</sup> Connecticut,<sup>219</sup> Colorado,<sup>220</sup> Florida,<sup>221</sup> Georgia,<sup>222</sup> Idaho,<sup>223</sup> Indiana,<sup>224</sup> Iowa,<sup>225</sup> Kentucky,<sup>226</sup> Louisiana,<sup>227</sup> Maine,<sup>228</sup> Michigan,<sup>229</sup> Minnesota,<sup>230</sup> Mississippi,<sup>231</sup> Missouri,<sup>232</sup> Montana,<sup>233</sup> Nevada,<sup>234</sup> New Hampshire,<sup>235</sup> New Mexico,<sup>236</sup> North Carolina,<sup>237</sup> North Dakota,<sup>238</sup> Ohio,<sup>239</sup> Oklahoma,<sup>240</sup> Oregon,<sup>241</sup> Pennsylvania,<sup>242</sup>

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*Id.* at 47, 54.

<sup>214</sup> See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA*, 122-23 (1997) ("Current evidence suggests that a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the high U.S. death rate from violence"). The weakness of Zimring's hypothesis also is illustrated by a simple chart that shows how gun crime in every category has declined even as the number of guns per 100,000 people has nearly *tripled*. See *GUN CONTROL AND GUN RIGHTS: A READERS AND GUIDE* 61-62 (Andrew J. McClurg et. al. eds., 2002) [hereinafter *GUN CONTROL AND GUN RIGHTS*].

<sup>215</sup> ALASKA STAT. § 18.65.700 (2004).

<sup>216</sup> ALA. CODE § 13A-11-75 (1994). In practice, Alabama's RTC law works like the standard shall issue legislation. As explained *supra* at note 186, Alabama is more precisely described as liberal discretionary.

<sup>217</sup> ARIZ. REV. STAT. ANN. § 13-3112 (2001).

<sup>218</sup> ARK. CODE ANN. § 5-73-309 (Supp. 2005).

<sup>219</sup> As explained *supra* at note 186, Connecticut is most accurately described as liberal discretionary.

<sup>220</sup> COLO. REV. STAT. § 18-12-203 (2005).

<sup>221</sup> FLA. STAT. ANN. § 790.06 (West Supp. 2006).

<sup>222</sup> GA. CODE ANN. § 16-11-129 (2003).

<sup>223</sup> IDAHO CODE ANN. § 18-3302 (Supp. 2005).

<sup>224</sup> IND. CODE ANN. § 35-47-2-1 (LexisNexis 2004).

<sup>225</sup> Recall that Iowa is, strictly speaking, liberal discretionary, but arguably shall issue in practice. See *supra* note 186.

<sup>226</sup> KY. REV. STAT. ANN. § 237.110 (LexisNexis 2004).

<sup>227</sup> LA. REV. STAT. ANN. § 40:1379.3 (Supp. 2005).

<sup>228</sup> ME. REV. STAT. ANN. tit. 25, § 2003 (Supp. 1995).

<sup>229</sup> MICH. COMP. LAWS § 28.425b (2004).

<sup>230</sup> MINN. STAT. § 624.714 (Supp. 2005).

<sup>231</sup> MISS. CODE ANN. § 45-9-101 (Supp. 2004).

<sup>232</sup> MO. REV. STAT. § 571.090 (2003).

<sup>233</sup> MONT. CODE ANN. § 45-8-321 (2005).

<sup>234</sup> NEV. REV. STAT. § 202.3657 (Supp. 2003).

<sup>235</sup> N.H. REV. STAT. ANN. § 159:6 (2002).

<sup>236</sup> N.M. STAT. § 29-19-4 (2004).

<sup>237</sup> N.C. GEN. STAT. § 14-415.11 (2001).

<sup>238</sup> N.D. CENT. CODE § 62.1-04-03 (Supp. 2005).



South Carolina,<sup>243</sup> South Dakota,<sup>244</sup> Tennessee,<sup>245</sup> Texas,<sup>246</sup> Utah,<sup>247</sup> Vermont,<sup>248</sup> Virginia,<sup>249</sup> Washington,<sup>250</sup> West Virginia,<sup>251</sup> and Wyoming.<sup>252</sup>

It is fair to observe in all this that things might change. Just like preferences expressed through Article Five amendment, constitutional politics can shift. But the most recent enactments of RTC legislation show, that after nearly twenty years of debate and controversy, the trend is toward more concealed carry, not less.

Michigan enacted concealed carry in 2001 over sincere fears of blood in the streets.<sup>253</sup> In practice, “it’s basically been a big ho-hum.”<sup>254</sup>

[A] heated debate was raging about Michigan’s plan to make it easier to get concealed weapons permits. One side said more guns would make society safer from violent crime while the other said making concealed weapons permits easier to obtain was surely a recipe for disaster. Three years later, neither prediction has come true. Law enforcement officers and local officials say Michigan’s streets are not safer—or more dangerous—than they were three years ago when the law went into effect. But there have been no major incidents involving people with the permits. No accidental discharges. No murders. No anarchy. . . .

. . . .

[Prosecutor David Gorcyca said] “Generally speaking, I’m not an advocate for more guns being out on the streets . . . . [b]ut the statistics have shown there hasn’t been any more violence. People are, fortunately, acting responsibly.”

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<sup>239</sup> OHIO REV. CODE ANN. § 2923.125 (Supp. 2005).

<sup>240</sup> OKLA. STAT. tit. 21, § 1290.12(A)(12) (2002).

<sup>241</sup> OR. REV. STAT. § 166.291 (2005).

<sup>242</sup> 18 PA. CONS. STAT. § 6109(e) (2000).

<sup>243</sup> S.C. CODE ANN. § 23-31-215 (Supp. 2004).

<sup>244</sup> S.D. CODIFIED LAWS §§ 23-7-7.1, 23-7-8 (Supp. 2003).

<sup>245</sup> TENN. CODE ANN. § 39-17-1351 (Supp. 2004).

<sup>246</sup> TEX. GOV’T CODE ANN. § 411.177 (Vernon 2005).

<sup>247</sup> UTAH CODE ANN. § 53-5-704 (Supp. 2005).

<sup>248</sup> Vermont case law says concealed carry is protected by the state constitution. *See supra* text accompanying note 198.

<sup>249</sup> VA. CODE ANN. § 18.2-308 (Supp. 2005).

<sup>250</sup> WASH. REV. CODE ANN. § 9.41.070 (West 2006).

<sup>251</sup> W. VA. CODE § 61-7-4 (Supp. 2005).

<sup>252</sup> WYO. STAT. ANN. § 6-8-104 (2005).

<sup>253</sup> *See* Korie Wilkins, *Our Quiet Rise in Handguns*, DAILY OAKLAND PRESS, June 27, 2004, [http://www.theoaklandpress.com/stories/062704/loc\\_062712.shtml](http://www.theoaklandpress.com/stories/062704/loc_062712.shtml).

<sup>254</sup> *Id.*

Because there have been no major incidents, many local officials are calling the law a success.<sup>255</sup>

New Mexico adopted a shall-issue law in 2001 that the New Mexico Supreme Court declared unconstitutional because large municipalities had the option to opt out.<sup>256</sup> In 2003 the legislature tried again, this time eliminating the municipal opt out.<sup>257</sup> Opponents of concealed carry, resisted to the end, filing suit to have the law declared unconstitutional.<sup>258</sup> New Mexico's arms guarantee includes a caveat that "the carrying of concealed weapons"<sup>259</sup> is not a constitutional part of the right.<sup>260</sup> Opponents claimed that this barred the new concealed carry law.<sup>261</sup> The argument was frivolous and the Court unanimously upheld the legislation, explaining that the obvious impact of the constitutional caveat was to leave regulation of concealed carry to the legislature.<sup>262</sup>

Missourians debated RTC for years before the legislature overrode the Governor's veto to pass the Concealed Carry Act on September 11, 2003.<sup>263</sup> Senator Michael Gibbons released a statement explaining his vote to override, which captures the drama:

First, I need to address a rumor that the Republican Party and my future Senate colleagues have pressured me, threatening my leadership position or any further that I may have. These rumors are absolutely false.

....

... Seven out of ten states have a shall-issue right-to-carry, a total of 44 states with some form of concealed carry. Looking at these 44 states, one finds some deterrent effect on violent crime with no

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<sup>255</sup> *Id.* See generally Michigan State Police, Carrying Concealed Weapons (CCW) Annual Reports, [http://www.michigan.gov/msp/0,1607,%207-123-1591\\_3503\\_4654-77621--,00.html](http://www.michigan.gov/msp/0,1607,%207-123-1591_3503_4654-77621--,00.html) (last visited Feb. 8, 2006) (click on desired report to view pdf copy).

<sup>256</sup> *Baca v. N.M. Dep't of Pub. Safety*, 47 P.3d 441, 445 (2002).

<sup>257</sup> N.M. STAT. ANN. §§ 29-19-1 through 29-19-13 (West 2005).

<sup>258</sup> *State ex rel. N.M. Voices for Children, Inc., v. Denko*, 90 P.3d 458, 458 (2004).

<sup>259</sup> N.M. CONST. art. II, § 6.

<sup>260</sup> *State ex rel. N.M. Voices for Children, Inc.*, 90 F.3d at 459.

<sup>261</sup> *Id.* at 460.

<sup>262</sup> *Id.*

<sup>263</sup> H.R. 349, 92nd Gen. Assem., Reg. Sess. (Mo. 2003) (since codified at MO. REV. STAT. §§ 571.100 through 571.121 (2005)). See also Marc Powers, *Abortion, Gun Bills Go Around Governor*, SOUTHEAST MISSOURIAN, Sept. 12, 2003, available at <http://www.semissourian.com/story/119469.html>.

increase in violence, shootouts or harm to children because of permits.

....

How close has Missouri been to joining these other states and passing a less restrictive bill? In 2000, Governor Holden won by less than 1% of the vote. If Jim Talent had won, a less restrictive bill would already be law, and in 2004 we may have a new governor who would make signing such a bill a top priority.

Even closer, in less than two months, a pro-conceal carry candidate will be elected in the 11th Senate District to fill the vacancy caused by Senator DePasco's recent death, guaranteeing a veto proof majority for a riskier bill.

The passage of a shall-issue right to carry is inevitable.<sup>264</sup>

As in New Mexico, the opposition's last stand was a lawsuit claiming that the Missouri Constitution's provision that the right to keep and bear arms did not guarantee a right to carry concealed weapons, actually barred the lawmakers from permitting concealed carry. That action was dispensed with quickly and Missourians joined the growing majority of Americans who can bear arms in public for self-defense without breaking the law.

Minnesota, home of Walter Mondale, the liberal standard-bearer who imprudently campaigned on the theme, "I will raise your taxes," adopted a shall issue law in 2003,<sup>265</sup> after coming close in 2001.<sup>266</sup> Opponents of concealed carry made the familiar last stand in *Unity Church of St. Paul v. Minnesota*,<sup>267</sup> challenging that enactment of the law violated a constitutional requirement that bills deal with a single subject (the right to carry law was appended to a Department of Natural Resources Bill).<sup>268</sup> A county judge agreed,<sup>269</sup> and the Minnesota Court of Appeals affirmed.<sup>270</sup>

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<sup>264</sup> *Remarks on the Floor of the Missouri Senate on the Occasion of the Veto Override Attempt (HB 349) September 11, 2003*, <http://www.senate.state.mo.us/03info/members/d15/vetooverride.htm> (statement of Sen. Michael Gibbons).

<sup>265</sup> MINN. STAT. § 624.714 (Supp. 2005).

<sup>266</sup> For a procedural history of the failed 2001 bill see Minnesota Legislative Reference Library, Resources on Minnesota Issues: Firearm Carry Laws, <http://www.leg.state.mn.us/lrl/issues/firearmcarry.asp> (last visited Feb. 8, 2006). See also Transcript of Interview by Jim Lehrer with Walter Mondale (July 29, 2004), [http://www.pbs.org/newshour/bb/politics/july-dec04/mondale\\_7-29.html](http://www.pbs.org/newshour/bb/politics/july-dec04/mondale_7-29.html) (where Lehrer uses the phrase "I will raise your taxes" to describe Mondale's policies).

<sup>267</sup> No. C-03-9570, 2004 WL 1630505, at \*1 (Minn. Dist. Ct. July 14, 2004), *aff'd*, 694 N.W.2d 585 (Minn. Ct. App. Apr. 12, 2005).

<sup>268</sup> *Id.* at \*2.

In 2004, Ohio became the most recent state to enact a shall issue law after much debate and political maneuvering on all sides.<sup>271</sup> What is different about Ohio is how the state constitutional right to arms forced the issue. The Ohio Supreme Court in *Klein v. Leis*<sup>272</sup> had concluded that a state ban on concealed carry was not absolute since by statute carrying a firearm for self-defense was an affirmative defense to an arrest for carrying a concealed weapon.<sup>273</sup> Moreover, since the Ohio Constitution protects open carry of firearms, the restrictions on concealed carry were not a violation of the right to “bear” arms.<sup>274</sup>

Citizen activists, who had been pushing a shall issue law for several years, took *Klein* at its word, and began carrying handguns openly in “Defense’ Walks.”<sup>275</sup> By the end of 2004, a shall issue bill, backed by police, was signed by the Governor who “had long said he would only sign the bill if law enforcement supported it.”<sup>276</sup>

Finally, and again, there is a lesson from Wisconsin. In 1993 the prohibitionist movement was pressing forward with handgun bans.<sup>277</sup> By 1998 Wisconsin had amended its constitution to block the gun bans.<sup>278</sup> And by 2004, the legislature came within one vote of overriding the Governor’s veto of a shall issue concealed carry bill.<sup>279</sup> The standard explanation for such a dramatic turnabout is NRA lobbying. But as the Wisconsin bill was nearing a vote, the *Milwaukee Sentinel* checked neighboring states and offered a report suggesting why reasonable people might support concealed carry without being brainwashed by the NRA:

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> OHIO REV. CODE ANN. § 2923.125 (Supp. 2005).

<sup>272</sup> 795 N.E.2d 633 (Ohio 2003).

<sup>273</sup> *Id.* at 638; OHIO REV. CODE ANN. §§ 2923.12, 2923.16 (Supp. 2005).

<sup>274</sup> *Klein*, 795 N.E.2d at 640 (O’Connor, J., dissenting).

<sup>275</sup> Buckeye Firearms Ass’n, “Defense” Walks Make History in Ohio, GRASSROOTS ACTION GUIDE, at <http://www.buckeyefirearms.org/modules.php?name=Content&pa=showpage&pid=60> (last updated Nov. 5, 2003).

