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Easier than Obtaining a Driver's License: The Federal Licensing of Gun Dealers

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EASIER THAN OBTAINING A DRIVER'S LICENSE: THE
FEDERAL LICENSING OF GUN DEALERS

*Keersten Heskin**

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* This Note is dedicated to the memory of my grandfather, Americo "Ricky" Molta, for always giving so unselfishly of his time and energy. I'd also like to thank my parents for their constant support and encouragement. Special thanks goes to Teresa Matushaj not only for inspiring me to write on this topic, but also for helping me put it all together. Thank you to Michelle Grabda for helping me with the research. Thanks also goes to Dan Rather and Kevin Ashley for their valuable insights and comments.

I. INTRODUCTION

Although gun control has been a topic of debate in the United States for years,¹ it traditionally has not been at the forefront of most people's political agenda. As a result, special interest groups have played a prominent role in shaping public discourse² and influencing governmental decisionmaking.³ Special interest groups opposing gun control have been better organized than those in favor of gun control⁴ and thus able to thwart strict regulation in this area.⁵

Recently, however, there has been increasing support for stricter gun control legislation.⁶ The changing political environment is due in part to a recent surge in random violence.⁷ According to a 1993 report

1. See Thomas V. DiBacco, *Gun Debate Echoes Through History*, ORLANDO SENTINEL, Apr. 10, 1994, at G-6. Gun control dates back to colonial times. *Id.* However, early gun control was often discriminatory against African Americans and Indians. *Id.* The first ban on handguns was enacted in 1837. Laurel Loomis, *A New Look at Gun Control Legislation: Responding to a Culture of Violence*, 27 BEVERLY HILLS B.J. 160, 162 (1993).

2. See ERIK LARSON, *LETHAL PASSAGE* 185 (1995) ("[T]he NRA has been most influential . . . in defining the vocabulary of the firearms debate and thus, in a sense, winning the debate before it even began."); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 103 (1995) ("The gun lobby has successfully drawn narrow parameters around the gun control debate. . .").

3. For example, a 1930s NRA-led letter-writing campaign turned an attempt to ban or regulate a wide variety of firearms into merely a regulation on the sale of machine guns and sawed-off shotguns. OSHA G. DAVIDSON, *UNDER FIRE* 29 (1993). See *id.* at 22-36 for the history of the NRA from its beginnings in 1871, through its collapse at the end of the 19th century, and up to 1977 when the NRA "became the Gun Lobby," *id.* at 36.

4. See Harvey Berkman, *Gun Lobbyists Lose Firepower in Legislatures*, NAT'L L.J., June 6, 1994, at A1, A26 (noting that the NRA has a full-time staff of 500 while the best-organized pro-gun-control lobby has a full-time staff of 50). Until recently there has been very little organized opposition to the NRA. See *id.* (quoting the president of the best-organized pro-gun-control lobby as saying that the NRA "command[ed] the field" through the mid-1980s).

5. See *supra* note 3. However, anti-gun-control groups have suffered major setbacks recently. See Berkman, *supra* note 4, at A1, A26.

6. Herbert Buchsbaum, *Guns R Us*, SCHOLASTIC UPDATE, Feb. 11, 1994, at 18, 18 (suggesting that the spread of gun violence to the suburbs is the reason for the growing number of people demanding gun control). The pro-gun-control lobby is increasing in strength, Berkman, *supra* note 4, at A26, and will bring some balance to the struggle.

7. See Berkman, *supra* note 4, at A26. While statistics have shown that the actual rate of violent crime has slightly decreased, Gordon Witkin, *Should You Own a Gun?*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 24, the public perception is that the rate of violent crime has increased, Jay Bookman, *Statistics Don't Justify Public's Fear of Violence*, ATLANTA CONST., July 12, 1992, at C2. This perception is most likely due to the increased number carjackings, drive-by shootings, and abductions which leave people feeling helpless. *Id.* This also can be evidenced by the outcry for more gun control by victims of such random acts. See, e.g., *After Vigil for Verdict, a Plea for Gun Control*, N.Y. TIMES, Feb. 18, 1995, at 26. For example, several victims in the Long Island Rail Road shooting took the opportunity to plead for stricter

published by the FBI, “[e]very American now has a realistic chance of murder victimization in view of the random nature the crime has assumed.”⁸

The shift toward increased support for gun control also may be attributed to the growing number of young persons who are victims⁹ and perpetrators¹⁰ of gun violence.¹¹ Murders of persons aged fifteen to nineteen attributable to firearms rose from sixty-six percent in 1975 to eighty-five percent in 1992.¹² This victimization of children arouses society’s anger,¹³ and, as a result, gun control is now an issue that is fostering significant political activity.¹⁴

Although there is disagreement on the degree to which firearms should be accessible to law-abiding adults,¹⁵ it is apparent that every effort should be made to keep children and criminals from possessing firearms. Children and criminals are two classes of individuals who are most likely to be dangerous when in possession of firearms.¹⁶

gun control instead of condemning convicted shooter Colin Ferguson. *Id.*

8. FBI, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1993 287 (1994).

9. See Scott D. Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills*, 20 J. LEGIS. 19, 20 & n.16 (1994) (noting that one Los Angeles hospital which did not admit a single child under the age of 10 for gun-related injuries prior to 1980 subsequently treated a three-year-old and an eight-year-old for serious gunshot wounds); Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 58 n.11 (1992) (noting large increase in youth firearm murders).

10. See Athelia Knight, *Strategies to End the Carnage*, WASH. POST, Oct. 27, 1993, at A1 (noting that the percentage of homicide defendants from age 16 to 18 increased 10% in just two years). School crime and violence are not unique to inner city schools. Ronald D. Stephens, *Gangs, Guns, and School Violence*, USA TODAY (Magazine), Jan. 1994, at 29, 29. Students throughout the United States are bringing guns to school. See *id.* As a result, “[f]istfights are being replaced by gunfights” in the nation’s schools. *Id.*

11. Gun-related deaths of children prompt many to take up the anti-gun cause. See Jeffrey Bills, *Anti-gun Marchers from All Walks*, CHI. TRIB., Oct. 9, 1994, § 2, at 3. Watching young people die has prompted many to start grass-roots efforts to stop gun violence and battle the pro-gun lobby. See Robert Davis, *Crime Fighters on the March*, USA TODAY, Sept. 30, 1994, at 9A.

12. FBI, *supra* note 8, at 285. During that same time period the percentage of murders involving knives and other nonfirearm weapons used against murder victims decreased slightly. See *id.* at 285 tbl. 5.7.

13. See Joan Beck, *Can We Do Right by Our Kids Before It’s Too Late?*, CHI. TRIB., Oct. 20, 1994, § 1, at 31 (lamenting the tragedy of youth violence and advocating stricter gun control).

14. See Berkman, *supra* note 4, at 26.

15. Anti-gun-control and pro-gun-control groups both agree that firearms should only be in the hands of responsible citizens. LARSON, *supra* note 2, at 3.

16. See *id.* at 19-20. This prohibition should not be limited to felons. Rather, the type of crime should be considered also. It makes no sense to prohibit persons who have been convicted of tax evasion from owning a gun, while allowing violent criminals to own one if they are lucky

Criminals have already shown their propensity to break the law. Children, on the other hand, generally lack the judgment and experience necessary to responsibly handle dangerous instruments.¹⁷

If the goal is to prevent firearms from reaching certain classes of individuals, it is necessary to determine how to accomplish this objective. State and local law traditionally have been the primary sources of regulation in this area;¹⁸ however, laws vary dramatically from jurisdiction to jurisdiction.¹⁹ In some areas of the country, possession of firearms is severely restricted and only those who can prove good moral character may legally own a firearm.²⁰ In other parts of the country, gun possession is required as a matter of law.²¹ One might assume that states with strict regulations would have a lower crime rate than those states with lax regulations. However, states with strict gun control laws generally have not been successful in reducing the crime rate.²² This Note contends that this failure is not due to the fact there is no correlation between the accessibility of firearms and gun violence. Rather, the reason current laws do not work is because firearms are still readily available.²³ This Note further asserts that there

enough to get the charges reduced.

17. This principle is already recognized in the context of the licensing of drivers; states require individuals to reach a certain age before they are allowed to get behind the wheel of a car. *See, e.g.*, FLA. STAT. § 322.05 (1993). The same rationale should prevent children from possessing firearms.

18. Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 324-25 (1992).

19. *See id.* at 325-26; Bill Montgomery, *Guns Bought in Georgia Arm Northern Criminals*, ATLANTA CONST., Oct. 11, 1993, at A1.

20. *See, e.g.*, N.Y. PENAL LAW § 400.00(1) (McKinney Supp. 1995). Furthermore, in New York City an individual must prove a compelling need before they may obtain a license to carry a firearm. *See Sable v. McGuire*, 460 N.Y.S.2d 52, 52 (N.Y. App. Div. 1983) (reversing decision nullifying police commissioner's denial of application for license to carry concealed weapon on grounds that applicant failed to distinguish himself from countless others in every conceivable occupation who did business within city without benefit of license); *Bernstein v. Police Dep't of New York*, 445 N.Y.S.2d 716, 716-17 (N.Y. App. Div. 1981) (reversing decision annulling denial of application for license to carry concealed weapon because applicant "failed to 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession'").

21. Boser, *supra* note 18, at 326. For example in Kenneshaw, Georgia, every head of household residing in the city limits is required to maintain a firearm and ammunition. *Id.* at 326 n.81. The only exemptions are those heads of households who suffer a physical disability, are convicted felons, or oppose firearms because of religious beliefs. *Id.*

22. *See id.* at 326 & n.83.

