SYMPOSIUM ARTICLE

BACKGROUND CHECKS FOR FIREARMS SALES AND LOANS: LAW, HISTORY, AND POLICY

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TABLE OF CONTENTS

I. INTRODUCTION 304
II. THE BLOOMBERG LAWS 306
A. *Background on Federal Laws Regarding Arms Sales* ... 306
B. *The Bloomberg System for Private Sales, Loans, and Returns* 313
III. NEGATIVE EFFECTS OF THE BLOOMBERG LAWS 315
A. *Self-Defense* 316
B. *Museums* 317
C. *Firearms Safety Instruction* 318
D. *Families* 320
E. *Minors and Young Adults* 321
F. *Firearms Sharing on One's Property* 323
G. *Firearms Sharing on Public Lands* 325
H. *Safe Storage* 326
I. *Hunting* 327
J. *Law Enforcement* 327
K. *Unreasonable Penalties for Easily Violated Laws* 329
L. *Responses to the Above Criticisms* 330
IV. FEDERAL COURTS ON WHEN A GUN CONTROL LAW IS "LONGSTANDING" 332
V. GUN POSSESSION PERMISSION SYSTEMS IN THE NINETEENTH CENTURY AND EARLIER 336
A. *Colonial Period* 336
B. *Early Republic Until the Civil War* 337
C. *Reconstruction* 338
VI. THE EARLY TWENTIETH CENTURY: HANDGUN PERMISSION VS. NOTIFICATION 340
A. *Before the Revolver Association Act* 342
B. *The First Uniform Firearms Act* 346
C. *Through 1929* 350

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D. The 1930 Uniform Firearms Act 355
E. Through 1936 358
F. Summary and Analysis 360
VII. Fixing the Problems 362
A. Exempt Loans and Returns 363
B. Exempt Persons Who Have Already Passed a Background Check 363
C. Do Not Require Dealer Processing 364
VIII. Conclusion 366

This Article examines past and present systems requiring that a person receive permission before buying or borrowing a firearm. The Article covers such laws from the eighteenth century to the present, which have traditionally been rare in the United States. The major exceptions are antebellum laws of the slave states, and laws of those same states immediately after the Civil War that forbade gun ownership by people of color, unless the individual had been granted government permission. Today "universal background checks" are based on a system created by former New York City Mayor Michael Bloomberg and his "Everytown" lobby. Such laws have been enacted in several states and proposed as federal legislation. Besides covering the private sale of firearms, they also cover most loans of firearms and the return of loaned firearms. By requiring that almost all loans and returns be processed by a gun store, these laws dangerously constrict responsible firearms activities, such as safety training and safe storage. Massachusetts, Connecticut, and California are among the jurisdictions that have enacted less restrictive legislation creating controls on private firearms sales without inflicting so much harm on firearms safety.

I. Introduction

In Congress and in the states, "universal background checks" have become an important topic in the firearms policy debate. Legislation on the subject is the creation of former New York City Mayor Michael Bloomberg, whose lobby is called Everytown for Gun Safety in America ("Everytown").[1] The Bloomberg laws forbid most private sales of firearms, private loans, and the return of loaned firearms, unless the transaction is processed at a gun store, following the same procedure as if the gun store were selling a firearm from its inventory. In Congress, the Bloomberg legislation has been sponsored by Senator Charles Schumer (D-N.Y.). He calls his bill "the gold standard" for background checks.[2] Laws based on the Bloomberg federal model have been enacted in Delaware,[3] Colorado,[4] Washington,[5] and

[1] Previously, Mr. Bloomberg's lobby was called "Mayors Against Illegal Guns." *See* Michael Bloomberg, *Mayors Against Illegal Guns To Launch Gun-Control Ad Blitz*, Huffington Post (Mar. 23, 2013, 9:10 PM), http://www.huffingtonpost.com/2013/03/23/bloomberg-gun-ads_n_2941612.html [http://perma.cc/95CE-CHAN].

[2] 113 Cong. Rec. S2736 (daily ed. Apr. 17, 2013) (statement of Sen. Schumer).

[3] Del. Code Ann. tit. 11, § 1448B (2015).

[4] H.B. 13–1229, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (codified at Colo. Rev. Stat. § 18-12-112 (2013)).

Oregon,[6] and will be on the ballot in Nevada in 2016.[7] This Article concentrates on the federal Schumer bill as the national model, while also discussing its state analogues.

The Bloomberg laws are highly destructive of Second Amendment rights. Their effect is to criminalize many ordinary and responsible activities, such as firearms safety training, museum displays of historic arms, and safe storage. Mr. Bloomberg's Everytown organization argues that the laws are constitutional, because they are of the type that the Supreme Court, in *District of Columbia v. Heller*, called "presumptively lawful" and "longstanding."[8] However, examination of gun control laws from early American history through the first third of the twentieth century shows that the Bloomberg laws are outliers in the history of American gun control.

This Article takes no position for or against new laws about the private sale of firearms, as a constitutional or policy matter. Rather, the Article details how the Bloomberg system's stringent restrictions on firearms loans and returns seriously harm public safety. Further, Bloomberg's requirement that private sales may only be consummated at gun stores is needlessly burdensome and seriously undermines the purported objective of increasing background checks on private sales.

There are much better alternatives to the Bloomberg system of requiring that private transactions must always use gun stores as intermediaries. In particular, background checks on private sales can be accomplished by allowing the buyer and seller to conduct the check through contact with the appropriate state or federal agency via Internet or telephone. Nor is there a need to force people to travel to gun stores for background checks when they have already passed a more stringent check: the check for the issuance of a handgun carry permit (and the continuous checks undertaken to ensure the permit's validity).