<sup>276</sup> *Taft Signs Concealed Handgun Bill*, NBC4I.COM NEWS, Jan. 8, 2004, at <http://www.nbc4i.com/news/2751519/detail.html>.

<sup>277</sup> Wis. State Legislature Legislative Reference Bureau, *Regulation of Firearms in Wisconsin*, WIS. BRIEFS NO. 00-11, at 1-2 (2000), available at <http://www.legis.state.wi.us/lrb/pubs/wb/00wb11.pdf>.

<sup>278</sup> *Id.* at 3.

<sup>279</sup> See Dick Dahl, *Four States Holding to ‘No Issue’ Handgun Laws*, JOIN TOGETHER ONLINE, June 28, 2004, <http://www.jointogether.org/gv/news/features/reader/0,2061,572284,00.html>.

“I have never encountered a (threatening) event that involved an individual with a gun permit,” said Minnesota’s Hennepin County Sheriff Pat McGowan, whose county includes about 25% of the state’s population.

....

Likewise, Iowa has had “a relatively good experience,” said Doug Marek, deputy attorney general for criminal justice. “The system that we have in Iowa seems to be working well.” Iowa allows, but does not require, the state’s 99 sheriffs to issue concealed weapon permits—a so-called “may issue” provision that is law in 11 states.

....

“We have not seen in Michigan, that people get out their guns and start blasting each other.” said Matt Davis, of the Michigan Attorney General’s office. “It appears the new law is working.”<sup>280</sup>

Wisconsin does not yet have concealed carry. But then, prior to 1998, it did not even have a constitutional right to arms. That Wisconsin came so close so quickly to joining the 38 other RTC states suggests that the idea of self-help against violent threats continues to resonate strongly across America. As this article goes to print, the press for concealed carry in Wisconsin has been renewed, with intense speculation over whether crossover Democrats will maintain their support of a new bill, allowing the override of Governor Doyle’s promised veto.<sup>281</sup>

The objections to concealed carry legislation in Wisconsin and elsewhere, confirm that diehard opponents stand strongly against the idea<sup>282</sup> (in 1940, Wendell Willkie got 45% of the vote criticizing the New Deal).<sup>283</sup> But despite zealous opposition, in one state laboratory after another, RTC has become law and nowhere has the standard parade of horrors appeared.<sup>284</sup> The near twenty year wave of RTC laws

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<sup>280</sup> Steve Walters, *Weapons Laws Not Matching Hype; Concealed Carry Not Altering Crime, States Find*, MILWAUKEE J. SENTINEL, Nov. 3, 2003, at A1, available at <http://www.jsonline.com/news/state/Nov03/182381.asp>. The NRA categorizes these may issue states as “reasonable may-issue” (meaning that permits generally are granted) and “restrictive” may issue (meaning that special circumstances are required for a permit). Iowa is considered a reasonable may issue state. NRA Right-to-Carry Map, *supra* note 186.

<sup>281</sup> See JR Ross, *Concealed Carry Proponents Expect Full-court Press to Keep Democrats on Board*, ASSOCIATED PRESS, Dec. 14, 2005, available at <http://www.duluthsuperior.com/ml/duluthsuperior/13401571.htm>.

<sup>282</sup> See, e.g., Dahl, *supra* note 279.

<sup>283</sup> See *supra* note 177.

<sup>284</sup> See, e.g., *supra* note 213.

and their salutary aftermath refute many of the gun prohibitionists' core propositions: It is the gun, its easy availability, that will turn otherwise sensible and good citizens into murderers.<sup>285</sup> You are 43 times more likely to be killed by your own gun than to use it in self-defense (84% of the deaths in this count were suicides—still a tragedy, but it does not support the popular image of Ward Cleaver coming home late and being shot by June in a fit of rage or panic).<sup>286</sup> If attacked,

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<sup>285</sup> Don Kates has long argued that murderers typically have a long history of behavior that would bar them from legally owning guns and that those who seek permits for something that is quite easy to get away with absent a permit, present very little threat.

The endlessly repeated argument for banning firearms is that “[M]ost murders are committed by *previously law abiding* citizens where the killer and the victim are related or acquainted”; “*previously law abiding* citizens [are] committing impulsive gun-murders while engaged in arguments with family members or acquaintances.” “That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage . . . . The problem is you and me—law-abiding folks.”

. . . But every local and national study of homicide shows that murderers are far from being “ordinary citizens” or “law abiding folks.” Rather, they are extreme aberrants, their life histories being characterized by felony records, psychopathology, alcohol and/or drug dependence, and often irrational violence against those around them.

. . . The data set out in [that chapter] show that—unlike ordinary gun owners—roughly 90 percent of adult murderers have prior adult crime records, with an average adult criminal career of six or more years, including four major adult felony arrests.

DON B. KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE* 11 (1997) (emphasis in original; internal citations omitted).

<sup>286</sup> The 43 times more likely statement comes from Arthur L. Kellermann & Donald T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 *NEW ENG. J. MED.* 1557, 1560 (1986). The claim is a result of Kellermann and Reay counting 743 gunshot deaths in King County in Washington, which includes Seattle, from 1978 to 1983. *Id.* at 1558. For every case where a gun in the home was used in a justifiable killing, there were 4.6 criminal homicides, 37 suicides and 1.3 unintentional deaths. *Id.* at 1559 tbl.3. See also Stevens H. Clarke, *Firearms and Violence: Interpreting the Connection*, *POPULAR GOV'T*, Winter 2000, at 3, 9, available at <http://www.iog.unc.edu/pubs/electronicversions/pg/pgwin00/article1.pdf>.

Gary Kleck argues that the real mistake in Kellermann's claim is the failure to include the millions of yearly defensive gun uses where no one is shot and the gun is not even fired. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 114 (Aldine de Gruyter 1991); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 *J. CRIM. L. & CRIMINOLOGY* 150, 181 & n.100 (1995).

Gun control advocate Andrew McClurg, who finds suicides still a compelling reason for strict gun control, makes a remarkable observation:

Most people are surprised to learn that annual firearm suicides routinely outpace firearm homicides. In 1996, . . . 18,166 Americans committed suicide with a firearm, substantially more than the 14,327 victims of homicide by firearm the same year. Firearm suicides have exceeded firearm homicides in

it is best to just give them what they want and run.<sup>287</sup> Permitting anyone other than police to go armed in public will lead to blood in the streets, transforming fender benders and petty slights into deadly gunfights.<sup>288</sup> It will be Dodge City in modern clothes.<sup>289</sup>

The prohibitionists' speculations, though not implausible in the abstract, simply have not turned out. In state after state, shall issue laws operate in tandem with decreased rates of violent crime. Even police officials concede readily that the nightmare scenario fortunately was just fiction.<sup>290</sup>

The substitute war seems to be showing why John Lott, who famously contends that concealed carry laws actually have caused dramatic *reductions* in crime and billions of dollars in net social and economic gains, is wrong.<sup>291</sup> This is remarkable given that the starting objection was that concealed carry

forty of the sixty years between 1933 and 1992. For all our fear of being victims of a violent criminal attack, “[i]f a randomly chosen person adds up the probabilities that each of the 5 ½ billion other people in the world will kill her, the sum . . . is still less than the probability she’ll kill herself.”

Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,”* 51 HASTINGS L.J. 953, 960 (2000) (emphasis added) (quoting John Allen Paulos, *Measuring American Society: A Better Chance You’ll Shoot Yourself Than Be Shot by Another*, 6 PUB. PERSP. 17, 17 (1995)).

As for the Ward Cleaver imagery, Gary Kleck finds “fewer than 2% of fatal gun accidents (FGAs) involve a person accidentally shooting someone mistaken for an intruder. With about 1400 FGAs in 1987, this implies that there were fewer than 28 incidents of this sort annually.” KLECK, POINT BLANK, *supra*, at 122.

<sup>287</sup> See, e.g., PETE SHIELDS, GUNS DON’T DIE—PEOPLE DO 125 (1981) (writing as Chairman of Handgun Control, Inc: “The best defense against injury is to put up no defense—give them what they want, or run.”).

<sup>288</sup> See, e.g., *supra* notes 213-14.

<sup>289</sup> This imagery seems more myth than fact. The bad men who hung out in saloons shot one another at a fearsome rate but for ordinary citizens Dodge City and other frontier towns were pretty safe places to live compared to many modern urban centers. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 327-28 (1992).

<sup>290</sup> See *supra* note 213.

<sup>291</sup> See, e.g., Andrew J. McClurg, “Lotts’ More Guns and Other Fallacies Infecting the Gun Control Debate,” 11 J. FIREARMS & PUB. POL’Y 139, 141-42 (1999) (arguing it is just impossible to isolate one factor out of thousands or millions and say it is the cause of reduction in crime), available at <http://www.saf.org/journal/11McClurg.pdf>. Lott would respond that criminals are basically rational, “when crime becomes more difficult, less crime is committed.” LOTT, *supra* note 185, at 43-47, 51-54. In the second edition of his book, Lott answers many of his critics and makes additional claims—e.g., that mass public shootings fall dramatically after RTC laws are passed. See LOTT, *supra* note 213, at 100-03. But see Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1200 (2003). Compare Ayres & Donohue, *supra*, with Florenz Plassmann & John Whitley, *Confirming “More Guns, Less Crime,”* 55 STAN. L. REV. 1313, 1313 (2003).

would turn a slow checkout line at Wal-Mart into a shooting gallery. (A tangential but interesting comparative development is that after enacting a flat ban on handguns, the British are experiencing a wave of gun crime that is unprecedented in their history.)<sup>292</sup>

Of course within Ackerman's model, the main thing is the two decades of debate and continuing votes for Right to Carry Laws. The salutary results are really just back story—practical endorsement of a wave of decisions that are important not because they are wise, but simply because they have been made. Ackerman's constitutional politics is a mechanism for determining America has decided something. But it is no guarantee our decision is the best one or even wise.<sup>293</sup>

Still, if the prohibitionists' speculations had held true, if a few experiments showed concealed carry to be a really bad idea, it would have gained little traction in other states. That RTC legislation continues to spring up across the nation suggests something about these constitutional politics growing up statewide that we cannot really say about the federal legislative signals in Ackerman's story of a transformative New Deal.

Purely federal constitutional politics really does demand that we ignore whether constitutional moments produce wise or foolish change. The important thing is that "We the People" have decided on a particular course, and exhibited that decision in a way that is dramatic enough to be discernable to those looking for the right signals.

But where we can track constitutional politics through successive experiments in our laboratories of democracy—the

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<sup>292</sup> News stories decrying this state of affairs abound. See, e.g., David Bamber, *Gun Crime Trebles as Weapons and Drugs Flood British Cities*, TELEGRAPH.CO.UK, Feb. 24, 2002, <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2002/02/24/nguns24.xml> ("availability of weapons - many of them from eastern Europe - is also increasing"); *A Country in the Crosshairs*, BBC NEWS, Jan. 4, 2002, <http://news.bbc.co.uk/1/hi/uk/1741336.stm> (Britain enacted a flat ban on handguns in 1996. Today "no one knows how many illegal firearms there are in Britain, although estimates range from between 200,000 to several million. Whatever the true figure, it is said to be growing daily"); *Handgun Crime 'Up' Despite Ban*, BBC NEWS, July 16, 2001, <http://news.bbc.co.uk/1/low/uk/1440764.stm>.

For detailed critique of the wave of gun crime following England's 1997 handgun ban, see Joyce Lee Malcom, *Gun Control's Twisted Outcome: Restricting Firearms Has Helped Make England More Crime Ridden than the U.S.*, REASON ONLINE, Nov. 2002, <http://www.reason.com/0211/fe.jm.gun.shtml>.

<sup>293</sup> Once we are on the course set by a transformative New Deal, we have rejected alternative experiments. It is pure speculation how things would have turned out under alternate models.



same proposition working its way through a cumbersome legislative process state after state, year after year for decades—we have not only evidence of mounting democratic assent, we also can assess whether the proposition is sound. As each test proceeds, the remaining states operate as a control group, allowing us to see whether the debated measure is better or worse than doing nothing.

There is another slightly different advantage where constitutional politics grows up statewide. It permits competition between alternative schemes. So far I have discussed a dynamic where concealed carry bills either pass or fail. But it is incomplete to cast the RTC decision as binary.

Taking a slightly longer view of things, there was a third choice on the table. The RTC wave appeared just a few short years *after* arguments for a universal ban on handguns had been pressed by prohibitionists and considered and rejected by a majority of Americans.<sup>294</sup> So in addition to deciding yes or no about concealed carry, we also have seriously considered the possibility of banning handguns entirely. With the exception of a handful of municipal ordinances, including famously Morton Grove, Illinois,<sup>295</sup> and for the moment, the District of Columbia,<sup>296</sup> this third choice has been rejected.<sup>297</sup>

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<sup>294</sup> Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 514 n.4, 515 n.5, 516 n.8 (1995) (pointing out scores of statements and official positions advocating a total ban on handguns and all firearms); ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL AND OTHER GUNS WITH WHICH AMERICANS WON THE WEST, PROTECTED BOOTLEG FRANCHISES, SLEW WILDLIFE, ROBBED COUNTLESS BANKS, SHOT HUSBANDS PURPOSELY AND BY MISTAKE, AND KILLED PRESIDENTS - TOGETHER WITH THE DEBATE OVER CONTINUING SAME 200-01 (1973) (describing congressman Abner Mikva's failed early 1970s bill to outlaw all handguns except for police and military).

Senator Dianne Feinstein (D-CA), discussing the passage of the assault weapons ban that she authored, candidly admitted that the only reason she does not seek a ban and confiscation of all guns is that it is not yet politically feasible: "If it were up to me, I would tell Mr. and Mrs. America to turn them in." See *'Hand Them All In,'* LAS VEGAS REV. J., Oct. 13, 1997, [http://www.reviewjournal.com/lvrj\\_home/1997/Oct-13-Mon-1997/opinion/6211250.html](http://www.reviewjournal.com/lvrj_home/1997/Oct-13-Mon-1997/opinion/6211250.html) (quoting *60 Minutes: Interview by Lesley Stahl with United States Senator Dianne Feinstein* (CBS television broadcast, Feb. 24, 1995)).

<sup>295</sup> See *infra* Section III for discussion of the failure of handgun ban initiatives. While the city of Chicago and several suburbs have virtual handgun bans, the Illinois legislature recently enacted legislation that prevents a citizen from being convicted for violating the ban if he used the handgun for lawful self defense on his own property. 720 ILL. COMP. STAT. ANN. 5/24-10 (2005).