23. ATF estimated in 1994 that licensed firearms dealers sell 7.5 million guns per year. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEPARTMENT OF THE TREASURY, ATF FACTS 2 (Nov. 1994).

is currently very little effective federal gun control legislation. In the absence of strong federal legislation, firearms are being transported from states with lax gun laws into states with stringent gun laws.²⁴ Thus, in order for there to be any effective gun control, the federal government will have to take the initiative and provide effective national legislation.²⁵

A variety of solutions to the gun problem have been attempted or proposed.²⁶ This Note focuses solely on the federal government's efforts at controlling the proliferation of firearms. Part II of this Note discusses the divergent views on gun control. Part III examines the constitutional issues relevant to federal legislation in this area and concludes that most federal regulation of firearms is valid under the Constitution. Part IV examines past and present federal firearms legislation, and Part V evaluates the effectiveness of the present federal firearms legislation. The focus will be on the federal licensing of dealers. Part VI suggests changes to current law that will make it more effective. This Note concludes that more stringent federal regulation of those who sell firearms is necessary in order to ensure that firearms are unavailable by either legal or illegal means to those who are a danger to society.

II. THE POSTURE OF THE GUN CONTROL DEBATE

While there are differing views on the degree to which firearms should be restricted, for simplicity's sake two factions can be identified easily. One faction opposes all gun-control legislation (anti-gun-control groups),²⁷ while the other advocates gun-control in at least some form

24. Montgomery, *supra* note 19, at A1, A4. Many of the guns involved in crimes in northern states were purchased in southern states and transported North via Interstate 95, aptly named the "Iron Pipeline." *See id.*

25. While beyond the scope of this Note, strong regulation of the manufacture and sale of firearms is necessary. The need for strict regulation in these areas is discussed in Erik Larson's book. *See* LARSON, *supra* note 2, at 57-83. Larson illustrates the weakness of present regulations by tracing a single gun—a Cobray M-11/9—used to commit murder in a Virginia Beach school. *Id.* Larson further examines the highly questionable conduct of Wayne and Sylvia Daniel, the individuals behind the manufacture of the Cobray, an assault weapon which they marketed as "The Gun That Made the Eighties Roar." *Id.* at 74.

26. There have been attempts to control guns by making manufacturers strictly liable for injuries resulting from the use of their guns. *See* Boser, *supra* note 19, at 313-16, 333-34. Guns have not been the only target in the battle to reduce the violent crime rate. *See* Dailard, *supra* note 9, at 19 (evaluating legislation introduced by Senator Daniel P. Moynihan which regulates the manufacture and sale of certain classes of ammunition instead of guns).

27. This group includes, of course, the NRA. *See* DAVIDSON, *supra* note 3, at 36 (stating that beginning in 1977 the NRA was "devoted single-mindedly—and proud of the fact—to the proposition that Americans and their guns must never, never be parted").

(pro-gun-control groups).²⁸ Anti-gun-control groups believe the government does not have the constitutional authority to infringe upon an individual's right to "keep and bear arms."²⁹ They believe an individual's right to bear arms is guaranteed by the Second Amendment's proclamation that "[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."³⁰ As a result, anti-gun-control groups view any effort to restrict the sale of firearms as a violation of their constitutional rights.³¹

On the other side of the debate, pro-gun-control groups do not believe the Second Amendment gives an individual the unrestricted right to bear arms.³² Rather, pro-gun-control groups insist that the Second Amendment was adopted to secure for states the right to maintain their own militia, thus enabling protection against federal and foreign encroachment.³³ They further contend that, in contemporary America, the National Guard is the "militia."³⁴

While both sides in the gun control debate recognize a crime problem in America,³⁵ their views diverge dramatically when it comes to identifying the cause and solution. The conflict arises when determining the role firearms play in the crime problem. Anti-gun-control groups postulate that it is not firearms that kill people, but rather people kill people.³⁶ They further assert that the solution lies in tougher enforcement of existing criminal laws and stricter sentencing of

28. Some of the people in this group may even be members of the NRA, as one survey showed that a majority of the NRA members surveyed favor registration of handguns and a little less than a majority favor limiting handgun purchases to one per month. LARSON, *supra* note 2, at 192. However, the official position of the NRA is that any form of gun control is a violation of an individual's right to bear arms. *Id.* at 185 (citing *NRA Member Guide*). Therefore, any reference in this Note to the NRA is a reference to the organization and its official position, and not the individuals who constitute its membership.

29. See DAVIDSON, *supra* note 3, at 134-35; LARSON, *supra* note 2, at 20.

30. U.S. CONST. amend. II.

31. A membership guide sent to Larson soon after he joined the NRA in 1993 states the group's position in unequivocal terms: "Any type of licensing and computer registration scheme aimed at law-abiding citizens is a direct violation of Second Amendment rights, serves no law enforcement purpose, and ultimately could result in the prohibition and/or confiscation of legally owned firearms." LARSON, *supra* note 2, at 185.

32. COALITION TO STOP GUN VIOLENCE, COALITION TO STOP GUN VIOLENCE 4 (n.d.) (copies available by writing to the Coalition to Stop Gun Violence at 100 Maryland Ave., N.E., Washington, D.C. 20002).

33. *Id.*

34. *Id.*; DAVIDSON, *supra* note 3, at 135.

35. In his book, Wayne LaPierre, Executive Vice-President of the NRA, discusses the crime problem in America. WAYNE R. LAPIERRE, GUNS, CRIME, AND FREEDOM 74-118 (1994).

36. LARSON, *supra* note 2, at 21.

convicted criminals.³⁷ Although these measures may alleviate the problem by removing some criminals from the street, history suggests they will not effectively solve the problem of violent crime.³⁸

Conversely, advocates for stricter gun control believe the wide availability of firearms is a major contributor to the crime problem.³⁹ They often reach this conclusion by examining the statistics of firearm-related deaths in industrialized nations that have strict gun control laws and comparing them to the number of firearm-related deaths in this country. For example, in 1990, handguns were used to murder 22 people in Great Britain, 68 in Canada, 87 in Japan, and 11,719 in the United States⁴⁰—the country with the easiest access to firearms.⁴¹ This wide disparity seems to indicate that the proliferation of firearms is the cause of the violent crime problem in the United States.⁴²

37. See LAPIERRE, *supra* note 35, at 17, 111-28.

38. Michele H. Kalstein et al., Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 593-95 (1992). For the sentences to deter criminal behavior effectively, several assumptions must be true. *Id.* One assumption is that the offender must be a rational cost-benefit analyst who weighs the benefits against the costs of committing the crime. *Id.* at 594. Generally, this is not what happens. *Id.* at 595. Most crimes are committed spontaneously and without any thought of the consequences. *Id.* Another problem with this solution is illustrated by the comment of FBI Director Louis J. Freeh at his swearing-in ceremony, where he stated “[t]he crime and disorder which flow from hopeless poverty, unloved children and drug abuse can’t be solved merely by bottomless prisons, mandatory sentencing minimums or more police.” Knight, *supra* note 10, at A16.

39. LARSON, *supra* note 2, at 21-22. Dr. Arthur Kellermann, an emergency-medicine physician, did a study of the rates of homicides and assaults in Seattle and Vancouver from 1980 through 1986. *Id.* at 22. The two cities were picked because they were close to each other, had similar economies, similar geophysical locations, and similar demographic profiles. *Id.* It was assumed they also watched the same movies and many of the same TV shows. *Id.* The main difference was in the degree of gun regulation. *Id.* Vancouver only allowed people to buy guns who could demonstrate they had a legitimate need for one, whereas in Seattle there were few restrictions. *Id.* The study showed that while the assault rate was the same, in Seattle the attackers were eight times more likely to use a handgun than those in Vancouver. *Id.* Furthermore, Seattle’s homicide rate was five times higher, and the difference was directly attributed to handgun-related killings. *Id.*

According to records kept by ATF, more than 222 million firearms were made in the United States or imported for sale here from 1899 through 1993. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *supra* note 23, at 1. ATF also estimated in 1994 that licensed firearms dealers sold about 7.5 million guns per year. *Id.* at 2.

40. COALITION TO STOP GUN VIOLENCE, *supra* note 32, at 6.

41. Herz, *supra* note 2, at 58 n.3 (citing James C. Harrington, *Texas, Especially, Needs Gun Control*, TEX. LAW., Nov. 4, 1991, at 10).

42. *Id.* at 6-7. There have been many other theories postulated to explain the difference in firearm-related deaths in the United States as compared to other industrialized nations. Boser, *supra* note 19, at 317. America’s “frontier society” has been blamed; however, both Canada and Australia also have a frontier history. *Id.* at 317-18. The United States’ multi-cultural and multi-ethnic composition also have been cited as a cause. *Id.* This theory is deficient because the

Another concern is the increasing use of firearms in suicides.⁴³ Studies indicate the mere presence of a gun in the home more than doubles the odds that an adolescent member of the family will commit suicide.⁴⁴ These statistics seem to signify that the solution is to ban firearms completely. But perhaps that is much too simple a solution. Although the proliferation of firearms most assuredly contributes to the predicament facing America, it is by no means the only source of the problem.⁴⁵ American culture and widespread poverty also must be blamed for the violence in our society.⁴⁶

III. CONSTITUTIONAL ISSUES

Any debate on gun control will invariably turn to the Second Amendment.⁴⁷ Anti-gun-control groups often cite the Second Amendment as conferring upon the individual the right to bear arms.⁴⁸ They further assert that any attempt by the federal government to control the sale or distribution of firearms infringes upon this right.⁴⁹ However, the Supreme Court has not interpreted the Second Amendment as granting an individual the right to bear arms.⁵⁰ In fact, what sparse caselaw there is seems to indicate otherwise.⁵¹ Furthermore, the national government may operate within wide parameters, as the Court has interpreted the right to bear arms in conjunction with the introductory phrase of the amendment, which indicates that the right is

violence occurs predominately within ethnic groups. *Id.* Rather, the most likely explanation is that the United States is the only modern industrial urban nation which continues to preserve a gun culture. *Id.* at 318. The United States is also the only industrial nation where possession of firearms is lawfully prevalent among a considerable segment of the population. *Id.*

43. Bob Herbert, *Mr. Dole's Call to Arms*, N.Y. TIMES, June 3, 1995, at 19. There was a study done in Washington which found that a gun kept at home was 43 times more likely to be used to kill its owner, a family member, or a friend than an intruder. LARSON, *supra* note 2, at 21.

44. LARSON, *supra* note 2, at 21.

45. *Id.* at 20-21.

46. While the easy access to firearms certainly is a factor, there are a variety of other factors contributing to the problem. Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1894-903 (1994). A recent report concluded that the risk factor most closely linked to youth violence was a low family income. *Id.* at 1895. Other factors included exposure to violence, drugs, alcohol, gangs, and television violence. *Id.* at 1896-903.

47. See *supra* text accompanying note 30 for the text of the Second Amendment.

48. See DAVIDSON, *supra* note 3, at 134-35; LARSON, *supra* note 2, at 20.

49. See *supra* note 31.

50. See Boser, *supra* note 18, at 347.

51. See *id.*

dependent upon the preservation of a strong militia.⁵²

While the 1857 Supreme Court decision in *Dred Scott* implied that the Constitution provided an individual right to bear arms,⁵³ later cases dealing directly with the Second Amendment have rejected such a right.⁵⁴ *United States v. Cruikshank*⁵⁵ was the first Supreme Court case to reject an individual right to keep and bear arms. In *Cruikshank*, the defendants were accused of violating a federal statute by banding together to intimidate two African-American citizens with the intent of hindering their free exercise of constitutional rights.⁵⁶ To conclude that the defendants had violated the statute, the Court stated it was first necessary to find that the rights at issue were indeed granted by the Constitution.⁵⁷ One of the rights the defendants were accused of hindering was the right of the citizen to bear arms for a lawful purpose.⁵⁸ The Court found that “bearing arms for a lawful purpose,” is neither a right granted by the Constitution nor dependent upon the Constitution for its existence in any manner.⁵⁹ The Court added that the Second Amendment has no effect other than to restrict the powers of the national government.⁶⁰ Thus, while not specifically interpreting the Second Amendment, the Court in *Cruikshank* did find that the right to bear arms is not an individual right.⁶¹

This view was reiterated in *Presser v. Illinois*.⁶² In *Presser*, the defendant was accused of violating a state statute which prohibited any body of men other than the state militia from organizing as a military company, or United States troops from drilling with arms in any city unless licensed by the governor.⁶³ One issue in *Presser* was whether the statute violated the Second Amendment.⁶⁴ In holding that the

52. See *infra* text accompanying notes 67-79.

53. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857). In *Dred Scott*, the Court held that African Americans were not citizens of the United States. *Id.* at 404. The Court implied an individual right to bear arms in its discussion of the rights that would have to be given to African Americans if it were determined that they were citizens of the United States. *Id.* at 416-17. The Court stated that among the rights that would have to be bestowed upon them as citizens was the right to carry arms. *Id.* at 417.

54. See *infra* text accompanying notes 55-67.

55. 92 U.S. 542 (1875).

56. *Id.* at 548 (quoting Enforcement Act of May 31, 1870).

57. *Id.* at 549.

58. *Id.* at 553.

59. *Id.*

60. *Id.*

61. See *id.*

62. 116 U.S. 252, 265 (1886).

63. *Id.* at 253-54.

64. *Id.* at 264.

statute did not violate the Constitution, the Court explained that the Second Amendment is a limitation only on the power of Congress and the national government.⁶⁵ Thus, the Court in *Presser* also found there is no individual right to “keep and bear arms.”⁶⁶

While the Court in *Cruikshank* and *Presser* found that the federal government is restricted in regulating the right to bear arms, it rejected the argument that the Constitution guarantees individuals the right to bear arms.⁶⁷ Yet, these early cases did not discuss the extent of the Second Amendment’s limitation on the federal government. In fact, the Supreme Court has addressed the extent of this limitation only once—in *United States v. Miller*.⁶⁸

In *Miller*, the defendants were charged with unlawfully transporting an unregistered firearm in interstate commerce, in violation of the National Firearms Act of 1934.⁶⁹ The Act provided for the registration of firearms and required the payment of a tax for firearms transferred in the continental United States.⁷⁰ The issue in *Miller* was whether this federal legislation violated the Second Amendment.⁷¹ In holding that the statute did not violate the Second Amendment, the Court focused on the term “militia” in the Amendment.⁷² The Court found that, in the absence of any evidence tending to show that possession or use of the particular gun had some reasonable relationship to the preservation or efficiency of a well-regulated militia, the Second Amendment did not guarantee the right to keep and bear such a gun.⁷³ Thus, it is apparent from this decision that the Second Amendment does not bar Congress from regulating the right to keep and bear arms.⁷⁴ The only limit placed on Congress by the Second Amendment is that it cannot pass a law which impairs the preservation or efficiency of a well-regulated militia.⁷⁵

As recently as 1980, the Supreme Court reaffirmed the holding of *Miller* in the case of *Lewis v. United States*.⁷⁶ In *Lewis*, the defendant,

65. *Id.* at 265.

66. *See id.* The Court, putting aside the Second Amendment, determined that the states could not prohibit people from keeping and bearing arms. *Id.*

67. *Presser*, 116 U.S. at 265; *Cruikshank*, 92 U.S. at 553.

68. 307 U.S. 174 (1939).

69. *Id.* at 175.

70. *Id.* at 166, 177 n.1 (citing National Firearms Act of 1934, Pub. L. No. 474, §§ 3, 5, 48 Stat. 1236, 1237-38 (repealed 1939)).

71. *See id.* at 176, 178.

72. *See id.* at 178-83.

73. *See id.* at 178.

74. *See id.*

75. *See id.*

76. 445 U.S. 55, 65 n.8 (1980).

a convicted felon, was caught in possession of a firearm.⁷⁷ Because 18 U.S.C. § 1202(a)(1) made it illegal for felons to carry guns, the defendant was convicted of possessing a firearm in violation of federal law.⁷⁸ The Court held that the Second Amendment does not guarantee the right to bear a firearm unless the firearm has “ ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’ ”⁷⁹ In no other case has the Court addressed the question of to what extent the federal government can regulate the right to keep and bear arms. However, if the Court continues to interpret the right to bear arms as having a relation to the preservation of a strong militia, the federal government will most likely be deemed to have broad legislative powers in this area.

The holdings in *Cruikshank*, *Presser*, *Miller*, and *Lewis* indicate that the Second Amendment grants no individual right to bear arms.⁸⁰ In the context of addressing state gun control laws, the Court specifically stated in *Cruikshank* and *Presser* that there is no individual right to bear arms granted by the Constitution.⁸¹ Thus, a state can completely ban firearms if it wishes. The Court in *Cruikshank* and *Presser* further found that the Second Amendment limits only the federal government.⁸² In *Miller*, the Court interpreted this limitation on the federal government to be related to the preservation of a strong militia.⁸³ *Lewis* reaffirmed this interpretation of the Second Amendment.⁸⁴ Therefore, the only laws invalid under the Second Amendment are those passed by the federal government which would hinder the preservation of a strong militia.

This proposition is further supported by lower federal courts which have applied the Supreme Court's holdings in *Presser* and *Miller*.⁸⁵ The Seventh Circuit addressed the Second Amendment in *Quilici v. Village of Morton Grove*.⁸⁶ In *Quilici*, the plaintiffs challenged a village ordinance which prohibited the possession of handguns within the village's borders as violative of the Second Amendment.⁸⁷ First, the

77. *Id.* at 56-57.

78. *See id.* at 57-58.

79. *Id.* at 65 n.8 (quoting *Miller*, 307 U.S. at 178).

80. *See Lewis*, 445 U.S. at 65 n.8; *Miller*, 307 U.S. at 178; *Presser*, 116 U.S. at 265; *Cruikshank*, 12 U.S. at 553.

81. *Presser*, 116 U.S. at 265; *Cruikshank*, 92 U.S. at 553.

82. *Presser*, 116 U.S. at 265; *Cruikshank*, 92 U.S. at 553.

83. *See Miller*, 307 U.S. at 178.

84. *Lewis*, 445 U.S. at 65 n.8.

85. *See, e.g., United States v. Tomlin*, 454 F.2d 176, 176 (9th Cir. 1972) (per curiam); *Pencak v. Concealed Weapon Licensing Bd.*, 872 F. Supp. 410, 413 (E.D. Mich. 1994).

86. 695 F.2d 261, 269-71 (7th Cir. 1982).

87. *Id.* at 263, 269.

plaintiffs argued that *Presser* supported the theory that the Second Amendment right to keep arms is a fundamental right which the State cannot regulate.⁸⁸ The court in *Quilici* rejected this argument, stating that it “border[ed] on the frivolous” in light of the explicit language in *Presser*.⁸⁹

Second, the plaintiffs in *Quilici* argued the entire Bill of Rights has been incorporated into the Fourteenth Amendment and thus applied to the states.⁹⁰ The *Quilici* court noted that the Supreme Court had specifically rejected this theory, and thus concluded it had no merit.⁹¹ Despite holding that the Second Amendment does not apply to the states, the *Quilici* court proceeded to comment on the scope of the Second Amendment.⁹² Construing the language according to its plain meaning, the court found it clear that the right to bear arms is “inextricably connected to the preservation of a militia.”⁹³ The *Quilici* court further noted that this was precisely how the Supreme Court interpreted the amendment in *Miller*.⁹⁴ Thus, the right to keep and bear arms extends only to those arms necessary for the preservation of a well-regulated militia.

As a result of the Supreme Court’s interpretation of the Second Amendment, there has been very little success in defeating federal legislation on the basis of an individual’s right to keep and bear arms.⁹⁵ However, the United States District Court in Montana recently held that, under the Tenth Amendment, a portion of the new Brady Act⁹⁶ was unconstitutional. In *Printz v. United States*,⁹⁷ the plaintiff qualified as a chief law enforcement officer (CLEO) under the Brady Act.⁹⁸ As a CLEO, the Brady Act required the plaintiff to perform background checks on certain individuals who wish to buy handguns.⁹⁹ The *Printz* court held that this portion of the Brady Act was unconstitutional under

88. *Id.*

89. *Id.*

90. *Id.* at 269-70.