<sup>296</sup> See Stephen P. Halbrook, *Second Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 105 (1995).

<sup>297</sup> In 1982 for example, California's Proposition 15, which would have prevented any new handguns from coming into California was rejected 63 to 37 percent. See *infra* text at note 367.

Handguns were a natural target for prohibition. Most gun crime is handgun crime.<sup>298</sup> And while the gun death rate is generally dominated by suicides that might just as easily be committed with long guns, for the remaining deaths, it is fair to speculate that concealability of the handgun was an advantage to the attacker. The Supreme Court denied *certiori* in the *Morton Grove*<sup>299</sup> case, extending an invitation to other municipalities to enact similar legislation and stirring a debate over whether the Court's rationale was that the Second Amendment is not incorporated against the states, does not protect an individual right, or was just too hot to touch. Still gun bans were rejected even in highly progressive enclaves.

We already have seen that a referendum to ban handguns failed in Madison, Wisconsin. As discussed in detail in Part III, statewide handgun ban referenda also failed by large margins in Massachusetts (1976) and California (1982).<sup>300</sup> By the late 1980s Josh Sugarman of the anti-gun Violence Policy Center lamented that Americans had lost interest in banning handguns and proposed a new strategy focusing on hitherto obscure category of guns he called "assault weapons" to breath life into the prohibitionists movement.<sup>301</sup>

As discussed in the next section, Sugarman's strategy had its own unintended consequences. For now it is sufficient to recognize that we have previously but are no longer talking seriously about banning handguns. The follow-up to that conversation has been a wave of state legislation enabling citizens not just to own handguns, but to easily obtain licenses to carry them concealed wherever they go.

Ackerman's point is about process. But the extra confidence we gain from successive state experiments, about the soundness of permitting concealed carry, underscores that the higher lawmaking signals we garner from the concealed

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<sup>298</sup> For example, in 1999, handguns accounted for 7,950 homicides, and other guns accounted for 2,174. See Transactional Records Access Clearinghouse, Bureau of Alcohol, Tobacco and Firearms, National Profile and Enforcement Trends over Time, Homicides by Weapon Type: 1976-2000, <http://trac.syr.edu/tracatf/trends/v04/weaptype.html> (last visited Feb. 8, 2006).

<sup>299</sup> See *supra* note 16.

<sup>300</sup> See *infra* text accompanying notes 370-71.

<sup>301</sup> See DAVID B. KOPEL, "Assault Weapons," in GUNS: WHO SHOULD HAVE THEM 190-92 (1995) ("Josh Sugarman authored the November 1988 strategy memo suggesting that the press and the public had lost interest in handgun control. He counseled the anti-gun lobby to switch to the 'assault weapon' issue, which the lobby did with spectacular success in 1989."). See discussion *infra* notes 377-81.

carry revolution are in an important way better than those Ackerman uses to expand the implications of the New Deal.

#### IV. A CONVERSATION BETWEEN GENERATIONS

Professor Ackerman builds the case for his Dualist model by criticizing the alternatives. The Burkean, a pure democrat, worships at the alter of the present and would cede the field to whatever majority holds sway. The Foundationalist hopes to construct a principled constitutional platform and by pursuing this normative vision of the good, would freely restrain majority will. The Dualist incorporates both and is hindered by neither; tempering each with the type of understanding reached after “a good conversation. . . . between generations.”<sup>302</sup>

We are today a nation where between 40 and 50 percent of households have at least one gun.<sup>303</sup> Guns in private hands number about a quarter *billion*.<sup>304</sup> We fire nearly four billion rounds downrange every year (most of those recreationally).<sup>305</sup> We sustain around 30,000 firearms deaths per year.<sup>306</sup> The majority of these are suicides. Gun control advocate Andrew McClurg reports, “Most people are surprised to learn that annual firearm suicides routinely outpace firearm homicides. In 1996 . . . 18,166 Americans committed suicide with a firearm, substantially more than the 14,327 victims of homicide by firearm the same year.”<sup>307</sup> Guns are used in over half of

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<sup>302</sup> Ackerman, *supra* note 1, at 477-78.

<sup>303</sup> In 1986, Wright and Rossi put the gun ownership percentage at half of all households, JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 143 (1986). Other estimates have been as low as forty percent. See GUN CONTROL AND GUN RIGHTS, *supra* note 214, at 1.

<sup>304</sup> See GUN CONTROL AND GUN RIGHTS, *supra* note 214, at 1.

<sup>305</sup> See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 86 (1997).

<sup>306</sup> See GUN CONTROL AND GUN RIGHTS, *supra* note 214, at 60. Taking 1997 as a source of uncontroversial numbers, firearms were estimated to have caused over 32,000 deaths (this number includes both criminal and lawful shootings). *Id.*

<sup>307</sup> Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,”* 51 HASTINGS L. J. 953, 960 (2000) “Firearm suicides have exceeded firearm homicides in forty of the sixty years between 1933 and 1992.” *Id.* (citing Garen Wintemute et al., *The Choice of Weapons in Firearms Suicides*, 78 AM. J. PUB. HEALTH 824, 824 (1988)).

Some will think it is odd and misleading to report firearms deaths without highlighting that most are suicides. The suicide deaths seem more comparable to the estimated 400,000 preventable deaths from obesity, see Gina Kolata, *Data on Death from Obesity is Inflated, U.S. Agency Says*, N.Y. TIMES, Nov. 24, 2004, at A5, or the nearly 420,000 from cigarette smoking, see Center for Disease Control, Tobacco

domestic homicides, resulting in about 1,800 murders annually.<sup>308</sup> Accidental deaths are typically the smallest fraction of American gun deaths and those where children are victims smaller still.<sup>309</sup> In 1993 for example, “119 children under the age of 13, including 30 under the age of 5 were killed in [firearms] accidents . . . .”<sup>310</sup> Depending on which studies we credit, Americans use guns defensively on the order of more than two million times per year, around 700,000 times a year, or around 75,000 times a year.<sup>311</sup> Fourteen million Americans routinely carry guns when they go out.<sup>312</sup>

This says something about the costs and character of our armed society, but in full context, the inter-generational conversation Ackerman solicits presents a bit of a problem. Looking across our history, America has spoken quite a lot and loudly about guns. But relatively little of that has been about gun *prohibition*. As we have seen, from the Framing through Reconstruction to the modern era, the principle work in the states has been about acknowledging the right of individuals to keep and bear private firearms. There is no equivalent, large-scale public decision-making from these periods that endorses the prohibitionist agenda.<sup>313</sup> The work of standard model

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Information and Prevention Source (TIPS), Cigarette Smoking-Related Mortality, [http://www.cdc.gov/tobacco/research\\_data/health\\_consequences/mortali.htm](http://www.cdc.gov/tobacco/research_data/health_consequences/mortali.htm) (last visited Feb. 8, 2006). The homicides seem more like the carnage inflicted by drunk drivers (about 17,000 deaths per year). See *Drunken Driving Deaths Drop*, CBS NEWS (Aug. 25, 2004), <http://www.cbsnews.com/stories/2004/08/25/national/main638544.shtml>. Between 1997 and 2002, an average of 57 children under 14 were killed in firearms accidents each year. See Common Sense about Kids and Guns, National Firearms Deaths, [http://www.kidsandguns.org/study\\_deaths.asp?National](http://www.kidsandguns.org/study_deaths.asp?National) (last visited Feb. 8, 2006).

<sup>308</sup> KLECK, TARGETING GUNS, *supra* note 214, at 74.

<sup>309</sup> For 2002 the CDC reports 11,829 firearms homicides, and 17,108 firearms suicides. Center for Disease Control, National Center for Health Statistics, fast stats A to Z, <http://www.cdc.gov/nchs/fastats> (follow “Homicide/Assault” and “Suicide/Self-Inflicted Injury” hyperlinks). This is in addition to accidental firearms deaths. During the same year 16,257 people died in unintentional falls and 17,550 died by accidental poisoning. *Id.* (follow “Accidents/Unintentional Injuries” hyperlink).

<sup>310</sup> KLECK, TARGETING GUNS, *supra* note 305, at 299. The highest number of accidental shooting deaths in one year was 3,014 in 1933. *Id.* at 323 tbl.9.2. Since 1973 (with 2,618 fatal gun accidents) the number has declined nearly every year. *Id.* In 1998 there were 900. NATIONAL SAFETY COUNCIL, INJURY FACTS 9 (1999). In 80 of these the victim was age 5-14. *Id.* 30 victims were under the age of 5. *Id.*

<sup>311</sup> See KLECK, TARGETING GUNS, *supra* note 305, at 151-54 (reporting his findings and those of other studies).

<sup>312</sup> Philip J. Cook et al., *The Gun Debate’s New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. POL’Y ANALYSIS AND MGMT. 463, 467 (1997) (“14 million people routinely carry [a gun] when they go out.”).

<sup>313</sup> See *generally* Bogus, *supra* note 159.

scholars parallels this argument.<sup>314</sup> Even the opposition to the standard model scholarship is basically reactive, limited to alternative explanations of the evidence offered by standard modelers.<sup>315</sup>

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<sup>314</sup> After discussing the rich originalist support for the individual rights view, William Van Alstyne underscores the point this way:

In recent years it has been suggested that the Second Amendment protects the “collective” right of states to maintain militias, while it does not protect the right of “the people” to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for *no known writing surviving from the period between 1787 and 1791 states such a thesis.*

William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 n.19 (1994) (emphasis added) (quoting STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 83 (1984)). See also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996).

For nineteenth century support of the individual right, see generally David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359.

For support of the individual right during the Reconstruction Era see Stephen P. Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 431-34 (1995) (providing a detailed account of debates confirming congressional intent to incorporate the individual rights view of the Second Amendment into the Fourteenth Amendment); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 342-48 (1991) (discussing the influence that Southern attempts to disarm the newly freed slaves had on the adoption of the Fourteenth Amendment and subsequent Supreme Court cases); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1260-62 (1992) (documenting through floor speeches that the framers of the Fourteenth Amendment intended to protect generally the freedoms in the Bill of Rights, including the right to keep and bear arms); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1167-68 (1991) (explaining that key framers of the Fourteenth Amendment viewed the right to keep and bear arms, unlike other constitutional provisions, as a “privilege of national citizenship” that applied against the states). See also *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857) (explaining that if free blacks were deemed citizens they would have commensurate rights including the right “to keep and carry arms wherever they went”).

<sup>315</sup> See, e.g., Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (the authors, standard modelers, illustrate some of the worrisome policy results of pressing the collective rights view of the Second Amendment very far, and suggest that collective rights scholars haven't really taken collective rights seriously, advancing it just as a makeweight). For a suggestion of how the collective rights view realistically might spin out in problematic ways, see Nicholas J. Johnson, *Testing the States Rights Second Amendment, A Showdown between Federal Environmental Closure of Firing Ranges and Protective State Legislation*, 38 IND. L. REV. 689 (2005).

It is not uncommon to find early municipal restrictions on carrying and use of handguns,<sup>316</sup> some of which seemed to have racist motivations.<sup>317</sup> But in terms of the broad public stirrings, decisions by the people on the order of state constitutional amendments or votes for a chief executive that Ackerman says are signals of higher lawmaking, there is really very little discussion about prohibition until quite late in the game.

The first major federal gun control law did not appear until more than fifty years after the founding of the National Rifle Association.<sup>318</sup> Formed in 1871 by two Union officers who lamented the generally poor marksmanship of their Civil War troops, the National Rifle Association was established to “promote and encourage rifle shooting on a scientific basis.”<sup>319</sup> Progress was plodding and the organization even suspended operations from 1892-1900.<sup>320</sup>

In 1904, advancing the idea of America as a nation of riflemen, Congress established the Civilian Marksmanship Program (“CMP”) for the purpose of promoting shooting clubs, national shooting competitions, and encouraging civilian training and practice with military arms.<sup>321</sup> Through a cooperative arrangement between the CMP and (for over fifty years) the NRA, citizens were able to purchase government surplus army rifles and handguns, including semiautomatic battle rifles that some would call assault rifles. Practical support for shooters remained the NRA’s central mission through the 1950s. The CMP though now detached from the NRA, continues its original mission, much to the chagrin of

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<sup>316</sup> David Hardy writes:

The first American handgun ban was enacted in 1837 [voided as a violation of the federal Second Amendment in *Nunn v. State*, 1 Ga. 243 (1846)], restrictions on sale or carrying of handguns were commonplace by the turn of the century, and the National Conference of Commissioners on Uniform State Laws spent seven years in the 1920s preparing a uniform state act on the subject.

Hardy, *supra* note 191, at 589 (internal citations omitted).

<sup>317</sup> See Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J. L. & PUB. POL’Y 17 (1995).

<sup>318</sup> Hardy, *supra* note 191, at 589-90 (“[P]rior to 1934, the sole federal statute on the subject was a 1927 ban on the use of the mails to ship firearms concealable on the person.”).

<sup>319</sup> See Brief History of NRA, *supra* note 161.

<sup>320</sup> See SHERRILL, *supra* note 294, at 212.

<sup>321</sup> See Civilian Marksmanship Program, About the CMP, [http://www.odcmp.com/about\\_us.htm](http://www.odcmp.com/about_us.htm) (last visited Feb. 8, 2006).

some,<sup>322</sup> and recently marked 100 years of providing Americans with surplus military arms and marksmanship training.<sup>323</sup>

It was not until 1904, writes Robert Sherrill, with the creation of the CMP that the NRA really became viable. Sherrill, who is deeply critical of both the NRA and the CMP, writes this:

In 1903, under the heavy handed encouragement of Secretary Root and key generals, Congress was persuaded to permit the NRA to get its hands officially into the U.S. Treasury; this came about via the establishment of the National Board for the Promotion of Rifle Practice, which, at its very first meetings, voted to turn over literally every available military shooting installation plus all available surplus weapons to the promotion of the NRA.