91. *Id.* at 270.

92. *See id.*

93. *Id.*

94. *Id.*

95. *See, e.g., Tomlin*, 454 F.2d at 176.

96. *See infra* part IV.E. for a discussion of the Brady Handgun Violence Prevention Act.

97. 854 F. Supp. 1503 (D. Mont. 1994).

98. *See id.* at 1506.

99. *See id.* at 1506 & n.2 (citing 18 U.S.C. § 922(s)(1)(B)-(F)). Under the Brady Act the CLEO is directed to make reasonable efforts to determine whether or not a transferee’s receipt or possession of the handgun would violate the law. *Id.* (citing 18 U.S.C. § 922(s)(2)). This provision is generally referred to as the “background check” provision. *See id.* at 1510 & n.14.

the Tenth Amendment.¹⁰⁰ The court found that by requiring states to implement an unfunded mandate, Congress in effect “substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program.”¹⁰¹

Invalidation under the Tenth Amendment represents a new approach in the attack on the constitutionality of federal firearms regulations.¹⁰² As of yet, it is unclear which way the Supreme Court would rule on this issue.¹⁰³ One weakness of an attack based on the Tenth Amendment is that the federal government could easily make the Brady Act constitutional by conditioning the receipt of federal funding on a state’s compliance with the statute.¹⁰⁴ Therefore, even if the Supreme Court were to agree with the district court’s holding in *Printz*, Congress would not truly be limited by the Tenth Amendment as long as it can condition the receipt of federal funding on any mandate.¹⁰⁵

IV. PAST AND PRESENT FEDERAL LEGISLATION

Traditionally, most gun control legislation has been left to the discretion of the states.¹⁰⁶ Nevertheless, Congress has enacted some significant legislation in this area as well.¹⁰⁷ There has been a recent

100. *Id.* at 1519-20.

101. *Id.* at 1519. Several other district courts have held the background check unconstitutional as a violation of the Tenth Amendment. *See, e.g.,* *McGee v. United States*, 863 F. Supp. 321, 325-28 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030, 1040-43 (D. Vt. 1994); *Mack v. United States*, 856 F. Supp. 1372, 1378-81 (D. Ariz. 1994). The district court in the Western District of Texas disagreed. *See* *Koog v. United States*, 852 F. Supp. 1376, 1381-88 (W.D. Tex. 1994).

102. *See* Harvey Berkman, *Printz v. United States: An NRA Win in Montana*, NAT’L L.J., June 6, 1994, at A26. The NRA has repeatedly mounted legal challenges to gun laws on the theory they violate the Second Amendment, but has repeatedly failed. *Id.* Another constitutional provision used to invalidate federal gun control legislation is the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Just recently, the Supreme Court held that the Gun-Free School Zones Act of 1990 exceeded Congress’ authority under the Commerce Clause. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

103. *See* Berkman, *supra* note 102, at A26. Professor Erwin Chemerinsky expresses doubts as to the outcome of this tactic. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. (forthcoming 1995).

104. *See* *Printz*, 854 F. Supp. at 1514 (quoting *New York v. United States*, 112 S. Ct. 2408, 2423 (1992)). *But see* Chemerinsky, *supra* note 103 (indicating that “strings on grants” can be just as coercive as a direct requirement and might be limited on federalism grounds).

105. *Cf.* *Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 615 (E.D. Ark. 1994). While it is true that the funding that will be withheld must be related to the federal mandate, this will not be an obstacle as federal aid for law enforcement certainly will be deemed related to gun control legislation. *Id.*

106. Boser, *supra* note 18, at 324-25.

107. *See infra* parts IV.A.-F.

trend toward even stricter federal regulations, as evidenced by the passage of the Brady Handgun Violence Prevention Act¹⁰⁸ and the Violent Crime Control and Law Enforcement Act of 1994 (1994 Act).¹⁰⁹

A. National Firearms Act of 1934

One of the first pieces of gun control legislation passed by the federal government was the National Firearms Act of 1934.¹¹⁰ This Act was prompted by the use of the "Tommy gun" in gangster activity.¹¹¹ Originally proposed to ban or regulate a wide variety of firearms, the resulting legislation ultimately regulated only the sale of machine firearms and sawed-off shotguns.¹¹² While machine guns and sawed-off shotguns are still available for sale, there is a transfer tax of \$200 levied on each.¹¹³ This was intended to make them prohibitively expensive, and in 1934 it was.¹¹⁴ However, the tax has not changed since 1934¹¹⁵ and, therefore, it no longer acts as a meaningful disincentive. In order for the tax to operate as a disincentive as intended, the tax must be raised to a level which once again makes machine guns and sawed-off shotguns prohibitively expensive.

B. Federal Firearms Act

In 1938, Congress further regulated commerce in firearms with the enactment of the Federal Firearms Act.¹¹⁶ The Act required any manufacturer or dealer who shipped, transported, or received any firearm

108. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C.A. §§ 921-925A (West Supp. 1995)).

109. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (to be codified in scattered sections of 18 & 42 U.S.C.).

110. National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236 (repealed 1939).

111. DiBacco, *supra* note 1, at G-6. The Tommy gun, named after its developer, John T. Thompson, was a submachine gun first produced in the early 1920s. *Id.* The gun had the lightness of a rifle and the rapid-fire devastation of a machine gun. *Id.* Though the gun was originally marketed as an "Anti-Bandit Gun," gangsters utilized the gun most extensively. *Id.* While J. Edgar Hoover spent nearly a decade trying to get Congress to pass controls, it was not until John Dillinger waged war with the Tommy gun, and Franklin Roosevelt supported the bill, that the Act came into existence. *Id.*

112. DAVIDSON, *supra* note 3, at 29.

113. National Firearms Act of 1934, §§ 2(a), 3(a). The Act also requires every importer, manufacturer, and dealer in firearms to register with the Internal Revenue Service. *Id.*

114. See LARSON, *supra* note 2, at 134-35. The tax was more than the retail price of some of these guns. *Id.* at 135.

115. *Id.*

116. Federal Firearms Act, Pub. L. No. 785, 52 Stat. 1250 (1938) (repealed 1968).

or ammunition in interstate commerce to obtain a license.¹¹⁷ Licensing fees under the Act were \$25 for manufacturers and \$1 for dealers.¹¹⁸ This marked the first time shipments of firearms and ammunition were required to be recorded.¹¹⁹ The Act further regulated the interstate shipment of firearms and ammunition by prohibiting shipment to any person known or reasonably believed to be under indictment for a violent crime, convicted of a violent crime, or a fugitive from justice.¹²⁰

C. Gun Control Act of 1968

The next significant piece of federal gun control legislation was prompted by the assassination of President John F. Kennedy.¹²¹ The fact that Lee Harvey Oswald allegedly killed the President using a gun purchased through the mail prompted a public outcry for more gun control legislation.¹²² Surprisingly, even the effective leader of the National Rifle Association (NRA) testified in front of Congress in support of the bill.¹²³ The resulting legislation was the Gun Control Act of 1968 (GCA).¹²⁴

GCA adds some important regulations on the sale of firearms. First, it prohibits the interstate transportation of firearms and ammunition through the mail to anyone other than a federal firearms licensee (FFL) and requires FFLs to keep records.¹²⁵ Second, it prohibits the sale of

117. *Id.* § 2.

118. *Id.* § 3(a). The fees were to be paid annually. *Id.*

119. *Id.* § 3(d). Only licensed dealers were required to maintain such records, and Congress gave the Secretary of the Treasury authority to fill the legislative gaps in this area. *See id.*

120. *Id.* § 2(d).

121. DAVIDSON, *supra* note 3, at 30. The legislative process was slow, however, coming to a conclusion around the time of Martin Luther King, Jr. and Robert Kennedy's assassinations. DiBacco, *supra* note 1, at G-6.

122. DAVIDSON, *supra* note 3, at 30.

123. *Id.* Retired General Franklin Orth, the executive vice president of the NRA, testified before Congress, saying " '[w]e do not think that any sane American, who calls himself an American, can object to placing into this bill the instrument which killed the president [sic] of the United States.' " *Id.*

124. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-928 and scattered sections of 26 U.S.C.). Congress passed two statutes, Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197, 225, 236 (1968) (title VII codified in scattered sections of 42 U.S.C. and Title VII repealed 1986), and the Act passed later in the same session, the Gun Control Act of 1968, which are now known collectively as the Gun Control Act of 1968. DOROTHY SCHRADER, LIBRARY OF CONGRESS, CRS REPORT FOR CONGRESS (THE BRADY HANDGUN CONTROL ACT: CONSTITUTIONAL ISSUES) CRS-4 (Nov. 16, 1994).

125. 18 U.S.C. §§ 922(a)(2), 923(g) (1988).

firearms to any person known or reasonably believed to be a felon.¹²⁶ Third, GCA prohibits the sale of firearms by nonlicensees to other nonlicensees known or reasonably believed to be out-of-state residents.¹²⁷ Fourth, only shotguns and rifles can be sold to individuals under twenty-one years of age.¹²⁸

While the interstate shipment of firearms is limited to FFLs under GCA,¹²⁹ the sale of firearms is not.¹³⁰ Rather, when it comes to sales, the licensing requirement only applies to individuals who are "in the business" of selling firearms.¹³¹ A person is deemed to be "in the business" of selling firearms if they devote time and effort to the activity with the intent to do so for profit and livelihood.¹³²

Although the licensing of dealers sounds protective, the requirements for obtaining a federal firearms license are minimal under GCA.¹³³ The toughest restriction prohibits convicted felons from obtaining a federal firearms license.¹³⁴ While a few other classes of individuals are prohibited from getting licenses,¹³⁵ many others are not.

126. *Id.* § 922(d)(1).

127. *Id.* § 922(a)(5).

128. *See id.* § 922(b)(1). However, it is unlawful to sell a shotgun or rifle to a person known or reasonably believed to be under 18 years of age. *Id.*

129. *Id.* § 922(a)(1)(A).

130. *See id.* § 922(a)(5).

131. *Id.* §§ 921(a)(11), (21), 923(a).

132. *Id.* § 921(21)(C). More specifically, a dealer selling firearms is defined as one

who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

Id.

133. It was so easy to get a license that in 1990 ATF licensed two dogs as FFLs. Knut Royce, *New Rules Target Gun Dealers*, N.Y. NEWSDAY, Feb. 15, 1994, at 5. Reporters used the dogs to demonstrate just how easy it is to get a federal firearms license. *Id.* Although requirements recently added will prevent a recurrence of these types of oversights, *see infra* text accompanying note 168, the requirements are still minimal.

134. *See* 18 U.S.C. §§ 923(d)(1)(B), 922(g) (1988 & Supp. V 1993).

135. The following classes of individuals also are not allowed to obtain a license: fugitives from justice, unlawful users or addicts of controlled substances, adjudicated mental defectives, individuals committed to mental institutions, aliens illegally or unlawfully in the United States, individuals dishonorably discharged from the armed forces, persons who have renounced United States citizenship, and individuals under indictment for a felony. *Id.* §§ 923(d)(1), 922(g) & (n).

D. Firearms Owners' Protection Act

Although most federal legislation has slowly placed more stringent controls on commerce in firearms, this trend took a step backward in 1986 with the passage of the Firearms Owners' Protection Act (FOPA).¹³⁶ FOPA is viewed as civil rights legislation for gun owners.¹³⁷ FOPA lifts several bans that had previously been in place. For example, FOPA permits the interstate shipment of ammunition to nonlicensees prohibited under GCA.¹³⁸ Additionally, FOPA lifts the prohibition against transporting firearms across state lines, provided the firearms are unloaded and not readily accessible.¹³⁹ FOPA allows dealers to transfer firearms to their "personal collections," and subsequently sell those firearms subject only to the restrictions on nonlicensees.¹⁴⁰ Their personal collections are those guns they own for their own use. Because they are able to sell these guns as nonlicensees, these transfers are exempt from the recording requirements.¹⁴¹ Furthermore, FOPA limits government inspections to once a year when no reasonable cause for the inspection exists.¹⁴² Enforcement is further

136. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921-929 (1988)). FOPA is sometimes referred to as the McClure-Volkmer Act. See LARSON, *supra* note 2, at 143.

137. This is evidenced by the congressional findings that

(1) the rights of citizens—

- (A) to keep and bear arms under the second amendment to the United States Constitution;
- (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
- (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
- (D) against unconstitutional exercise of authority under the ninth and tenth amendments;

require additional legislation to correct existing firearms statutes and enforcement policies.

18 U.S.C. § 921 note.

138. *Id.* § 922.

139. *Id.* § 926A.

140. *Id.* § 923.

141. *Id.* These transfers are exempt from the recording requirements, which are found at 18 U.S.C. § 923(g)(1)(A), and apply solely to licensed dealers because the sale of firearms from a personal collection is "subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed . . . dealer." *Id.* § 923(c).

142. *Id.* § 923. No reasonable cause is necessary if the inspection is a reasonable inquiry in the course of a criminal investigation of a person other than the licensee. *Id.* § 923(g)(1)(B)(i).

restricted by requiring the Bureau of Alcohol, Tobacco, and Firearms (ATF)¹⁴³ to prove that violations are willful before revoking an FFL's license.¹⁴⁴

Even though anti-gun-control groups may perceive FOPA to be a victory, there are some provisions which may be viewed as pro-gun-control. For example, FOPA extends to nonlicensees the prohibition against knowingly selling firearms to felons and other undesirable individuals, including drug addicts.¹⁴⁵ However, there is still no affirmative requirement for either licensees or nonlicensees to determine if the transferee is part of a disfavored class.¹⁴⁶ FOPA only prohibits the sale if the transferor knows, or has reason to believe, the transferee is not an eligible transferee.¹⁴⁷

E. Brady Handgun Violence Protection Act

While FOPA represented a victory for gun owners, the next significant gun legislation symbolized a victory for gun control advocates.¹⁴⁸ This was the Brady Handgun Violence Protection Act,¹⁴⁹ finally signed into law in 1993.¹⁵⁰ Brady, prompted by the assassination attempt on President Reagan, is named after James Brady, President Reagan's press secretary, who was severely wounded in the attack.¹⁵¹ Certainly the most controversial provision of the Brady Act is the provision which places a five-day waiting period on most handgun

143. The enforcement of the 1934 and 1938 Acts was originally given to the Internal Revenue Service (IRS) because the 1934 Act was based upon the taxing power. Schrader, *supra* note 124, at CRS-3. In 1942, the IRS assigned firearms enforcement to the same division that collected alcohol and tobacco taxes. *Id.* at CRS-3 to -4. In 1972, the Treasury reorganized the Alcohol, Tobacco, and Firearms division into a separate bureau. *Id.* at CRS-4. See LARSON, *supra* note 2, at 127-36 for an interesting account of the development of ATF as the enforcing agency for firearms.

144. Pub. L. No. 99-308, § 103. For a detailed discussion of the change in the scienter requirement for revocation, see David T. Hardy, *The Firearms Owners' Protection Act: A Historical And Legal Perspective*, 17 CUMB. L. REV. 585, 647-60 (1987).

145. Pub. L. No. 99-308, § 102(5).

146. See 18 U.S.C. § 922(d) (1988).

147. See *id.*

148. Kevin M. Cunningham, *When Gun Control Meets the Constitution*, 10 ST. JOHN'S J. LEGAL COMMENT. 59, 60 (1994); McClurg, *supra* note 9, at 87 ("To a large extent, passing the Brady bill . . . was more a symbolic victory . . . than the implementation of an effective means of keeping criminals from getting guns.").

149. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-925A (West Supp. 1995)).

150. DiBacco, *supra* note 1, at G-6. It took seven years to pass Brady. Harvey Berkman, "Brady II" Bill Faces a Fierce Battle, NAT'L L.J., Oct. 3, 1994, at A14.

151. DiBacco, *supra* note 1, at G-6.

purchases.¹⁵² This is intended to provide a “cooling off” period to reduce the occurrence of heat of passion crimes and suicides.¹⁵³

Arguably, the most effective provision of the Brady Act is the requirement for background checks in those states that do not already have them.¹⁵⁴ Under the Brady Act, a CLEO is required to conduct background checks on all individuals wishing to purchase handguns.¹⁵⁵ This provision has halted the sale of numerous handguns to felons.¹⁵⁶ Surveys found that in the first year the Brady Act was in effect, 45,000 convicted felons were prevented from buying handguns as a result of background checks.¹⁵⁷

F. Violent Crime Control and Law Enforcement Act of 1994

The most recent change in federal firearms legislation has been brought about by the Violent Crime Control and Law Enforcement Act of 1994 (1994 Act).¹⁵⁸ One of the most controversial provisions of the the 1994 Act is commonly referred to as the “assault weapons ban.”¹⁵⁹

152. 18 U.S.C. § 922. This provision is only applicable to states that do not already have background checks. *See* Pub. L. No. 103-159, § 102(a)(1) (codified at 18 U.S.C.A. § 922).

153. 139 CONG. REC. H9099 (daily ed. Nov. 10, 1993) (statement of Rep. Castle). While effective for some crimes, no waiting period is going to be effective for other crimes. An example is the Purdy case, where Patrick “Eddie” Purdy bought the AK-47 he used to kill numerous schoolchildren nearly six months prior to the attack. *See* DAVIDSON, *supra* note 3, at 10-12, 17.

154. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995) (referring to 18 U.S.C. § 922). Those states that already have some form of background check such as Maryland, California, and Florida are not affected by Brady. LARSON, *supra* note 2, at 235.

However, one thing the background checks will not be able to do is catch criminals who do not have records yet. Tom Morganthau, *Why Not Real Gun Control?*, NEWSWEEK, Oct. 11, 1993, at 33, 34. Background checks also will not be able to catch all criminals. This is because, even though felons are prohibited from buying guns, there are a large number of individuals who are arrested for violent felony offenses but end up plea bargaining, and thus are only convicted of misdemeanors. One case in point is Purdy, who was arrested for felonies several times but always plea bargained down to misdemeanors, and finally ended up killing several schoolchildren. *See* DAVIDSON, *supra* note 3, at 8, 17.

155. 18 U.S.C. § 922.

156. Fox Butterfield, *Handgun Law Deters Felons, Studies Show*, N.Y. TIMES, Mar. 12, 1995, at 23.

157. *Id.* A flaw in the law is that it does not require the arrest of felons who attempt to purchase handguns. *Id.* Rather, the decision to arrest the felon is in the discretion of local officials. *Id.*

158. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 18 U.S.C.).

159. *See* DOROTHY SCHRADER, LIBRARY OF CONGRESS, CRS REPORT FOR CONGRESS (THE ASSAULT WEAPONS BAN: REVIEW OF FEDERAL LAWS CONTROLLING POSSESSION OF CERTAIN FIREARMS) CRS-1 (Dec. 28, 1994).