By 1910 the War Department began supplying the NRA with cut-rate weapons. Having adopted the Model 1903 Springfield as the official infantry arm, the department declared the Model 1898 Krag as surplus and let NRA members have them for \$10 each, plus costs. NRA officials concede that this “greatly advanced” the NRA because this was the first time that the government used the riflemen as its outlet for used weapons. Thereafter the NRA could advertise that it

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<sup>322</sup> See John Mintz, *M-1 Rifle Giveaway Riles Gun Control Proponents*, PLAIN DEALER (Cleveland), May 9, 1996, at A14. For a highly critical, often humorous, informative critique of the CMP, see SHERRILL *supra* note 294, at 221-22. Sherrill writes:

[F]inally [the National Defense Act of 1916] created the Office of the Director of Civilian Marksmanship under the National Board for the Promotion of Rifle Practice—a bureaucratic enclave that was to swell eventually into two dozen civilian employees and three colonels, supervised by the twenty-five-member Board itself (most of whose members belong to the NRA), and operating on a budget of \$5 million. . . . There was considerable grouching among critics of the NRA when, at the height of the Vietnam War and the drafting of record numbers of men to fight an unpopular war, the Pentagon was assigning three thousand servicemen to provide housekeeping services at Camp Perry for the NRA devotees. The Perry matches alone cost taxpayers \$2 million. . . . And did the federal support of this manly hobby pay off in a better-trained citizenry on which the military forces could draw? Alas, not exactly. In fact the [CMP] was of insignificant value [according to a 1965 study] at a cost of \$100,000 to the taxpayer. In a sampling of 12,880 Army trainees . . . only 3.1 percent had been in the [CMP] before being inducted into the army. The study further showed that some gun club members had received no instruction at all and that some had never shot a gun. Perhaps the most embarrassing discovery was that fewer than half of the gun club members benefiting from the government program were of draftable age.

*Id.* Sherrill's book is anything but an endorsement of an armed society. But his description of the CMP is useful. Remember that lots of people did not like the New Deal either. See *supra* note 177.

<sup>323</sup> In 1994 the program was transformed from one funded out of the federal budget to a federal corporation that must sustain itself financially. It still promotes marksmanship training and sells surplus semiautomatic battle rifles to qualified citizens. See 36 U.S.C. § 40729 (2000).

paid to sign up. Only NRA members got the guns. Only NRA members got the free ammunition. Only NRA members got the free trips to shooting matches.

....

... [In 1916 the National Defense Act] authored primarily by Secretary [of War] Root... *incorporated into government policy* all the ad-hoc favoritism of previous years: \$300,000 dollars—an enormous sum for 1916—was set aside to promote civilian marksmanship training; the War Department was authorized to keep handing out guns and ammo to civilian rifle clubs; military instructors were made available to the NRA hobbyist; all military rifle ranges were opened to civilian gunmen; finally it created the Office of the Directory of Civilian Marksmanship under the National Board for the Promotion of Rifle Practice . . . .<sup>324</sup>

Sherrill brings the disgust of a modern gun control advocate to his description of the NRA's partnership with the federal government. But realize this is *his* disgust *circa* 1973. Nothing in his account and nothing I can find suggests any general sympathy at the turn of the century for Sherrill's views. There was as yet, no Coalition to Ban Handguns, Violence Policy Center or Handgun Control, Inc.—no prohibitionist movement to speak of.

The first major federal firearms regulation was the National Firearms Act of 1934 which subjected destructive weapons—e.g., full automatic firearms, short barreled rifles and shotguns, and silencers—to a two hundred dollar tax and registration enabling the tax.<sup>325</sup> These firearms remain available today under basically the same scheme of regulation.<sup>326</sup>

The 1934 Act was limited to a narrow class of destructive weapons.<sup>327</sup> Still under consideration was regulation of the trade in ordinary firearms. The Federal Firearms Act of 1938 established a system of licenses for firearms dealers.<sup>328</sup> The one-dollar license was required only for dealers who traded firearms in interstate or foreign commerce.<sup>329</sup> These dealers were required to keep a record of their sales and were prohibited from shipping guns across state

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<sup>324</sup> SHERRILL, *supra* note 294, at 219-21.

<sup>325</sup> National Firearms Act of 1934 §§ 3-5, Pub. L. No. 73-474, 48 Stat. 1236 (codified as 26 U.S.C. § 5801 (2000)).

<sup>326</sup> See National Firearms Act, 26 U.S.C. §§ 5611, 5841 (2000).

<sup>327</sup> National Firearms Act of 1934 § 1(a).

<sup>328</sup> Hardy, *supra* note 191, at 594.

<sup>329</sup> *Id.*



lines to violent felons or to anyone prohibited from receiving a firearm by the laws of the destination state.<sup>330</sup>

This was the state of federal gun law when the Supreme Court took the case that stands as its only direct treatment of the Second Amendment. It was a violation of the 1934 Gun Control Act that set up the Court's decision in *U.S. v. Miller*.<sup>331</sup> Miller, a bootlegger, was arrested for possession of an unregistered sawed-off shotgun.<sup>332</sup> He claimed that the 1934 Act was a violation of the Second Amendment.<sup>333</sup> When the case finally reached the Supreme Court, Miller had disappeared. The government argued its case unopposed.<sup>334</sup>

Part of the *Miller* opinion focused on whether the gun had a reasonable relationship to preservation of a well regulated militia.<sup>335</sup> Unable to conclude that it did, the Court ruled, "[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."<sup>336</sup> This prompts claims that the right is a collective or state right.

But then the Court explains that the "militia" consists of the general citizenry bearing "arms supplied by themselves and of the kind in common use at the time" and ignores that Miller was not part of any organized military unit. This part of the decision fuels individual rights claims.<sup>337</sup> This duality in *Miller* is underscored by the vacillating opinions of the executive branch about the meaning of the Second Amendment,<sup>338</sup> and leaves us today unable to say conclusively whether the right is individual or not.

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<sup>330</sup> *Id.* at 594. For a rich description of the details and political maneuvering leading to passage of the bill, see *id.* at 585-627.

<sup>331</sup> 307 U.S. 174 (1939).

<sup>332</sup> *Id.* at 175.

<sup>333</sup> *Id.* at 176.

<sup>334</sup> ROBERT J. COTTRILL, GUN CONTROL AND THE CONSTITUTION xxvii (Garland 1993).

<sup>335</sup> *Id.* at 177.

<sup>336</sup> *Id.* at 178.

<sup>337</sup> Quickly after *Miller* came circuit court opinions that basically ignored *Miller* and created their own more stringent tests. Subsequent cases applied these more stringent tests, even while citing *Miller*, resulting in our current situation where most lower federal courts have concluded that the Second Amendment does not guarantee an individual right. See Denning, *supra* note 138, at 963.

<sup>338</sup> See DOJ Memorandum, *supra* note 22; Karen Gullo, *Ashcroft Interprets 2nd Amendment*, CBSNews.com (May 23, 2001), <http://www.cbsnews.com/stories/2001/05/23/politics/main292854.shtml>. See also David B. Kopel, *An Army of One: The Right to Bear Arms Belongs to You, Not to the Government*, NAT'L REV. ONLINE, May 29, 2001, <http://www.nationalreview.com/kopel/kopel052901.shtml> (showing that Attorneys General from the administrations of Andrew Jackson, Abraham Lincoln through Franklin Roosevelt took the individual rights view) (last visited Feb. 8, 2006).

Approaching the 1960s, what older gun collectors call the golden age neared its end. Up to then, war surplus guns were plentiful and firearms could be ordered by mail.<sup>339</sup> But there was trouble ahead. The thriving culture of gun trading, collecting and shooting sports would be rocked by the next major federal gun control act.

The 1960s brought war, cultural revolution and assassination. It was also the decade where the first real threat to “the right to keep and bear arms” emerged. In 1973 Robert Sherrill wrote:

There had been gun-control bills eddying around the backwashes 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.<sup>340</sup>

Sherrill makes another observation that is both ironic and remarkable. Tracking the efforts of the domestic gun industry to fend off competition from cheap military surplus imports, Sherrill shows that American gun manufacturers, their agenda promoted by Connecticut Senator Thomas Dodd, contributed a central piece to the modern gun control agenda:

[Importers were bringing in millions of military surplus guns and selling them through big mail order houses]. Interarmco was importing Colt and Smith & Wesson military revolvers that were identical in construction and quality to, and selling for half the price

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<sup>339</sup> See, e.g., John T. Amber, *This Gun Collecting Game*, in GUN DIGEST TREASURY 106 (Harold A. Mertz ed., 7th ed. 1994). In a salient condemnation of the mail order trade Robert Sherrill writes:

On March 12, 1963, Oswald tore out the coupon and sent along a postal money order for \$21.45 to Klein’s Sporting Goods Co. in Chicago. . . . Klein’s was just one of many outlets for the Italian surplus military rifles . . . on March 13 Klein’s cashed the money order, and seven days later the rifle, fully assembled, was on its way by parcel post . . . .

SHERRILL, *supra* note 294, at 166.

<sup>340</sup> *Id.* at 70. David Hardy puts the assassinations into legislative context:

In April 1968, while [the 1968 Act] was in Senate committee consideration, Rev. Martin Luther King was murdered by a sniper. The day before the House vote, Robert F. Kennedy was killed. The day of the House vote, President Johnson publicly denounced [this early weaker version of the 1968 act] as a “half-way measure” . . . .

Hardy, *supra* note 191, at 601-02.

of, the Colt and Smith & Wesson commercial revolvers peddled in the classiest retail stores.

It's estimated that between 1959—about the time the New England manufacturers really began to get their anti-import propaganda going—and 1963, 7 million foreign weapons, mostly military surplus, were imported into the United States.

....

Around the cheapness of these firearms was to whirl all sorts of erroneous claims in the years ahead. The big American gun manufacturers argued that the castoff military weapons were unsafe, unreliable, not worth even their cheap price . . . . Most of the military rifles were manufactured to specifications that were higher and more rigid than those that apply to most sporting firearms. . . . But the quality of the competing firearms was hardly an issue that would be sufficient to inflame Congress. If the New England gun manufacturers wanted to block the imports . . . they would have to fall back on something simpler and more easily understood by the layman.<sup>341</sup>

First they tried a “national security gimmick” claiming that imports caused American manufactures to layoff skilled labor leaving America vulnerable when the need arose to produce combat weapons for the army.<sup>342</sup> This argument was underwhelming:

So they needed a new attack. And that's when Dodd came up with crime in the streets. Yes, true, to be sure—crime in the streets already existed; but it is significant that the gunmakers of New England didn't discover crime until they needed it. One can search the records of Congress and also the records of the bureaucracy from the mid-1950s until 1963 and find hardly a suggestion that easy gun access might be contributing to urban turmoil and crime.

....

. . . [T]he lightbulb went on over Dodd's head and, lo, before him, illuminated in mystic fashion, was the new ploy: Imported Cheap Guns Equal Street Crime!

On this theme was to be launched the 1963 gun-control hearings. . . . The restrictions that Dodd sought to impose on firearms would have little effect on the manufactures of America's old-line guns but would, he hoped, cripple the importers of foreign-made weapons.

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<sup>341</sup> SHERRILL, *supra* note 294, at 87-89.

<sup>342</sup> *Id.* at 90 (internal quotation marks omitted).

. . . Just when it seemed that Dodd's mail-order-guns show was going to die for lack of notoriety, president John Kennedy's death came along and revived it. . . . Whether he wanted to or not, Dodd now had to get in there and orate like he meant it, for he was caught by the wave of history.<sup>343</sup>

The tangible consequence of Dodd's efforts was the Gun Control Act of 1968.<sup>344</sup> The Act expanded the definition of persons prohibited from purchasing firearms and made limitations that were applicable only to interstate sales under the 1938 Act, universal.<sup>345</sup> The 1968 Act expanded the provisions of the 1938 Act, now requiring not just interstate, but all dealers to obtain a federal license.<sup>346</sup> The Act also barred mail order sales entirely, and placed new restrictions on dealer and private party sales to out-of-state residents.<sup>347</sup>

The era of free transferability was over. It is in this environment that a plausible organized resistance to the right to keep and bear arms splashed onto the scene. In 1975 the advocacy gained prominence as Pete Shields, spurred by the loss of his son to a criminal with a gun, devoted himself full-time to the newly formed National Council to Control Handguns (renamed Handgun Control, Inc. in 1980).<sup>348</sup> Early

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<sup>343</sup> *Id.* at 92-93, 157. David Hardy also provides interesting insight into the character and efforts of Dodd and his work for the establishment domestic gun manufacturers. See Hardy, *supra* note 191, at 595-98. Hardy characterizes Dodd as a staunch conservative (from the state that hosted gun firms Colt, High Standard, Remington, Mossberg, Winchester-Western, Strum-Ruger and Marlin) who kept a pistol in his desk and tried to take it to Senate floor the day he was to be censured. *Id.* at 595 nn.56-57.

<sup>344</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-930 (2004)). David Hardy details the complicated history leading up to the 1968 Act. Hardy, *supra* note 191, at 595-604. It started with a bill introduced by Dodd in 1963 that would have restricted mail ordering of handguns. *Id.* at 597. By 1968 Dodd had lost standing due to a censure vote, but still introduced the Bill that essentially became the 1968 act. *Id.*

<sup>345</sup> 18 U.S.C. §§ 921-927 (2004); Hardy *supra* note 191, at 597-98. See also *United States v. Posnjak*, 457 F.2d 1110, 1115 (2d Cir. 1972) (the act also enabled regulatory restrictions on importation of small cheap handguns deemed to have insufficient utility for sporting purposes).

<sup>346</sup> Hardy, *supra* note 191, at 607.

<sup>347</sup> *Id.* at 599.

<sup>348</sup> Brady Campaign, Brady Campaign United with the Million Mom March and the Brady Center to Prevent Gun Violence, A History of Working to Prevent Gun Violence, <http://www.bradiycampaign.org/press/?page=history> (last visited Feb. 8, 2006). The Brady organization's description of the high points of the gun control movement is a useful counterpoint to the events I highlight in this section. It describes personal tragedies, discrete pieces of legislation, initiatives of the organization, advertisements in the New York Times and, prominently, the recent spate of litigation against the gun industry. But it does not suggest any evidence of grand constitutional moments endorsing gun prohibition. Indeed, some of the organization's implicit claims seem a

on, Shields and others made it clear that our gun culture required radical change:

We're going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest. . . . Our ultimate goal—total control of handguns in the United States—is going to take time. . . . The first problem is to slow down the increasing number of handguns being produced sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of *all* handguns and *all* handgun ammunition—except for the military, police, [security guards, licensed clubs and collectors]—totally illegal.<sup>349</sup>

Around the same time, the Coalition to Ban Handguns was formed.<sup>350</sup> As the name promises, its goals were the same as HCI's.

During this period the NRA was transformed as well. Historically it had been occupied with constituent service.<sup>351</sup> The constituents were basically hobbyists.<sup>352</sup> NRA's focus had been support for national target matches, hunter education,

bit exaggerated. *See, e.g.,* Robert B. Bluey, *Attendance Down for Anti-Gun Million Mom March*, CNS NEWS.COM, May 10, 2004, <http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200405\CUL20040510b.html> (“It was business as usual in the nation's capital on Sunday despite the presence of the anti-gun Million Mom March, which drew only 2,000 people, a fraction of the number expected to attend.”); *Million Mom March' Draws 100 for Gun Control*, CNN.COM/US, May 13, 2001, <http://www.cnn.com/2001/US/05/13/moms.gun.control/index.html> (“In vastly reduced numbers from last year's rally, mothers who support gun control were back at the National Mall on Sunday, renewing their calls for tougher laws aimed at curbing firearms violence. Only about 100 supporters attended this year . . .”).

<sup>349</sup> Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 57-58. *See also* Kates et al., *supra* note 294, at 515-17 (pointing out scores of statements and official positions advocating a total ban on private possession of handguns or all firearms).

<sup>350</sup> Violence Policy Center, Appendix One: Groups and Organizations, Gun Control Groups, Coalition to Stop Gun Violence (CSGV) (“[CSGV] is a 501(c)(4) lobbying organization founded in 1974 as the National Coalition to Ban Handguns. CSGV is a coalition of national religious, professional, educational, and public health organizations that endorses banning the sale and private possession of handguns in America.”).

<sup>351</sup> Robert Sherrill's unflattering description of the NRA affiliation with the DCM program describes a group of hobbyists subsidized by the federal government. But since the prohibitionist movement had not emerged, the NRA had not developed the apparatus to oppose it. *See* SHERRILL, *supra* note 294, at 220-25.

<sup>352</sup> *See* Mark Benenson, Op-Ed, *Let Me Go Back to the Shooting Range*, WASH. POST, March 29, 1995, at A25 (“Things have changed for the worse since I joined the NRA in 1947, when I was 17 . . . . We were all gun bugs and target shooters—not much different from camera cranks. The public and the politicians paid very little attention to us . . . . This hobby honeymoon began to fade as the 1950's wore on. [Then came the Kennedy and King assassinations and] . . . the floodgates opened.”).

range development and preservation.<sup>353</sup> But as gun prohibition loomed, the NRA adapted. By the early 1970s the NRA was considered even by critics,

Dollar for dollar . . . probably the most effective lobby in Washington. Its assets hardly put it in the same league with the oil lobby, and for a crash campaign it could not gather the kind of slush fund the American Medical Association raised to fight Medicare. But among grass-roots lobbying organizations who specialize in letter writing campaigns, the National Rifle Association is in a class by itself. Its officials have boasted that they can get their million members to hit Congress with at least half a million letters on seventy-two-hour notice. . . . [A]t the height of the Vietnam War, Senator Edward Kennedy of Massachusetts said he was regularly getting more mail on the pending gun-control legislation than on the war . . . .<sup>354</sup>

In 1975, NRA established the Institute for Legislative Action (“ILA”) in response to growing prohibitionist advocacy.<sup>355</sup> Today, when people lament or boast of the NRA’s lobbying power they are really talking about ILA. It is largely through ILA, its capacity to rally the tens of millions of NRA sympathetic gun owners to vote for gun rights candidates and pester those who are not, that NRA’s gun rights agenda has advanced.<sup>356</sup>

One manifestation of this was the 1986 Firearms Owner’s Protection Act (FOPA).<sup>357</sup> In the years immediately after the 1968 Act, participants in the old gun show culture—collectors without dealer’s licenses who still went to shows and bought and sold guns—were prosecuted for dealing firearms without a license.<sup>358</sup> Prompted in part by complaints that these

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<sup>353</sup> The National Rifle Association Headquarters, <http://www.nrahq.org> (last visited Feb. 8, 2006).

<sup>354</sup> SHERRILL, *supra* note 294, at 195.

<sup>355</sup> NRA’s Legislative Affairs Division had been around since 1934. It did not lobby, but did mailings about legislative issues to members. *See* Brief History of NRA, *supra* note 161.

<sup>356</sup> *See* discussion accompanying *infra* note 421.

<sup>357</sup> Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921-926A, 929, & 26 U.S.C. § 5845 (2000)).

<sup>358</sup> *See* Hardy, *supra* note 191, at 628-30. One response to this was quite a number of people obtaining easily available federal firearms licenses. With this license the old gun trading culture was revived somewhat. So much so that by 1994 the Clinton administration lamented the nearly 250,000 licensed gun dealers. Worried that these kitchen table dealers were a source of guns used in crime, the Clinton administration developed more stringent regulatory requirements that reduced the number of federal firearms licenses to about 58,000. *See* Press Release, Violence Policy Center, Eleventh-Hour NRA Amendment to Justice Department Appropriations Bill Would License Tens of Thousands of New “Kitchen-Table” Gun Dealers (July 21, 2003), <http://www.vpc.org/press/0307ffl.htm>.

prosecutions targeted harmless collectors with felony prosecution, FOPA was alternately described as “necessary to restore fundamental fairness and clarity to our Nation’s firearms laws,” and “a national disgrace.”<sup>359</sup>

FOPA made substantial changes to the Gun Control Act of 1968. Among the most notable, it diminished the chance that a gun collector would be prosecuted for dealing firearms without a license,<sup>360</sup> liberalized slightly the restrictions on dealer sales of long guns to nonresidents,<sup>361</sup> gave gun owners the right to transport a legally possessed firearm through any state, notwithstanding contrary state law (so long as the gun is unloaded and not readily accessible)<sup>362</sup> and strengthened the position of gun dealers against government enforcement actions in a variety of minor ways.<sup>363</sup> It was a decided diminution of the regulatory apparatus affecting lawful possession and transfer of firearms,<sup>364</sup> and represented a substantial win for the gun crowd.

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<sup>359</sup> See Hardy, *supra* note 191, at 585, 629-30 (quoting 132 CONG. REC. H2665 (daily ed. Apr. 9, 1986) (statement of Rep. Tallon)); 132 CONG. REC. H1751 (daily ed. Apr. 10, 1986) (statement of Rep. Weiss).

<sup>360</sup> Hardy, *supra* note 191, at 629, 630 & n.244. Under the 1968 Act, some gun collectors were prosecuted for dealing in firearms without a license (collector who sold three guns over a two-year period prosecuted for dealing guns without a license). *Id.* at 606 n.118. FOPA gave additional protections to hobbyists by defining more tightly what it means to engage in the business of firearms sales. *Id.* at 630. Before FOPA, the prudent thing for collectors to do was obtain a dealer license. These were relatively easy to get. Under the Clinton administration, it was deemed a risk to public safety to have so many licensed gun dealers, many of whom were the same class of hobbyists who faced prosecution under the 1968 Act for not having a dealer license. See *supra* note 358.

<sup>361</sup> Hardy, *supra* note 191, at 634.

<sup>362</sup> *Id.* at 677-78. A legally possessed gun is one the person is allowed to possess in the place he is traveling from and the place he is traveling to. Prohibitive state regulations he encounters en route are trumped by the FOPA. *Id.*

<sup>363</sup> See *id.* at 643-53.

<sup>364</sup> David Hardy concludes:

FOPA’s amendment of the Gun Control Act is both deep and wide ranging. . . . FOPA will require greatly increased sensitivity, efficiency and coordination on the part of the administering agency. Delays may run afoul of FOPA’s various limitation periods; unjustified administrative inspections may clash with its restrictions on searches. . . . FOPA confers both substantive and procedural rights upon citizens accused of Gun Control Act violations. Scierer requirements limit application of most of the Act’s sanctions to willful violators; a citizen who wins a criminal acquittal need not face civil sanctions based on the same allegation. . . and the unprecedented availability of attorneys’ fees awards ensures that the financial risks of a meritorious defense may well be shifted to the prosecuting agency.

*Id.* at 680-81.

But the prohibitionist movement was having success as well. And at points the threat to private ownership of firearms seemed quite real. Gun bans and stringent restrictions emerged in discrete spots. Washington, D.C. enacted a handgun ban in 1976 and mandated that long guns be kept disassembled.<sup>365</sup> In 1981, the Illinois city of Morton Grove enacted a handgun ban whose validity was upheld by the Seventh Circuit Court of Appeals, and, in 1983, the Supreme Court declined to hear the case.<sup>366</sup> In 1982, San Francisco and Berkeley, California enacted similar ordinances but these were invalidated on state statutory grounds the same year.<sup>367</sup> Around the same time, the city of Chicago<sup>368</sup> and several of its suburbs enacted severe handgun restrictions that remain in place today.<sup>369</sup>

Between the late seventies and early eighties, we reached the crest of the prohibitionist movement.<sup>370</sup> Buoyed by

<sup>365</sup> D.C. CODE §§ 7-2502.02(4), 7-2507.02. *See generally* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 105 (1994).

<sup>366</sup> *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982). *See generally* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 250, 251 & n.198 (1983).

<sup>367</sup> Kates, Jr., *supra* note 366, at 251 n.198 (citing *Doe v. City and County of San Francisco*, 186 Cal. Rptr. 380 (Cal. Ct. App. 1982)).

<sup>368</sup> Section 8-20-010 of the Municipal Code of Chicago enacted a freeze on handgun ownership in 1982.

<sup>369</sup> Oak Park banned handgun sales in 1977 and ownership in 1984. OAK PARK VILLAGE, ILL., CODE §§ 27-1-1, 27-1-2, 27-2-1 (1994), *available at* <http://www.sterlingcodifiers.com/IL/Oak%20Park/index.htm>; NRA-ILA, Fact Sheets, *The War Against Handguns* (Feb. 15, 2001), <http://www.nra.org/Issues/FactSheets/Read.aspx?ID=17>. Evanston implemented a ban in 1982. EVANSTON, ILL., CODE § 9-8-2 (2005), *available at* <http://www.sterlingcodifiers.com/IL/Evanston/index.htm>; NRA-ILA, *supra*. In 1989, Wilmette became the fifth municipality nationwide to ban handguns. WILMETTE ILL., CODE § 12-24(b) (2005), *available at* [http://www.amlegal.com/nxt/gateway.dll/Illinois/wilmette\\_il/villageofwilmetteillinoiscodeofordinance?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:wilmette\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/wilmette_il/villageofwilmetteillinoiscodeofordinance?f=templates$fn=default.htm$3.0$vid=amlegal:wilmette_il); Lisa Black, *Wilmette Stands by Handgun Ban; Law Scrutinized After Intruder Shot*, CHI. TRIB., Jan. 14, 2004, Metro NW, at 1. Unlike many states, Illinois does not preempt municipal regulation of firearms. 430 ILL. COMP. STAT. 65/13.1 (2005). *See also* *City of Chicago v. Taylor*, 774 N.E.2d 22, 28 (Ill. App. Ct. 2002).

<sup>370</sup> Let me reemphasize the distinction I have made throughout. There is quite a lot going on in the gun debate. And it is not accurate to say that Americans have rejected gun control as distinguished from gun prohibition. Throughout this discussion I have said that the important contest here is between the "prohibitionist" agenda and a constitutional right to arms that would block it. My intent is to distinguish more between policies than people. There are baskets full of gun control measures at the state, local, and federal levels. The dispute here is not really about these various regulatory schemes. Rather it is between constitutional protection of an armed society and a structure where individual firearms survive purely at the will of the legislature.



municipal ordinances banning handguns, but frustrated that statewide legislation seemed to have been thwarted (by the gun lobby or otherwise), prohibitionists bypassed the legislature and went straight to the people. The result was failed gun ban referenda in Massachusetts and California that are richly described by David Bordua.

In what was originally billed as a major step in the eventual national banning of private ownership of handguns, a ban proposition was placed before the people of Massachusetts at the time of the national election in November 1976. Advocates were highly optimistic. Massachusetts was the “most liberal” state in the union. Gun ownership rates were relatively low. Boston’s major newspaper, the *Globe*, favored the ban, as did the *Christian Science Monitor*, the *Washington Post* and the *New York Times*.

The pro-ban movement was led by a group called People vs. Handguns, which had been established in early 1974 under the primary leadership of John J. Buckley, Sheriff of Middlesex County. . . .

. . . .

Gun control advocates in Massachusetts saw this as a golden opportunity to bypass the gun lobby and go directly to the people—the people whose will had so long been thwarted by the National Rifle Association. The closeness of the predicted result indicated that every effort should be made to “get out the vote.” As cited in Holmberg and Clancy (1977: 35),

Speaking for People vs. Handguns, Buckley said, “For many years the legislature has listened to the small but loud voice of the gun lobby” and he urged the legislature to “listen to the voice of the people.”

The outcome was defeat of the proposition by a vote of 1,669,945 to 743,014—a ration [sic] of 2.25 to 1. Put another way, the proposition to ban private ownership of handguns was opposed by 69.2% of the 2,412,959 votes cast on the proposition (Holmberg and Clancy, 1977: 156). Eighty-six percent of the eligible electorate went to the polls. A full 77% of the eligible Massachusetts voters voted on the handgun proposition.

. . . .

The central element of [California] Proposition 15 was the requirement that all handguns be registered between November 3, 1982, and November 3, 1983, after which time registration would be frozen. The attempt was to freeze the number of handguns by freezing registrations.

. . . The size and greater difficulty of campaigning in such a large and diverse state and the feeling that events such as the attempted assassination of President Reagan and especially the murder of John

Lennon [led to predictions the proposition might come close to passing] . . . .

It is far too early to present a thorough analysis of the campaign and countercampaign over Proposition 15. The results, however, were quite like those in Massachusetts. Voter turnout was high—72% of eligible voters. The proposition was defeated by 63% to 37%—not as dramatic as the 69% to 31% defeat in Massachusetts, but decisive nonetheless.

. . . .

Sheriff Buckley was wrong. When severe gun control is made salient and the public is approached directly, the gun lobby turns out to be more in tune with public opinion than do the civic disarmers. This conclusion is based on a national NRA-sponsored poll by a “conservative” firm; by a slightly populist sociologist’s survey in Illinois in 1977; and, with less analysis, by a gun-control-movement-sponsored poll conducted in Massachusetts in 1977 by a “liberal” firm.