The 1994 Act, however, does not ban all assault weapons; rather, it prohibits the manufacture, transfer, or possession of "semi-automatic assault weapons."¹⁶⁰ Congress has narrowly defined this term, which includes nineteen specific models or types of weapons, and built into the law a physical-features test to prevent copycats.¹⁶¹ Nonetheless, in an effort to avoid the physical features net cast by Congress, manufacturers have slightly modified weapons banned by the 1994 Act and given these modified weapons new names.¹⁶² The ban also does not affect semi-automatic assault weapons lawfully possessed under federal law on the date the law took effect.¹⁶³ Even though the assault weapons ban has been virtually ineffective,¹⁶⁴ anti-gun-control groups are still vigorously opposed.¹⁶⁵ As a result, there is presently a bill before Congress which, if passed, will repeal the assault weapons ban.¹⁶⁶

While the assault weapons ban has fostered considerable debate, one of the least-discussed changes incorporated in the 1994 Act affects the licensing of FFLs.¹⁶⁷ Applicants are now required to send in a photograph and a set of fingerprints with their application.¹⁶⁸

160. Pub. L. No. 103-322, § 110102(a) (codified at 18 U.S.C.A. § 922).

161. *Id.* § 110102(b) (codified at 18 U.S.C.A. § 921(30)(A)). The language in the statute meant to prevent copycat assault weapons reads "[t]he term 'semiautomatic assault weapon' means—(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as" *Id.* (emphasis added).

162. *60 Minutes: What Assault Weapons Ban?* (CBS television broadcast, Feb. 5, 1995) (transcript available in WESTLAW, 60MIN Database).

163. Pub. L. No. 103-322, § 110102(a) (codified at 18 U.S.C. § 922(v)). This provision has actually increased the interest in and sale of assault weapons by giving people an incentive to buy them now before they are no longer available. *See 60 Minutes, supra* note 162. In fact, gun dealers perceive the ban to be good for business. *See id.* The government estimates that the total number of assault weapons in circulation is close to a million and a half. *Id.* Another effect of this provision was the increased production of assault weapons by manufacturers in anticipation of the ban. *See id.*

164. *60 Minutes, supra* note 162 (broadcasting the comments of Bill Perkins, a gun dealer, in which he said: "The [A]ct did more to put firearms out there on the streets . . . [President Clinton] accomplished what gun dealers have tried to accomplish for years, and that is to get these sales up.").

165. *See id.*; 'We Must Forge a New Social Compact,' WASH. POST, Jan. 25, 1995, at A30.

166. H.R. 125, 104th Cong., 1st Sess. (1995). However, President Clinton in his State of the Union address on January 24, 1995, promised to thwart the repeal of the assault weapons ban, stating: "[A] lot of people laid down their seats in Congress so that police officers and kids wouldn't have to lay down their lives under a hail of assault weapon attack, and I will not let that be repealed. I will not let it be repealed." *We Must Forge a New Social Compact, supra* note 165, at A30.

167. KEITH BEA, LIBRARY OF CONGRESS, CRS ISSUE BRIEF (GUN CONTROL) CRS-1, at summary (Feb. 9, 1995).

168. Pub. L. No. 103-322, § 110301(a) (codified at 18 U.S.C.A. § 923(a)). Bill Bridgewater, Executive Director of the National Alliance of Stocking Gun Dealers, which

Applicants are also required to certify their compliance with state and local laws governing firearms dealerships, including zoning ordinances.¹⁶⁹ Furthermore, the Secretary of the Treasury is required to furnish local law enforcement agencies with the names of federally licensed dealers in their area.¹⁷⁰

V. EFFECTIVENESS OF CURRENT FEDERAL LEGISLATION

In order to stem the proliferation of firearms among unsuitable individuals such as children and criminals, it is essential to have strong federal legislation.¹⁷¹ As evidenced by the easy access to firearms afforded to children and criminals, the present laws are inadequate in dealing with the problem.¹⁷² Most of the debate surrounding gun control has centered around the questions of which individuals should be allowed to buy firearms, what requirements must be met before they can obtain possession, and what types of firearms should be available.¹⁷³ However, legislation of this sort is only the first step. Prohibiting children and criminals from purchasing firearms will not be productive unless there is effective control over those who are responsible for the sale of firearms.¹⁷⁴ Thus, while there are many areas of gun control legislation which can be improved, this section focuses on the effectiveness of the licensing procedure for federal dealers.

As stated in part IV of this Note, it is fairly easy to obtain a federal firearms license.¹⁷⁵ Once licensed, dealers are able to purchase an unlimited number of firearms wholesale through the mail.¹⁷⁶ Moreover,

represents storefront dealers, favors this provision because it helps weed out "kitchen-table" and black-market dealers. Royce, *supra* note 133, at 5.

169. Pub. L. No. 103-322, § 110302 (codified at 18 U.S.C.A. § 923(d)(1)).

170. *Id.* § 110307 (codified at 18 U.S.C.A. § 923(1)).

171. BEA, *supra* note 167, at CRS-1.

172. *See supra* notes 22-24 and accompanying text.

173. *See supra* part IV. The NRA strongly opposes the prohibition of sales to law-abiding citizens, requiring a waiting period or registration, and the selective prohibition of the sales of certain firearms. LARSON, *supra* note 2, at 185-86.

174. *See* BEA, *supra* note 167, at CRS-1.

175. *See supra* notes 133-35 and accompanying text.

176. LARSON, *supra* note 2, at 125-26. One study concluded that disreputable gun dealers often obtain guns wholesale through the mail, then sell the weapons without adhering to state and local laws. Pierre Thomas, *Report Criticizes U.S. Licensing of Gun Dealers*, WASH. POST, Dec. 12, 1992, at B3. Felons also are able to get licenses by having friends and relatives apply for them. *Id.* In addition, in order to receive guns wholesale, a licensed dealer needs only to send the manufacturer a copy of the license. LARSON, *supra* note 2, at 151. Licenses are very susceptible to forgery, and thus felons are able to make several copies, change the names and addresses, and give the licenses to other people. *See id.* at 151-52.

once this license is obtained, there are very few controls in place to prevent the dealer from using the license for illegal means.¹⁷⁷

A. Dealerships Operated Out of the Home

One problem with current law is that dealers are allowed to operate gun businesses out of their homes.¹⁷⁸ These operations are commonly referred to as “kitchen-table” operations.¹⁷⁹ The problem with such operations is that it is easy for them to avoid the notice of law enforcement.¹⁸⁰ They are not required to advertise or identify themselves in any way as commercial dealers.¹⁸¹

By failing to require dealers to maintain business premises, it is easier for those who do not intend to run a legitimate business to continue receiving large quantities of firearms. Naturally, it also makes it easier to operate an illegal firearms operation. While some dealers who operate out of their homes run legitimate businesses, many of them have the license simply to buy firearms legally for themselves at wholesale prices.¹⁸² Still other kitchen-table operators use their licenses to sell firearms illegally.¹⁸³

177. See Knut Royce, *They Peddle Fear, Death*, N.Y. NEWSDAY, Mar. 14, 1994, at 4. Even if a dealer is caught violating federal firearms criminal statutes, the penalties are so lenient that prosecutors are reluctant to bring charges. *Id.* For example, a Tennessee dealer who dumped more than 7000 guns with altered serial numbers was sentenced to only 15 months. *Id.* However, if instead he had possessed less than a teaspoon of crack he would have been sentenced to five years. *Id.* Lax sentencing of illegal gun traffickers is also a major problem but it is beyond the scope of this Note.

178. See LARSON, *supra* note 2, at 124-26; Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995). In fact, an ATF study concluded that 74% of federally licensed firearms dealers operate out of their homes. FIREARMS AND EXPLOSIVES DIV., BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, OPERATION SNAPSHOT (FINAL REPORT) 3 (1993) [hereinafter OPERATION SNAPSHOT]. In addition, dealers are not required to sell a minimum number of firearms per year in order to maintain their licenses. See LARSON, *supra* note 2, at 124. Larson, in his “Life and Liberty Preservation Act,” proposes that dealers be required to show minimum sales of at least \$1000 in their first year of operation. *Id.* at 217-18.

179. See LARSON, *supra* note 2, at 124.

180. See *id.* at 124-26. That is, unless the weapons begin to turn up during arrests with the serial numbers intact. See *id.* at 126; *infra* note 191.

181. LARSON, *supra* note 2, at 124. Licensees are required only to identify themselves as licensees by openly displaying their license. *Id.* at 126-27. An ATF printout in Maryland identified 334 FFLs in Baltimore alone, yet only 18 were listed in the phone book as established dealers and pawnshops. *Id.* at 124-25.

182. *Id.* at 124.

183. *Id.*

B. *The Ease of Obtaining a Federal Firearms License*

Another problem with the current regulation regime is the ease with which a person may obtain a federal firearms license.¹⁸⁴ An individual who meets the age requirement and does not have a felony record or fall into any of several prohibited classes is virtually guaranteed a license.¹⁸⁵ Worse yet, there have been many cases where individuals with felony records have slipped by ATF and obtained licenses anyway.¹⁸⁶

Furthermore, the current federal legislation does not require any type of training or testing,¹⁸⁷ so there is no assurance that an applicant is even aware of what the laws are.¹⁸⁸ It defies reason, logic, and common sense that there is more preparation and training required to obtain a driver's license than to get a federal firearms license.¹⁸⁹ In some states it is easier to get a federal firearms license than it is to get a permit to carry a gun.¹⁹⁰ The federal firearms license is a professional license and should be treated as such; individuals entrusted with these licenses are entrusted with the distribution of dangerous weapons that, in the wrong hands, can wreak havoc before anyone is able stop it.¹⁹¹

184. *See id.* at 123-26. In 1990, 34,336 people applied for licenses. *Id.* at 123. There was a rejection/withdrawal rate of only 4%. *Id.*

185. Royce, *supra* note 177, at 4. For a summary of the other prohibited classes of individuals, see *supra* note 135.

186. *See* Royce, *supra* note 177, at 4. The problem is that the Treasury Department's database on felons is far from comprehensive. *Id.* This is due to the fact that data on arrests and convictions is provided by the states; some states have very low degrees of automation and others have difficulty in maintaining the completeness of their records. *Id.*

187. *See* 18 U.S.C. § 923.

188. Though applicants must certify compliance with state and local law, Pub. L. No. 103-322, § 110302 (codified at 18 U.S.C.A. § 923(d)), applicants are not required to prove compliance as a condition to a license, nor are they required to show that they know any of the federal gun laws. Applicants do not have to demonstrate any firearms knowledge either. LARSON, *supra* note 2, at 123.

189. One gun dealer is quoted as saying "[i]t's an absolute joke. There is nothing, including a driver's license, that you could get as easily as a federal firearms license." Letta Tayler, *On LI, a Conflict with Zoning Rules*, N.Y. NEWSDAY, Mar. 14, 1994, at 4.

190. *See* LARSON, *supra* note 2, at 123-24.

191. This is exactly what happened in Boston when Samuel Miller, Jr. was issued a federal dealers license. Kevin Cullen, *One Weapon's Trail Ends in Tragedy*, BOSTON GLOBE, May 1, 1990, Metro at 1. Miller, a convicted drug dealer, sent in \$30 and an application; within two months he was certified as an FFL. *Id.* With this license he was able to receive at least ten high-powered semiautomatic pistols through the mail. *Id.* These firearms were then sold out of his home to teen-age gang members in Boston. *Id.* Before nine of these firearms were finally recovered, they were used in at least nine acts of violence. *Id.* at 1, 12. At least one of the acts

C. Problems with the Regulation of FFLs

The fact that licenses are so easy to obtain, coupled with the large number of dealers already licensed, has made enforcement of the law more difficult.¹⁹² There are about 200,000 licensed dealers throughout the country,¹⁹³ a total close to the number of gas stations.¹⁹⁴ ATF, however, has fewer than 300 inspectors.¹⁹⁵ In short, ATF lacks the personnel to effectively regulate all the FFLs.¹⁹⁶

However, the number of licensees has dropped since reaching a peak in 1992, in part because of a provision in the 1994 Act¹⁹⁷ which requires a set of fingerprints and a photograph to be submitted with each application.¹⁹⁸ Another factor in the decline may be a result of the increase in some of the license fees.¹⁹⁹ These changes demonstrate how ineffective previous legislation was in weeding out undesirable applicants.

D. Problems of Current Law Exemplified in Zodda Case

Essentially all of the problems associated with the regulation of FFLs

traced to the firearms was murder. *Id.* The only reason Miller was eventually caught was because regulators got a tip from a suspicious United Postal Service delivery person. *Id.* at 12. In other words they got lucky.

192. See LARSON, *supra* note 2, at 123. For an account of how overburdened a typical ATF office is, see Mike McAndrew & Jonathan D. Salant, *Glut of Gun Dealers Swamps ATF: At Last Year's Inspection Rate, Federal Regulators Would Need 50 Years to Check Every New York Gun Dealer*, POST-STANDARD, Mar. 14, 1994, at A1.

193. Pierre Thomas, *Gun Dealer Licenses Hit 3-Year Low*, WASH. POST, Feb. 22, 1995, at A3. In just one year, the number of licensees dropped 51,704, leaving 193,924 licensed dealers as of January 1995. Pat Griffith, *Brady Law Cuts Dealers 18 Percent*, PITTSBURGH POST-GAZETTE, Mar. 15, 1995, at A5. The number of licensed dealers may continue to drop as more licenses come up for renewal.

194. See Thomas, *supra* note 193, at A3. Prior to the enactment of the Violent Crime Control and Law Enforcement Act of 1994, there were actually more gun dealers than gas stations. *Id.*

195. *Id.*

196. LARSON, *supra* note 2, at 123. In addition to being greatly outnumbered by gun dealers, these inspectors are also charged with inspecting wineries, liquor distributors, distilleries, breweries, tobacco producers, and 10,500 explosives users and manufacturers. *Id.* However, this is an improvement, because in the 1960s there were only five inspectors responsible for checking the records of 100,000 gun dealers. *Id.*

197. See Thomas, *supra* note 193, at A3.

198. Pub. L. No. 103-322, § 110301 (codified at 18 U.S.C.A. § 923(a)).

199. Compare 18 U.S.C. § 923(a)(3)(B) (1988) (requiring a \$25 license fee for pawnbrokers dealing in firearms) with Pub. L. No. 103-159, § 303 (codified at 18 U.S.C. § 923(a)(3)(B) (Supp. V 1993)) (requiring a \$200 license fee for three years for anyone who is not a dealer in destructive devices).

are exemplified in the case of John Russell Zodda.²⁰⁰ In 1983, Zodda easily obtained a federal firearms license, listing his Manhattan residence as a business address.²⁰¹ With this license and at least two forged licenses, he was able to obtain thousands of guns and quickly became one of the nation's leading traffickers in illegal weapons.²⁰² By the time law enforcement finally caught up with him in 1991, he had sold an estimated 2400 firearms illegally.²⁰³ He had an impressive customer list, which included the Genovese crime family and deadly Chinese gangs operating in lower Manhattan.²⁰⁴ As the chief of the investigations division for the Manhattan District Attorney pointed out, "[t]his is what's wrong with all of the gun laws in this country. . . . You can get an FFL, and it's basically a license to put guns out on the street. No one can stop you." ²⁰⁵

The Zodda case illustrates the difficulty enforcement officials encounter in uncovering dealers who operate illegal businesses. In 1986, Zodda was interviewed by an ATF agent in connection with his license renewal.²⁰⁶ At that time, the agent purportedly found that Zodda's records were in compliance with all laws and regulations.²⁰⁷ Zodda, however, testified at trial that he had not kept any records of his transactions as required by law.²⁰⁸ These records aid officials in tracing guns used in criminal activity.²⁰⁹ This is helpful in two respects: one, it helps law enforcement find the criminal; and two, it tells law enforcement how the firearm got into the hands of the criminal.²¹⁰ Without a central registry with information on all dealers and their transactions, law enforcement is forced to "conduct the equivalent of a 'house to house' search, randomly asking licensed [dealers] whether they have done business with a suspect and maintained those

200. See Scott Ladd, *Top Gun Trafficker Armed with Law*, N.Y. NEWSDAY, Mar. 15, 1994, at 15.

201. *Id.*

202. *Id.*

203. *Id.* Zodda was convicted on eight federal counts, including conspiracy to violate federal gun laws, making false statements on his gun applications, and forging at least two federal firearms licenses. *Id.* The biggest tragedy is that Zodda was given a sentence of only 40 months. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* According to a prosecutor, Zodda told the ATF agent that he only dealt in a few firearm sales a year and that he intended to stop gun dealing completely in a few months. *Id.*

208. *Id.*

209. See LARSON, *supra* note 2, at 126-27.

210. *Id.*

records."²¹¹ If officials had accurate information concerning Zodda's transactions, he would have been stopped much earlier and would not have been able to put over 2000 firearms in the hands of the mafia and gang members.²¹²

E. Sale of Firearms by Nonlicensees

Another major gap in federal licensing laws is the complete lack of regulation of sellers who do not possess a federal firearms license.²¹³ While these individuals are prohibited from purchasing firearms through the mail wholesale,²¹⁴ they are not prohibited from selling them.²¹⁵ In addition, the only prohibition private owners have is that they cannot sell to people they know or should know are not residents of the state, children, criminals, or members of an undesirable class.²¹⁶ Even the new Brady regulations do not affect these private sales.²¹⁷ The sellers in these instances are under no obligation to do any sort of background check on potential buyers.²¹⁸ Some critics have referred to this as not just a "gap" in the law but a "chasm."²¹⁹

F. Changes in Licensing Procedure

Even though stricter regulation of FFLs is necessary, the 1994 Act has improved the licensing procedure.²²⁰ One change in the licensing procedure of FFLs is that dealers are now required to follow all local zoning laws.²²¹ Thus, if a locality prohibits the sale of firearms from a home, then a dealer will be unable to obtain a license to do so. The

211. Ladd, *supra* note 200, at 15.

212. *See id.* What can be accomplished when ATF has accurate information is exemplified by the Project Detroit study. LARSON, *supra* note 2, at 149. It is an ongoing effort by ATF and the Detroit police to trace as many guns as possible. *Id.* Because there is no central registry, they were able to trace only half the weapons they set out to trace. *See id.* at 149-50. Despite the difficulties, Project Detroit led to investigations of 13 licensed dealers. *Id.* at 151. At least ten of the dealers were successfully prosecuted. *Id.* Unfortunately, difficulties in tracing do not allow all weapons to be traced. *See id.* at 150. Even more unfortunate is that similar projects are not in place throughout the country.

213. *See supra* notes 130-35, 146-47 and accompanying text.

214. 18 U.S.C. § 922(a)(2).

215. *Id.* §§ 921(a)(11), (21), 923(a).

216. *Id.* § 922(a)(5).

217. LARSON, *supra* note 2, at 235.

218. *See* 18 U.S.C. § 922; *see also* LARSON, *supra* note 2, at 235 (discussing the loophole caused by not including nonlicensees in Brady).

219. LARSON, *supra* note 2, at 235. One Colorado law enforcement official is quoted as saying "[i]t's not even a loophole [i]t's a chasm." *Id.*

220. *See supra* part IV.F.

221. Pub. L. No. 103-322, § 110302 (codified at 18 U.S.C.A. § 923(d)(1)(F)).

flaw in the system is that if there are no zoning prohibitions, dealers still will be able to operate out of their homes or other locations.²²² This is only one example of how federal law allows inconsistent results when it defers to state and local law.²²³

Another provision in the 1994 Act will make the regulation of kitchen table operations easier. This particular provision requires ATF to give a list of all licensed dealers to local law officials.²²⁴ Prior to the passage of the 1994 Act, local officials did not have this information, so it was easier for kitchen-table operations operating illegally to remain undetected by local authorities.²²⁵

A final change brought on by the 1994 Act is that, prior to obtaining a license, applicants are required to certify they will comply with all local laws and inform the local CLEO they intend to apply for a federal firearms license.²²⁶ This requirement is beneficial because it will at least make FFLs aware of what the local laws are. Furthermore, ATF has found that this provision has operated as a deterrent for some applicants.²²⁷ Presumably the deterrent effect may be attributed to either the applicant's intent to not comply with local laws or their desire to escape the notice of local officials. This effect indicates that the absence of such a provision in prior law did little to discourage those who wished to obtain a federal firearms license for illegal reasons.²²⁸ Deterrence is important because of the repercussions that follow from a license getting into the wrong hands, such as those of Terrence Williams.