The conclusions from survey data are confirmed by the overwhelming defeat of two strict gun control proposals: the Massachusetts handgun ban in 1976 and Proposition 15 in California in 1982. These gun lobby victories cannot be explained by richer campaign budgets, nor by superior lobbying frequency and skill, since both gun control defeats were by the electorate as a whole . . . .<sup>371</sup>

In 1993, as a gun ban referendum was failing in Madison, Wisconsin,<sup>372</sup> President Bill Clinton was asked whether he supported a ban on handguns. In an answer that has been construed as meaning *Yes, eventually*, he said, “I don’t think the American people are there right now. But with more than 200 million guns in circulation, we’ve got so much more to do on this issue before we even reach that.”<sup>373</sup> And earlier, this: “We can’t be so fixated on our desire to preserve the rights of ordinary Americans to legitimately own handguns and rifles . . . that we are unable to think about [] reality.”<sup>374</sup>

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<sup>371</sup> David J. Bordua, *Adversary Polling and the Construction of Social Meaning: Implications in Gun Control Elections in Massachusetts and California*, 5 LAW & POL’Y Q. 345, 355-56, 359-60, 364 (1983), available at [www.saf.org/LawReviews/BorduaQuarterly.htm](http://www.saf.org/LawReviews/BorduaQuarterly.htm).

<sup>372</sup> See McFadden, *supra* note 44, at 714.

<sup>373</sup> Jann S. Wenner & William Greider, *The Rolling Stone Interview: President Clinton*, ROLLING STONE, Dec. 9, 1993, at 45.

<sup>374</sup> Paul Bedard, *Clinton a Boon to NRA; Fund Raising Ad Cites His Stands*, WASH. TIMES, July 6, 1993, at A1; Press Release, U.S. Senate Republican Policy Comm. (Sept. 21, 1999), available at [http://rpc.senate.gov/\\_files/92199ClintonGunLaws.pdf](http://rpc.senate.gov/_files/92199ClintonGunLaws.pdf).

Clinton was elected to two terms and by 2004 opined that his administration's gun policies, particularly the now expired 1994 gun ban, cost Democrats control of Congress and that Al Gore's carryover support for more stringent gun control contributed to Gore's loss in 2000.<sup>375</sup>

And that part of the story deserves further attention. By the mid to late 1990s, with two statewide handgun ban referenda defeated, the public conversation was less about outright bans, and more about gun control as crime control. Proposals for waiting periods and background checks evolved into the instant check system in place today.<sup>376</sup>

Still, during this period there were serious proposals to restrict firearms possession by ordinary citizens. The ambitions of groups like the Coalition to Ban Handguns were being pressed, but gained little traction. The problem was, the same types of guns (handguns) preferred by criminals were also the tools preferred by good people interested in self-defense. The full details of the debate are a story yet to be told, but by the 1990s Americans seemed to have rejected handgun bans.

Undaunted, Josh Sugarman in a now famous memorandum summarized the problem and suggested an entirely new target for prohibition. Dave Kopel reports, "Josh Sugarman authored the November 1988 strategy memo suggesting that the press and the public had lost interest in handgun control. He counseled the anti-gun lobby to switch to the 'assault weapon' issue, which the lobby did with spectacular success in 1989."<sup>377</sup> In Sugarman's words:

Although handguns claim more than 20,000 lives a year, the issue of handgun restrictions consistently remains a non-issue with the vast majority of legislators, the press, and public. . . . Assault weapons . . . are a *new* topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.<sup>378</sup>

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<sup>375</sup> See text at *infra* note 390 and accompanying text.

<sup>376</sup> For information about the National Instant Criminal Background Check System (NICS), see NICS Information, <http://www.fbi.gov/hq/cjisd/nics/index.htm> (last visited Feb 8, 2006).

<sup>377</sup> David B. Kopel, *Assault Weapons, in GUNS: WHO SHOULD HAVE THEM?* 159, 190-92 (1995).

<sup>378</sup> VIOLENCE POL'Y CTR., *ASSAULT WEAPONS AND ACCESSORIES IN AMERICA* (1988), available at <http://www.vpc.org/studies/awacont.htm>.

While it was true that these obscure guns were seldom used in crime, the rare instances where they were, turned out to be striking illustrations of the costs of an armed society.<sup>379</sup> After a full court press by Clinton and his allies in Congress<sup>380</sup> the assault weapons ban passed.<sup>381</sup>

It turns out that the ban really wasn't much of a ban after all. The legislation focused not on functionality but on accouterments that had no lethal function. Except for a few of the rarest examples, most of the "banned" guns remained on the market after simple modifications to remove the bayonet

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<sup>379</sup> See Jon E. Dougherty, *California Expanding Ban on "Assault Weapons,"* WORLDNETDAILY.COM, Dec. 31, 2000, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=15421](http://www.wnd.com/news/article.asp?ARTICLE_ID=15421) (discussing Patrick Purdy's attack on a school playground in Stockton, California).

<sup>380</sup> David Kopel writes:

The federal "assault weapon" ban could not have become law without the substantial, energetic assistance of President Clinton. In April and May of 1994, the president ordered the executive branch into a full-court press to pass the "assault weapon" prohibition in the House of Representatives. The ban lost by a single vote, but House Speaker Tom Foley violated the rules of the House, and delayed declaring the vote ended until House leaders could cajole after-the-fact vote switches, thereby giving the ban a 216-to-214 victory. The "assault weapon" ban was incorporated into a comprehensive federal crime bill several weeks later.

When the crime bill came to the floor of the House . . . in August 1994, [opponents] appeared to have killed the bill on a procedural vote. Senate Majority Leader George Mitchell and House Speaker Foley went to the White House, and told President Clinton that the crime bill could not pass if the "assault weapon" ban was included. Moreover, they warned that voting for a crime bill containing an "assault weapon" ban would hurt Democrats all over the country.

President Clinton's pollster Stanley Greenberg disagreed. He produced data which he said showed that not a single Democrat would lose his seat over the "assault weapon" ban. White House strategists suggested that because the "assault weapon" issue had such high public visibility, the president would appear indecisive if he did not insist on retaining the gun ban. The president did insist, and, after weeks of hard-fought insider politicking, the House and the Senate both passed the crime bill with the full-strength version of the "assault weapon" ban.

A few weeks after the November 1994 elections, President Clinton telephoned one of the leading Democratic supporters of the . . . ban. After congratulating the Congressman on his reelection, the president opined that the . . . ban had cost the Democrats twenty-one seats in the House of Representatives. Clinton later told the Cleveland *Plain-Dealer* that the "assault weapon" issue and the NRA's efforts had given the Republicans twenty additional seats.

KOPEL, *supra* note 301, at 160.

<sup>381</sup> Congress amended the 1968 Gun Control Act with the Crime Control Act of 1994, adding restrictions on the sale of certain magazine fed, center fire, semiautomatic rifles. 18 U.S.C. §§ 921, 922. A summary of the 1994 Act appears in *NRA v. Magaw*, 132 F.3d 272, 277-79 (6th Cir. 1997).

lug and flash-hider and swap out the pistol grip and folding stocks.<sup>382</sup>

And something else happened. The ban, that was not a ban, gave these formerly obscure guns a higher profile. People who were never interested in them now wanted one . . . or two.<sup>383</sup> After nearly ten years of being banned, these guns were more plentiful and cheaper than before the ban.<sup>384</sup> Even most of the magazines (the ammunition feeding device), which truly were prohibited from further manufacture, were, judging by pricing, more plentiful than before the ban.<sup>385</sup>

Some people believed that Congress had quite properly banned machine guns.<sup>386</sup> Those who were paying attention

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<sup>382</sup> Gun control groups characterized these adjustments differently. "Despite the [assault weapons] ban, many gun manufacturers have evaded the law by making minor modifications to banned weapons." Join Together Online, Hot Issues: Federal Assault Weapons Ban, [http://web.archive.org/web/20031013174812/www.jointogether.org/gv/issues/hot\\_issues/assaultweapon/](http://web.archive.org/web/20031013174812/www.jointogether.org/gv/issues/hot_issues/assaultweapon/) (last visited Feb. 8, 2006).

<sup>383</sup> See David B. Kopel, Editorial, *More Guns, Less Gun Violence*, WALL ST. J., Aug. 4, 2000, at A10, available at <http://www.freerepublic.com/forum/a398a9e4c7569.htm> ("Bill Clinton has been the best president the gun industry ever had. During the antigun panics that Mr. Clinton helped incite in 1993-94, and again in 1999, firearms sales skyrocketed, as consumers bought while they still could. For some months in 1993-94, manufacturers were running their plants on three shifts a day and still couldn't keep up with demand.").

<sup>384</sup> Issues of *The Shotgun News* throughout the ten years of the ban show functionally identical guns available after the ban for lower prices than before it. (Collection of THE SHOTGUN NEWS on file with author.)

<sup>385</sup> For example, tens of millions of magazines for the AR-15 type (semiautomatic version of the U.S.G.I. rifle) rifle were in circulation world wide. One evident exception was magazines for Glock pistols. These guns are of fairly recent design and thus relatively few of the magazines were in circulation. After the ban went into effect, Glock magazine prices escalated to over 150 dollars. After the ban expired they are back to the seventy-five dollar level. Deborah Sontag, *Many Say End of Firearm Ban Changed Little*, N.Y. TIMES, Apr. 24, 2005, at 1, available at <http://www.galleryofguns.com/shootingtimes/Articles/DisplayArticles.asp?ID=7044>.

During the ban, there was such a premium on pre-ban Glock magazines that dealers would trade police departments a new (law enforcement only) pistol for the departments' used pre-ban pistols. With three pre-ban magazines selling for over 100 dollars, the old Glock (with its pre-ban magazines) was worth as much on the open market as a new one. (Interview notes of authors' conversations with dealers on file with author.)

For commentary and criticism of lawsuits against the gun industry by the same municipalities that have been selling used police guns back onto the market in exchange for discounts on new ones see the sources cited *infra* note 418.

<sup>386</sup> Over the past three years between seventy and ninety percent of the second and third year law students in my Gun Control seminar have believed that the Assault Weapons Ban was a ban on fully automatic machine guns. Conversations suggest that sloppy news reporting contributes to this perception. Whatever the cause, Josh Sugarman guessed right. It seems many people thought the legislation was about machine guns. See, e.g., Editorial, *Republicans Hurt Themselves with Pro-gun Votes*, ST. PETERSBURG TIMES (Florida), Mar. 28, 1996, at 15A.

appreciated that the law was mainly symbolic.<sup>387</sup> But the ban had potentially long term practical value. Congress had embraced the “bad gun formula” of gun prohibition. With that done, prohibition might advance by expanding the category. (Hunting rifles might become “sniper rifles,” thirty pound single shot .50 caliber rifles might become “terrorist weapons,” etc.).

Bill Clinton expended considerable political capital to pass the assault weapons ban. The political fallout was dramatic. In the next election Democrats lost the House and have yet to regain it. Clinton attributed Democrats’ loss of the House significantly to the wrath of gun owners.<sup>388</sup> Even House Speaker Tom Foley (D-Wash.) was unseated. Descriptions of the fallout by Clinton and other Democrats are stories of a failure.<sup>389</sup>

According to Clinton, the fallout continued into the 2000 presidential race. Presidential elections are complicated stories. But in a 2004 interview with Charlie Rose, Clinton said this about the defeat of Albert Gore in 2000:

The NRA beat him in Arkansas. The NRA and Ralph Nader stand right behind the Supreme Court in their ability to claim that they

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<sup>387</sup> As the ban seemed ready to expire, Tom Diaz of the Violence Policy Center acknowledged in an interview on National Public Radio:

If the existing assault weapons ban expires, I personally do not believe it will make one whit of difference one way or another in terms of our objective, which is reducing death and injury and getting a particularly lethal class of firearms off the streets. So if it doesn’t pass, it doesn’t pass.

[In the interview Diaz displays a gun that remained legal under the ban, and NPR Reporter Larry Abramson explains that “the manufacturer, simply redesigned the gun to remove features specifically forbidden by the assault weapons ban, like a collapsible stock.”]

The bells and whistles that were [prohibited by] the earlier law, this gun has none of them, so it’s perfectly legal. This stock kind of looks like it folds, but it doesn’t. It’s fixed. There’s no bayonet mount on this gun.

*Assault Weapons Ban Due to Expire in September* (NPR radio broadcast Mar. 11, 2004), available at <http://cgi.cse.unsw.edu.au/~lambert/cgi-bin/johnrlott.tripod.com/other/NPRSemiAutoBan.html>.

<sup>388</sup> Evelyn Theiss, *Clinton Blames Losses on NRA*, PLAIN DEALER, Jan. 14, 1995, at A1.

<sup>389</sup> Theiss, *supra* note 388 (“[T]he fight for the assault-weapons ban cost 20 members their seats in Congress . . . . The NRA is the reason the Republicans control the house.”); Departing California Congressman Anthony Beilenson said this: “We unnecessarily lost good Democratic members because of their votes on the Brady bill and semiautomatic assault weapon ban. . . . [T]hey will have but a modest effect out there in the real world. It was not worth it at all.” Greg Pierce, *Inside Politics*, WASH. TIMES, Nov. 9, 1995, at A6.

put George Bush in the White House. . . . I think the NRA had enough votes in New Hampshire, in Arkansas, maybe in Tennessee and in Missouri to beat us. And they nearly whipped us in two or three other places.<sup>390</sup>

After the Gore loss, the Democrats seemed less excited about the prohibitionist agenda, evidently concerned that the anti-gun stance had cost them. Writing for the *New York Times* in 2001, James Dao (after blaming the evident decline of the gun control movement on George W. Bush) says this:

[M]any centrist and conservative Democrats have also concluded that gun control has become their party's albatross, costing it crucial votes among white, male, rural voters in key states across the South and Midwest. And their concerns have touched off a roiling debate within the party over whether to play down or even discard the issue.

"Gun control," lamented Steve Cobble, director of Campaign for a Progressive Future, a liberal political action committee, "has become the shorthand for why Democrats don't do well."

Even President Clinton, a staunch advocate of gun control, offered what for gun control advocates was surely a dispiriting post-election assessment of the rifle association's strength. "They probably had more to do than anyone else in the fact we didn't win the House this time, and they hurt Al Gore," he said.<sup>391</sup>

Leading up to the 2004 presidential election, the Democratic National Committee commissioned a study of how the party's stance on guns has affected the election of Democrats.<sup>392</sup> The study's overall aim is to at least repackage

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<sup>390</sup> George F. Will, *Bringing Out the Big Guns*, WASH. POST, Oct. 14, 2004, at A31.

<sup>391</sup> James Dao, *New Gun Control Politics: A Whimper, Not a Bang*, N.Y. TIMES, Mar. 11, 2001, § 4, at 1, available at [http://www.nytimes.com/learning/teachers/featured\\_articles/20010312monday.html](http://www.nytimes.com/learning/teachers/featured_articles/20010312monday.html).