Terrence Williams legally held a federal firearms license.²²⁹ He decided to sell firearms out of his barbershop.²³⁰ In only a two-month period he was able to sell at least 250 handguns, all of which had their

222. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995).

223. *Id.*

224. Pub. L. No. 103-322, § 110307 (codified at 18 U.S.C.A. § 923(1)).

225. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995); *supra* notes 178-83 and accompanying text.

226. Pub. L. No. 103-322, § 110302 (codified at 18 U.S.C. § 923(F)).

227. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995).

228. *Id.*

229. *See* Susan Caba, *Barber Pleads Guilty to Transporting Guns*, PHILA. INQUIRER, Feb. 3, 1994, at B1.

230. *Id.* Under the federal licensing requirements this is perfectly acceptable. *See* LARSON, *supra* note 2, at 124-26. In fact, gun dealerships are being conducted out of some other surprising locations, such as day care centers. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995). However, with the new requirement that dealers comply with local zoning requirements, these practices will no longer be allowed in some jurisdictions. Telephone Interview with Kristine Denholm, Spokesperson, ATF (Feb. 17, 1995).

identifying serial numbers obliterated.²³¹ Because of these actions and the inadequacy of gun tracing,²³² the extent of the damage caused by this one gun dealer will never be known. However, it is probably safe to assume that the firearms were not bought for legal purposes.

Hence, the real problem with federal legislation in the area of federal licensing of dealers is that a single licensee can supply hundreds or thousands of illegal, untraceable firearms to dangerous individuals.²³³ Without strict federal regulation, even states with strict gun control laws are unable to prevent FFLs from purchasing firearms through the mail, thus bypassing state regulation.²³⁴ Furthermore, lax regulation in this area ends up supplying the inner-city gun trade, which makes firearms readily available to those not allowed to purchase them legally.²³⁵ Strict federal legislation in this area is necessary to keep firearms away from dangerous individuals and to make state gun control laws effective.

VI. RECOMMENDATIONS FOR CHANGE

While the 1994 Act has improved the licensing and regulation of FFLs, the present law is still largely ineffective in preventing the illegal sale of firearms.²³⁶ In order to be more effective, the laws have to be changed to make the application process stricter, and thus allow ATF to effectively regulate FFLs.²³⁷ The following are four specific recommendations for accomplishing these goals.

First, the number of FFLs needs to be reduced to a number that ATF will be capable of regulating effectively. This may be accomplished by limiting the issuance of federal firearms licenses to those individuals that actually intend to run a firearms dealership.²³⁸ While technically this is already required, in practice there is no requirement that they operate a firearms business.²³⁹ In order to ensure that FFLs intend to

231. Caba, *supra* note 229, at B1.

232. *See id.*; LARSON, *supra* note 2, at 149-50 (stating that ATF was unable to trace weapons due to incorrect identification by investigators, obliterated serial numbers, and inadvertently or deliberately sloppy recordkeeping among licensed dealers). One potential problem is that gun-purchase records, which are the most valuable information in the tracing network, are kept in the hands of the gun dealers themselves. *Id.* If dealers do not want to cooperate they can make ATF's job very difficult. *Id.*

233. *See supra* text accompanying notes 200-12.

234. *See supra* notes 18-22, 129-32 and accompanying text.

235. *See supra* text accompanying notes 200-05.

236. *See supra* part V.

237. *See supra* part II.C.

238. *See* LARSON, *supra* note 2, at 123-26.

239. *Id.* In order to determine the characteristics of the FFL population, ATF instituted Operation Snapshot. OPERATION SNAPSHOT, *supra* note 178, at 1. ATF found that in the 12

operate a firearms dealership, ATF must be given the authority to deny licenses to those who cannot prove they intend to operate a legitimate business.²⁴⁰ Proof of intent could include rental of commercial property, advertising as a firearms dealership, or being listed in the telephone book as a firearms dealer.

If FFLs could not afford to rent commercial property, they would still be allowed to run the business out of their homes if local zoning did not prohibit it.²⁴¹ By requiring FFLs to advertise, or list themselves in the telephone book as firearms dealers, it would not be as easy to escape the notice of law enforcement.²⁴² ATF also should be allowed to require that an FFL sell a certain number of firearms per year to maintain the license,²⁴³ further ensuring that FFLs operate legitimate dealerships.

Second, the licensing procedure needs to be stricter. It should be not be easier to obtain a federal firearms license than it is to obtain a driver's license. Applicants should be required to receive instruction on the applicable laws.²⁴⁴ They should also be required to pass a test to demonstrate their knowledge of these laws.²⁴⁵ This will be beneficial in two respects. First, it will ensure that FFLs know the law, making it more likely they will follow it. Second, by requiring training and testing, obtaining a license will require more effort than it does under the present law. The extra effort will not discourage those who seriously intend to operate a legitimate business,²⁴⁶ but will deter a number of those applicants who have the license only to be able to buy guns cheaply.

Third, there should be an effective system in place which provides for disciplinary action when an FFL is in violation of the law.²⁴⁷ The

months preceding Operation Snapshot inspections, 46% of the dealers had disposed of zero firearms and 34% had disposed of only 1-10 firearms. *Id.* at 6.

240. LARSON, *supra* note 2, at 123.

241. See Pub. L. No. 103-322, § 110302 (codified at 18 U.S.C.A. § 923(d)(1)(F)).

242. See *supra* part V.A.

243. Larson, in his proposed "Life and Liberty Preservation Act," advocates setting up an objective definition of "engaged in the business" of dealing firearms. LARSON, *supra* note 2, at 218. He suggests that any dealer who wishes to keep its license must prove sales of at least \$1000 in its first year of operation. *Id.*

244. LARSON, *supra* note 2, at 123-24. Larson proposes that every dealer be required to take a course designed to familiarize themselves not only with the firearms laws, but with the way in which buyers try to evade the laws. *Id.*

245. *Id.*

246. *Id.* at 220.

247. *Id.* at 218. ATF has been very unsuccessful in revoking licenses for violations, with an average of revoking only 10 licenses per year from 1975 to 1990. *Id.* at 144. This is despite the fact that in 1990, ATF conducted 8471 routine inspections in which 90% of the dealers had

system should take into consideration the severity of the violation and render disciplinary action accordingly.²⁴⁸ If the violation is minor, only a warning is necessary, whereas suspension or revocation should result if the FFL fails to remedy the situation after a certain number of warnings. If the violation is sufficiently severe, ATF should immediately revoke or suspend the license.²⁴⁹ An established disciplinary scheme will give FFLs the incentive to follow the regulations.

Finally, nonlicensees should no longer be allowed to sell or transfer firearms without following the same rules as FFLs.²⁵⁰ Nonlicensees should be required to have background checks done on all prospective transferees,²⁵¹ a process which could be performed by local law enforcement or a local firearms dealership.²⁵² This would prevent nonlicensees from selling to individuals not allowed to own firearms.²⁵³

The implementation of these changes would reduce the number of FFLs dramatically and thereby aid in their regulation.²⁵⁴ Unless applicants are serious about becoming legitimate commercial sellers, they would be deterred from applying. Because the majority of FFLs do not operate as legitimate commercial sellers,²⁵⁵ the number of FFLs should dramatically decrease. This will allow ATF to more effectively monitor the remaining FFLs.²⁵⁶ In addition, these changes would actually help FFLs who intend to operate legitimate firearms dealerships by reducing the competition.²⁵⁷

violations. *Id.* One explanation for the small numbers of revocations is that revocation can be a difficult process. *Id.* An example is the case of a Michigan dealer doing business as Al's Loan Office. *Id.* Al's had several serious violations. *Id.* Instead of prosecuting, ATF instructed the principals of Al's on proper recording procedures. *Id.* However, in 10 subsequent inspections they still found violations. *Id.* at 145. ATF was finally successful in revoking the license, 13 years after the first violation was found. *Id.*

248. *See id.* at 218.

249. *See id.* A comparable system is in place in the context of driving violations. *See, e.g.,* FLA. STAT. §§ 322.0261-.271 (Supp. 1994). For example, if caught speeding, points are put on a driver's license, and if enough points are accumulated, the license is revoked. *Id.* § 322.27(3). However, if caught driving under the influence, most states require that the license be revoked immediately. *See, e.g., id.* § 322.27(6).

250. LARSON, *supra* note 2, at 219.

251. *Id.*

252. *Id.*

253. *See supra* notes 126-27, 145-46 and accompanying text.

254. *See supra* notes 192-96 and accompanying text.

255. *See supra* note 239.

256. LARSON, *supra* note 2, at 220.

257. *Id.*

VII. CONCLUSION

The increased use of firearms in our society by both children and criminals, and the inadequacy of current legislation, has forced us to address the issue of gun control. We have to address this issue now, as it has been inadequately addressed by the federal government for too long.²⁵⁸ Strong support for lax gun laws in the past has resulted in the weak system of gun control that we currently have. Until serious efforts are made to devise stronger firearms legislation, firearms will continue to fall into the hands of the wrong people.²⁵⁹ For any firearms legislation to be truly effective, it must be implemented on a national scale.²⁶⁰ Gun control legislation need not concentrate on making it more difficult for law-abiding adults to obtain guns. Rather, it would be more sensible to enact reasonable restrictions prohibiting children and criminals from having access to firearms, and to make sure that those responsible for firearms distribution adhere to these restrictions.

258. *See supra* part V.

259. *See supra* part V.D.

260. *See supra* notes 18-25 and accompanying text.