Pressed on how hard Democrats should push for renewal of the assault weapon ban, Governor Mark Warner (D-VA) said:

I don't think shifting the rate [sic] back onto a gun control issue is going to at least in southern states and many Midwestern states is going to move the Democrats forward. Bill Clinton told the congressmen in '94 they'd be real popular if they did that. Ninety million gun owners deep le [sic] resented it and many, many congressmen were voted out of office.

*Live From the Headlines: Assault Weapon Ban Up for Renewal Soon* (CNN Television Broadcast, May 15, 2003), available at <http://edition.cnn.com/TRANSCRIPTS/0305/15/se.13.html>.

<sup>392</sup> Mark J. Penn & Peter Brodnitz, *Winning the Gun Vote* (Oct. 16, 2003), [http://www.dlc.org/documents/AGS\\_Penn\\_1003.pdf](http://www.dlc.org/documents/AGS_Penn_1003.pdf).

the message to make it more palatable to gun owners.<sup>393</sup> This is understandable since the first two sentences of the study conclude: “Americans widely believe that there is a right to bear arms but many—gun owners in particular—do not believe Democrats share this belief. As gun owners represent almost four in ten Americans this perception impedes efforts to create a durable Democratic majority.”<sup>394</sup>

Depending on who tells the story, this sentiment is roughly confirmed by another failed referendum. This one in Washington state. Initiative 676 was presented as a gun safety measure and focused on the powerful image of children killed in firearms accidents.<sup>395</sup> Although in a typical year, these events are relatively rare—twice as many children ages five to fourteen die in bicycle accidents than in gun accidents<sup>396</sup>—the image of a child dying because of a negligently stored gun is incredibly powerful and was the motivating theme of Washington Initiative 676.<sup>397</sup>

Initiative 676 would have moved Washington toward the New York, Sullivan Law style of regulating handguns (recall our earlier discussion of Sullivan Law handgun regulations, requiring a permit for possession, spurring adoption of the Uniform Revolver Act that required a permit for concealed carry but not for mere possession).<sup>398</sup> Possession of a handgun would require a license.<sup>399</sup> It would be called a

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* The survey found that seventy-four percent of Americans “believe there is a Constitutional right to own guns but it allows for laws intended to keep guns out of the hands of criminals.” *Id.*

<sup>395</sup> See Office of the Secretary of Washington State, Voter’s Pamphlet: State General Election Nov. 4, 1997, at 6-7 (1st ed. 1997), available at <http://www.secstate.wa.gov/elections/pdf/vp97gen.pdf>.

<sup>396</sup> See David B. Kopel, *Children and Guns: Sensible Solutions*, INDEPENDENCE INST., Apr. 25, 1993, <http://www.rkba.org/research/kopel/kids-gun.html>.

<sup>397</sup> A report by The News Hour is illustrative:

Washington State has introduced tough legislation in an attempt to reduce gun-related accidents. But will the legislation, called Initiative 676, really protect the innocent or does it infringe on the right to bear arms? Rod Minott . . . files this report.

Rod Minott: Two years ago a shooting accident took the life of 14-year-old Michael Hastings. It happened after a babysitter at a friend’s home played with a stolen handgun.

Transcript of *Newshour: A Shot at Safety* (PBS television broadcast Nov. 4, 1997), [http://www.pbs.org/newshour/bb/law/july-dec97/guns\\_11-4.html](http://www.pbs.org/newshour/bb/law/july-dec97/guns_11-4.html).

<sup>398</sup> See *supra* text accompanying notes 191-92.

<sup>399</sup> Initiative 676, § 4 (Wash. 1997), available at <http://www.secstate.wa.gov/elections/initiatives/text/i676.pdf>.



“handgun safety license.”<sup>400</sup> Applicants for the license would have course work (eight hours minimum) and an examination to complete.<sup>401</sup> 676 required all handguns to be sold with trigger locks, but had no other requirements for safe storage or penalties for unsafe storage.<sup>402</sup> The teeth of 676 was the requirement of a license to own the gun.

When the votes were counted nearly *seventy* percent of voters said no to Initiative 676.<sup>403</sup> Sarah Brady of Handgun Control, Inc. criticized that the result was warped by NRA money.<sup>404</sup> Gun rights advocates charged that the initiative’s financial supporters numbered only 1,000 people from the Seattle area including Bill Gates (in for about \$200,000).<sup>405</sup> An in-depth study of the failure of 676 is yet to come. Undoubtedly there was lobbying on both sides. Sarah Brady suggested that NRA obfuscation is the only way to explain why Washingtonians would vote against a measure designed to reduce the tragedy of juvenile gun accidents.<sup>406</sup> But it is just possible that voters were not convinced on the basic message.

The National Safety Council reported in 2002 that since 1993, firearm homicides are down 41 percent, and fatal firearm accidents have dropped 49 percent to the lowest levels since

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at § 10.

<sup>402</sup> *Id.* at § 3.

<sup>403</sup> The final tally was 1,193,720 against and 496,633 for. SeattleTimes.com, 1997 Election Results, [http://seattletimes.nwsourc.com/politics/past\\_results/1997/state\\_97.html](http://seattletimes.nwsourc.com/politics/past_results/1997/state_97.html) (last visited Feb. 8, 2006).

<sup>404</sup>

The NRA came into the state using their multi-million-dollar bulldozer to squash this grassroots call for responsible gun ownership. Unable to defeat this reasonable and responsible Initiative with facts, the NRA blanketed the airwaves with apocalyptic rhetoric—which even included accusations that I 676 supporters had Satanic connections.

Press Release, Handgun Control, Statement by Sarah Brady Re: NRA’s Big Guns Hold Washington State Hostage to Weak Gun Laws (Nov. 4, 1997), *available at* <http://www.bradycampaign.org/press/release.php?release=94>.

<sup>405</sup>

Billed as a “grassroots movement,” I-676 proponents had a contributor list of about 1000 individuals. 90+% of their money came from within a 20 mile radius of Seattle. WeCARE. . . the PAC formed to oppose the initiative, had a contributor list of more than 11,000. Who had the grassroots movement?

Joe Waldron, *The Final Count on I-676 in Washington State*, <http://www.womenshooters.com/wfn/i676.html> (last visited Feb. 8, 2006).

<sup>406</sup> *See supra* note 404.

record-keeping started in 1903.<sup>407</sup> To add some context, in 2002 there were 44,000 accidental automobile deaths, 15,700 accidental poisoning deaths, 14,500 accidental deaths caused by falls, 3,000 accidental drowning deaths, 2,900 accidental deaths caused by fires, flames, and smoke, 1,000 accidental deaths caused by natural heat or cold and 776 accidental firearms deaths.<sup>408</sup> In this context it is a bit easier to understand how voters might reject even an honestly packaged gun safety measure.<sup>409</sup>

It is hard to find a facially objective source on the sense of Washington voters about Initiative 676<sup>410</sup> but the University of Washington student newspaper may come close:

Initiative 676 is a cleverly crafted attempt to trick voters into giving gun-control proponents a real treat by turning a constitutionally protected right into a state regulated privilege.

....

Depending on who you listen to, I-676 is about trigger locks, handgun safety courses, police confiscation, inflated bureaucracy, handgun databases and the influence of Satan.

....

One section of Initiative 676 requires all handguns to be equipped with trigger locks when sold. . . . [It] doesn't stop with trigger locks. It requires all handgun owners to take an eight-hour safety courses and obtain a gun license.

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. . . The right-wing paranoids hint that the proposed database of handgun owners, one of I-676's 26 provisions, is part of the black-helicopter conspiracy to disarm America. And there's NRA Vice

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<sup>407</sup> THE NATIONAL SAFETY COUNCIL, INJURY FACTS (2003), *available at* [www.nsc.org/library/report\\_injury\\_usa.htm](http://www.nsc.org/library/report_injury_usa.htm).

<sup>408</sup> *Id.*

<sup>409</sup> This year in my gun control seminar, I asked students to survey three of their classmates. The two questions were, "How many guns are owned by Americans" and "How many gun accidents are there each year?" One law student, who admitted she did not know the answer, speculated from what she had seen and read in the media that there were about 500,000 guns owned by Americans and that there were around 100,000 accidental firearms deaths each year.

<sup>410</sup> L. Brent Bozell III of the Media Research Center charged that 676 was consistently front page news in the run up to the vote, when there was some sense it would pass. The coverage was drastically muted after 676 was defeated: "Maybe we shouldn't blame the national media for downplaying the [gun rights] victory. After all, after spending years labeling a group as 'extreme,' 'radical' and the like—how to explain its 71% landslide?" L. Brent Bozell, III & Tim Graham, Editorial, *An NRA Victory? That's Not Fit to Print*, WALL ST. J., Nov. 21, 1997, at A22.

President Charlton Heston, who thinks the measure should be designated "I-666."

Demonic influence aside, it's too bad poor arguments have clouded the I-676 debate. It's a confusing bill that will create a gross expansion of state intrusion into private lives, and the voters of Washington state deserve to know the truth.<sup>411</sup>

Having only sporadic success in the legislatures, gun prohibitionists pursue a parallel strategy in the courts and regulatory agencies, with lawsuits aimed at manufacturers and distributors. The recipe included proposals to regulate firearms as defective consumer products and to sanction manufacturers for deceptive advertising.<sup>412</sup> These initiatives have had some limited success, forcing some companies and brands to go out of business.<sup>413</sup> Handgun manufacturer Smith & Wesson, attempting to ward off these lawsuits, entered into a settlement with the Clinton Administration.<sup>414</sup> An immediate consequence was gun people boycotting Smith.<sup>415</sup> Other manufacturers declined to follow Smith's lead.<sup>416</sup> Some state

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<sup>411</sup> Editorial, *Of Guns . . . Initiative 676 is Confusing and Unnecessary*, ONLINE DAILY UNIV. OF WASH., Oct. 29, 1997, <http://archives.thedaily.washington.edu/1997/102997/guns.102997.html>.

<sup>412</sup> For discussions of these strategies and the issues they raise, see Jon S. Vernick & Julie Samia Mair, *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?*, 4 J. HEALTH CARE L. & POLY 126 (2000) (putting the number of state laws explicitly banning municipal lawsuits at 19); Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived From Any Angle*, 32 CONN. L. REV. 1277 (2000); James H. Warner, *Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 776 (2000); Jon S. Vernick and Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193 (2000); David B. Kopel, *Treating Guns Like Consumer Products*, 148 U. PA. L. REV. 1213 (2000) (responding to Vernick and Teret); Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995) (advancing a theory of negligent marketing and distribution); Debra Burke, JoAnne Hopper & B.J. Dunlap, *Women, Guns, and the Uniform Commercial Code*, 33 WILLAMETTE L. REV. 219 (1997); Alana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN'S L.J. 351 (1997); Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REV. 212 (2002).

<sup>413</sup> See, e.g., Sharon Walsh, *The Cheapest Handgun Was Loaded with Profit; For Pistol Firm, Heavy Sales, Then Bankruptcy Protection*, WASH. POST, Aug. 26, 1999, at A1.

<sup>414</sup> See, e.g., Amy Paulson, *Smith & Wesson Agrees to Landmark Gun Safety Settlement*, CNN.com, Mar. 17, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/03/17/gun.lawsuit/index.html>; *Smith & Wesson Agrees to 'Code of Conduct,' Federal, Local Officials Agree to Drop Suits*, COURT TV ONLINE, Mar. 17, 2000, [http://www.court tv.com/archive/national/2000/03/17/clinton\\_guns\\_ap.html](http://www.court tv.com/archive/national/2000/03/17/clinton_guns_ap.html).

<sup>415</sup> See MCCLURG ET. AL, *supra* note 214, at 347-55.

<sup>416</sup> *S & W Under the Gun*, GOTTLIEB-TARTARO REPORT, Apr. 2000, at 1, available at [http://www.ccrkba.org/pub/rkba/gt-report/gt-report\\_064.html](http://www.ccrkba.org/pub/rkba/gt-report/gt-report_064.html).

legislatures enacted statutes blocking their municipalities from bringing these suits.<sup>417</sup>

With the passing of the Clinton administration, the Smith & Wesson initiative lost steam. Smith & Wesson's British management team sauntered off. New owners stepped in and Smith & Wesson chased after its lost goodwill with gun owners. The lawsuits continued, some of them tinged with irony because many of the municipalities that have sued gun companies on the negligent marketing theory of dumping guns also sell large lots of their old police guns back into the market at bargain basement prices.<sup>418</sup>

In search of constitutional moments we are after something approximating democratic assent. Is it a concession of defeat at the ballot box that one of the prohibitionists' central strategies at this stage of the game is to bypass democracy and pursue litigation? As the wave of creative lawsuits against gun manufacturers was building, *The Economist* criticized:

American public officials have usurped democratic debate on both tobacco and handguns by launching a wave of lawsuits designed to win through legal threats what they have been unable to win in Congress and state legislatures . . . .

. . . .

If gun-control advocates achieve their goals by legal threats, rather than through properly enacted legislation, it will be a Pyrrhic victory. With good reason, gun-owners will never accept their defeat as legitimate.

Far from standing up for voters against powerful entrenched interests, America's mayors and state attorneys-general—and the anti-tobacco and anti-gun campaigners egging them on—are

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<sup>417</sup> Center for Policy Alternatives, Gun Lawsuit Preemption, <http://www.stateaction.org/issues/issue.cfm/issue/GunLawsuitPreemption.xml> (last visited Feb. 8, 2006).

<sup>418</sup> One of the claims is negligent or intentional market dumping (below market price sales). The irony is that for decades, municipal police departments have traded in their used side arms for newer weapons. The trade-ins have been some of the best bargains in the gun market.

For discussion and criticism of the practice, see Hunter T. George, *Should Police Trade in Guns? Critics Say Practice Puts Cheap Weapons on Street for Crime*, SEATTLE POST-INTELLIGENCER, Aug. 30, 1999, at B1; Vanessa O'Connell, *Unloading Old Police Guns: More Cities Ban Trade-Ins and Resales*, WALL ST. J., Nov. 10, 1999, at B1 (discussing the decisions of New Orleans, Miami, St. Louis and Bridgeport, Connecticut to abandon or review the decades old practice of trading in old weapons for steep price breaks on new ones).

themselves ramming down the throats of voters polices which they have not endorsed.<sup>419</sup>

This sort of comment is perhaps easy to dismiss coming from *The Economist*. But Robert Reich, former member of the Clinton cabinet and seemingly more sympathetic to restrictive gun control measures, says basically the same thing:

If I had my way, there'd be laws restricting cigarettes and handguns. But this Congress won't even pass halfway measures. . . . Almost makes you lose faith in democracy, doesn't it?

. . . .

The goal of [recent litigation] efforts is to threaten the industries with the risk of such large penalties that they'll agree to a deal—for the gunmakers, to limit bulk purchases and put more safety devices on guns to prevent accidental shootings.

But the way to fix everything isn't to turn our backs on the democratic process and pursue litigation as the [Clinton] administration is doing. It's to campaign for people who promise to take action against cigarettes and guns, and against the re-election of House and Senate members who won't. . . . In short, the answer is to make democracy work better, not give upon [sic] it.<sup>420</sup>

It is plausible to respond that NRA money has skewed the democratic process, leaving the Courts as the best fair alternative. But this ignores the fact that the NRA's power is not money but votes. George Will writes:

The NRA is a coast to coast nation within a nation . . . . The NRA has *only* 4 million adult members . . . . [A]bout 95 percent of NRA members vote.

Each of the 4 million pays \$35 in annual dues. Polls indicate that another 14 million Americans think they are NRA members and an additional 28 million think they are affiliated in some way with the NRA because of their membership in one or more of the 35,000 shooting and hunting clubs.<sup>421</sup>

For all the talk about NRA power, there is an even simpler explanation for the general failure of the prohibitionists' movement: It is very hard to push an agenda

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<sup>419</sup> *When Lawsuits Make Policy*, ECONOMIST, Nov. 21, 1998, at 17.

<sup>420</sup> Robert B. Reich, *Smoking, Guns*, AM. PROSPECT, JAN. 17, 2000, at 64, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4343>.

<sup>421</sup> George F. Will, *Bringing Out the Big Guns*, WASH. POST, Oct. 14, 2004, at A31.

that conflicts with the choice of roughly half of American households to own guns.

Approaching the 2004 presidential election, Congress considered legislation immunizing the gun industry from lawsuits brought by victims of firearms crimes. It was burdened by a Democrat amendment requiring extension of the Assault Weapons Ban and thus stalled.<sup>422</sup> In the midst all of this, there is a revolution underway. Josh Sugarman was correct that Americans had lost interest in handgun bans.<sup>423</sup> But his lament does not capture the full story. Something much more dramatic is afoot. State by state, Americans are embracing the idea of armed self-defense through state statutes liberalizing the concealed carry of handguns.<sup>424</sup>

By 2004, thirty-eight states had liberal concealed carry legislation (another eight have a restrictive form).<sup>425</sup> As the 2004 presidential campaign wound to a close, John Kerry was working the gun issue by cozying up to hunters. Whether duded up and tramping through an Ohio cornfield toting a semiautomatic shotgun that (with a different stock configuration) would be a contraband assault weapon under the 1994 law, or telling stories about crawling around on his belly hunting deer with his trusty double-barrel shotgun,<sup>426</sup>

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<sup>422</sup> See Steven HARRAS, *Gun Manufacturer Protection Bill Surprisingly Defeated in U.S. Senate*, 32 PROD. SAFETY & LIAB. REP. 221, 221 (2004) (describing how S. 1805, immunizing gun manufacturers and dealers from suits by victims of gun crime, seemed destined for easy passage until it was killed by an amendment extending the ban on so called assault weapons).

<sup>423</sup> See *supra* note 289 and accompanying text.

<sup>424</sup> The antigun Brady organization has compiled a list of states with the most citizens per capita licensed to carry concealed firearms.

Where most nonfelons may carry concealed weapons: Alaska, Washington, Oregon, Idaho, Nevada, Arizona, Montana, Wyoming, Utah, North Dakota, South Dakota, Oklahoma, Texas, Arkansas, Louisiana, Michigan, Indiana, Kentucky, Tennessee, Maine, Vermont, New Hampshire, Pennsylvania, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida.

Justin Ewers, *Choose a Weapon*, U.S. NEWS & WORLD REP., Feb. 10, 2003, at 56.

<sup>425</sup> See NRA Fact Sheet, *supra* note 175.

<sup>426</sup> Kerry got a pass from the mainstream media, but the web is filled with incredulity and ribald comments about Kerry's claim. One of the less inflammatory writers observes:

Apparently hoping to outdo Hillary Clinton's improbable attempt to reinvent herself as a duck hunter, John Kerry has tried to avoid alienating supporters of gun rights by depicting himself as a deer hunter. Mark Steyn will have none of it. Steyn wrote in the London Telegraph yesterday: "He was in Wisconsin the other day, pretending to be a regular guy, and was asked what kind of hunting he preferred. 'I'd have to say deer,' said the senator. 'I go out with my trusty 12-gauge double-barrel, crawl around on my

Kerry showed that gun prohibition—the handgun ban Bill Clinton speculated about in 1993—was not even on the table in America in 2004. About the same time, the Assault Weapons Ban, so much the political touchstone in 1994, expired with a whimper—though not without some dishonest media effort to invigorate it.<sup>427</sup>

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stomach . . . . That's hunting.' This caused huge hilarity among my New Hampshire neighbours. None of us has ever heard of anybody deer hunting by crawling around on his stomach, even in Massachusetts.”

*Oh, Deer: Steyn Shoots Down Kerry's Hunting Tale*, NEWSMAX.COM, July 28, 2004, <http://www.newsmax.com/archives/ic/2004/7/28/121032.shtml>.

<sup>427</sup> As the ban was set to expire, CNN Miami Bureau chief aired a report about the ban that CNN quickly had to apologize for and correct. The CNN report gave the impression that the ban was about machine guns and then staged a shooting demonstration that suggested the banned guns also were much more powerful than similar but legal ones. World Net Daily reports:

In two broadcasts last Thursday, CNN incorrectly reported that fully automatic weapons are currently banned under the Violent Crime Control and Law Enforcement Act of 1994. The CNN broadcasts included firing demonstrations by the Broward County, Fla., Sheriff's Department that implied currently banned weapons are much more powerful than similar but legal one, when in fact that is not the case.

As reported by the Washington Times, during one of the demonstrations Broward County Sheriff Ken Jenne introduced a detective who fired an old Chinese AK-47.

“That is one of the 19 currently banned weapons,” said Jon Zarella, CNN's Miami bureau chief. In fact, that firearm was not one of those banned under the 1994 act. The detective fired six shots, after which Zarella said, “Ok. Now that was semiautomatic.”

Jenne then responded, “Now this is automatic.”

The detective fired a burst at a cinder-block target, after which Zarella declared: “Wow! That obliterated those blocks . . . . Absolutely obliterated it. And you can tell the difference,” according to the Times report.

Machine guns, AK-47s and other fully automatic weapons are regulated by the National Firearms Act of 1934. The 1994 law banned some semiautomatic, military-style rifles and will expire in September 2004 if Congress does not renew it. Semiautomatic guns fire one shot each time the trigger is pulled.

. . . .

Yesterday, CNN clarified which firearms are banned under the 1994 law and told viewers the ban is based on external features such as whether the weapon has a pistol grip or a flash suppressor.

A CNN anchor introduced yesterday's broadcast by saying: “On this program on Thursday, we aired a live demonstration CNN set up with law-enforcement officials of a banned semiautomatic rifle and its legal counterpart. We reviewed that demonstration . . . and decided that a more detailed report would better explain this complex issue.”

. . . .

By the end of November, Republicans had won the House, Senate and the White House and Democratic strategists were headed back to the drawing board to figure how to sell the politics of Manhattan's Upper West Side to red America.<sup>428</sup> By early 2005 the Department of Justice had released a memorandum reflecting the position of the United States that the individual rights view of the Second Amendment (the "standard model")<sup>429</sup> is correct.<sup>430</sup> In early 2005 the National Academy of Sciences published a 328 page report evaluating eighty different gun control measures.<sup>431</sup> This exhaustive treatment concludes that we cannot say with any confidence that gun control has had any effect on crime<sup>432</sup> and recommends

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On Thursday, the camera showed bullets hitting a cinder-block target as the Broward County detective fired an AK-47 in [automatic] mode. When the detective fired a legal semiautomatic firearm, the camera showed an undamaged cinder-block target.

On Friday, CNN admitted the detective had not been firing at the cinder block.

"In fact, if you fire the same caliber and type bullets from the two guns, you get the same impact," Zarella said in yesterday's broadcast.

*CNN 'Backpedals' on Gun Story: Admits it Misled Viewers in Comparing Different Types of Weapons*, WORLDNETDAILY, May 20, 2003, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=32677](http://www.wnd.com/news/article.asp?ARTICLE_ID=32677). The gun crowd often cites this as an illustration of the general media bias against gun rights. The episode is sparsely covered in the main stream media. One mainstream source is a National Public Radio feature, exploring whether the mainstream media is guilty of biased coverage of gun issues. See *Gun Shy* (NPR radio broadcast Mar. 11, 2005), available at [http://www.onthemediamedia.org/transcripts/transcripts\\_031105\\_guns.html](http://www.onthemediamedia.org/transcripts/transcripts_031105_guns.html). For the original CNN transcript, see CNN.com, Transcripts, *Live From the Headlines: Assault Weapon Ban Up for Renewal Soon* (CNN television broadcast May 15, 2003), <http://edition.cnn.com/TRANSCRIPTS/030515/se.13.html>.

<sup>428</sup> See *supra* note 380.

<sup>429</sup> Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Kopel, *supra* note 62, at 1362 & n.1.

<sup>430</sup> DOJ Memorandum, *supra* note 22.

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an *individual right* of a private citizen to own and carry firearms in a peaceful manner.

SUBCOMM. ON THE CONST. OF THE COMM. ON THE JUD., 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS 12 (1982) (emphasis added).

<sup>431</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2004), available at <http://www.nap.edu/books/0309091241/html>.

<sup>432</sup> "These programs are widely viewed as effective, but in fact knowledge of whether and how they reduce crime is limited. Without a stronger research base, policy makers considering adoption of similar programs in other settings must make decisions without knowing the true benefits and costs of these policing and sentencing interventions." *Id.* at 10.



further study.<sup>433</sup> Similarly, a panel consisting mainly of gun control supporters commissioned by the Centers for Disease Control and Prevention to evaluate the effectiveness of existing gun control measures found that there is no conclusive evidence that gun control has had any impact on crime.<sup>434</sup> By the fall of 2005, the contentious question of gun manufacturers' liability for illegal use of their products was resolved democratically.<sup>435</sup> On October 26, 2005, President Bush signed the Protection of Lawful Commerce in Arms Act.<sup>436</sup> The legislation passed 65-31 in the Senate and 283-144 in the House.<sup>437</sup>

Much of the factional dispute over gun rights results from fear that any particular measure is just a step toward much more severe restrictions. The avowed agenda of the prohibitionists makes this fear, on the long view of things, understandable. Verifying that the prohibitionists' movement is alive and well is San Francisco's newly enacted Proposition "H." Approved by fifty-eight percent of voters, Proposition H bans possession of handguns within city limits. This reinstates San Francisco onto the short list of municipalities that have banned handguns. Current owners have until April 2006 to surrender their guns. Predictably, the measure was applauded by the Brady organization and decried by the NRA, which has commenced litigation challenging the constitutionality of the ban.<sup>438</sup>

For now, at least, the constitutional politics of gun control supports two conclusions. First, under any standard, prohibitionists have not marshaled the support to sustain the

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<sup>433</sup> *Id.* For criticism that the evidence supports the unqualified conclusion that the laws studied simply do not reduce crime, see John R. Lott, Jr., *Shooting Blanks*, N.Y. POST, Dec. 29, 2004, available at <http://www.tsra.com/Lott119.htm>.

<sup>434</sup> TASK FORCE ON CMTY. PREVENTIVE SERVS., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws* (2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>.

<sup>435</sup> The *New York Times* editorial page, perhaps reflecting the views that prompted the lawsuits in the first place, rejected the idea that this was democracy at work. See *The Gun Industry Rolls Congress*, N.Y. TIMES, Oct. 18, 2005, at A26. Query though how one is to tell whether Congress is serving the people (in this case the gun people) or has gotten rolled.

<sup>436</sup> Pub. L. No. 109-92, 119 Stat. 2095 (2005).

<sup>437</sup> GovTrack.us, S. 397: Protection of Lawful Commerce in Arms Act, <http://www.govtrack.us/congress/bill.xpd?bill=s109-397> (last visited Feb. 8, 2006).

<sup>438</sup> See Susan Jones, *NRA Challenges San Francisco Gun Ban*, CNSNEWS.COM, Nov. 10, 2005, <http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200511%5CNAT20051110b.html>; *San Francisco, NRA Make Deal on Handgun Ban*, ASSOCIATED PRESS, Dec. 28, 2005, <http://www.forbes.com/home/feeds/ap/2005/12/28/ap2418176.html>.

claim that “We the People” have spoken against an individual right to arms. Second, the very opposite has happened. America has endorsed the right to arms through signals that, compared to Ackerman’s complex theory of a transformative New Deal, are more legitimate because they are easier for the citizenry at large to detect and understand.

## V. CONCLUSION

Speaking critically of efforts to marginalize the Second Amendment, Justice Antonin Scalia mused that perhaps few tears will be shed if the Court finally concludes that there is no constitutional right to arms.<sup>439</sup> A captive of the beltway, Justice Scalia can be forgiven for this impression. If the job took him out more often to the forty plus states with explicit right to arms guarantees, the thirty-eight with strong right to carry laws or pressed him into conversation with some of the common folks who make up the seventy-six percent of Americans who think they have a constitutional right to own firearms, he might express a different sentiment. And odd as it may seem, it is Professor Ackerman who, if true to his principles, would be the first to tell the good Justice that these signals are some of the best reasons for the Court to raise up an individual right to arms from the disputed Second Amendment.

There is a final practical point. It is obvious that many of us weight the costs of guns differently. Some people viscerally hate guns, see no utility in them and think it is insane to talk about balancing factors like the benefits of defensive gun use and the political value of an armed citizenry. These benefits though are for a second group, core points in a thoughtful approach to the gun question. And there is a third group that is just as visceral about gun rights as the first is about gun control.

The single thing all three groups agree on is that there are some people who should not have guns—criminals, the insane, etc. Beyond that there seems little common ground. Because many in the first group have acknowledged that their ultimate aim is prohibition but also have said it will have to be achieved incrementally, those in the second and third group

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<sup>439</sup> See Antonin Scalia, *Vigilante Justices: The Dying Constitution*, 49 NAT’L REV. 32, 32-33 (1997) (“We may like . . . the elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.”).

tend to view many gun control proposals as another scot down the slippery slope. If the Court finally takes prohibition off the table by affirming that the Second Amendment protects an individual right, the central barrier to consensus on measures that would further restrict the untrustworthy from accessing guns would dissolve. That would be good for all of us.