This Article proceeds as follows:

Part II describes the Bloomberg laws.

Part III details the ways in which the Bloomberg system criminalizes the activities of the large majority of firearms owners, including those who have never sold a firearm to anyone. Firearms safety instruction, museum displays of firearms, and many other constructive activities are severely impaired or made impossible.

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[5] Wash., Initiative No. 594 to Require Background Checks for Gun Sales and Transfers (June 17, 2013) [hereinafter Wash. I-594], http://sos.wa.gov/_assets/elections/initiatives/FinalText_483.pdf [http://perma.cc/F29G-J2DB] (codified primarily at WASH. REV. CODE § 9.41.010 (2015)).

[6] S.B. 941, 78th Legis. Assemb., Reg. Sess. (Or. 2015), https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB941/Enrolled [http://perma.cc/7L8E-BVVS].

[7] Nev. Initiative Petition to Enact The Background Check Act (August 11, 2014), http://nvsos.gov/Modules/ShowDocument.aspx?documentid=3440 [http://perma.cc/3DDU-BPEC].

[8] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

Parts IV–VI address the issue of whether the Bloomberg laws qualify as "presumptively constitutional" and "longstanding." Part IV synthesizes the lower court decisions that have analyzed whether a particular type of gun control is "longstanding."

Part V examines the Bloomberg laws in light of their analogues—gun licensing laws for slaves and for free people of color—from the colonial period through the nineteenth century. Before 1900, there was no tradition of gun licensing laws being applied to citizens who were recognized as having the full scope of constitutional rights.

Part VI surveys state laws from the early twentieth century through 1936. Although 1936 is beyond the temporal limits of what lower courts have treated as "longstanding," this Article goes up to 1936, erring on the side of over-inclusion. Even when one takes into account everything through 1936, the Bloomberg laws have very few analogues. This deficiency does not mean that the Bloomberg laws are automatically unconstitutional; it simply means that the Bloomberg laws do not qualify for the "longstanding" safe harbor. Rather, the government bears the burden of proving them constitutional, under the ordinary procedures of heightened scrutiny.

Part VII examines alternatives to the Bloomberg model. These alternatives would be more effective at achieving the objectives of background checks on the private sale of firearms, without creating the unnecessary problems that result from the Bloomberg system.

Part VIII concludes.

II. The Bloomberg Laws

A. Background on Federal Laws Regarding Arms Sales

In 1968, Congress enacted the Gun Control Act of 1968 ("GCA") based on its power to "regulate Commerce . . . among the several States."[9] The GCA requires that every person who is "engaged in the business" of selling firearms must obtain a Federal Firearms License ("FFL").[10] Thus, FFLs are necessary for retailers, wholesalers, and manufacturers of firearms. Only persons with an FFL may engage in interstate commerce in firearms,

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[9] U.S. Const. art. I, § 8.

[10] A person is "engaged in the business" of selling firearms if he is:

> a person 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.

18 U.S.C. § 921(a)(21)(D) (2012). A person who is "engaged in the business," but who does not have an FFL, is guilty of a federal felony every time he sells a firearm.

such as buying firearms from wholesalers for the purpose of selling them to retail customers.

Under the GCA, when a firearms retailer sells a firearm to a customer, the customer must fill out ATF Form 4473. Created by the federal Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), Form 4473 has three dozen fields that must be completed by the customer and the retailer.[11] Under federal law, there are nine categories of "prohibited persons" who may not purchase or possess firearms.[12] These include convicted felons, illegal aliens, domestic violence misdemeanants, and persons who have renounced U.S. citizenship.[13] The buyer must indicate on the 4473 whether she falls within any of those categories.[14] A false answer to these questions is a federal felony.[15] Many people have been prosecuted for falsifying a 4473.[16]

The retailer must retain the 4473 Form.[17] In addition, the retailer must separately record in his "Acquisition and Disposition" record book every firearm that comes into his inventory, as well as the sale of any firearm from his inventory.[18]

The GCA forbids anyone who is not an FFL[19] from purchasing handguns outside her state of residence.[20] Interstate purchase of long guns is allowed; the seller must be an FFL (not a private person), and the purchase must be legal in the FFL's state and in the buyer's state.[21]

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[11] 27 C.F.R. § 478.124 (2010); *see also* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, OMB NO. 1140-0020, ATF FORM 4473: FIREARMS TRANSACTION RECORD PART I—OVER-THE-COUNTER (2012) [hereinafter ATF Form 4473], https://www.pdffiller.com/en/project/38073119.htm?form_id=1535 [http://perma.cc/8327-TCUT]. Among the mandatory data collected by the form are the race and ethnicity of the customer, although neither piece of information has anything to do with the customer's legal eligibility to purchase a firearm. ATF Form 4473, Question 10. Representatives Diane Black (R-Tenn.) and Ted Poe (R-Tex.) have introduced House Amendment 325, an appropriations rider to prohibit spending federal funds to mandate race or ethnicity disclosure by firearms purchasers. They argue that collecting the information is racist. *See* Tim Devaney, *Republicans Assail Race Disclosures in Gun Purchases*, THE HILL (Apr. 19, 2015), http://thehill.com/regulation/239306-republicans-assail-race-disclosures-in-gun-purchases [http://perma.cc/CT6Q-BGR9].

[12] 18 U.S.C. § 922(g) (2012).

[13] *Id.*

[14] *See* ATF Form 4473, *supra* note 11.

[15] 18 U.S.C. §§ 922(a)(6), 924(a)(2) (2012).

[16] *See*, *e.g.*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., ALL AGENCIES CURRENT FY: PROSECUTIONS (2015), http://trac.syr.edu/laws/18/18USC00924.html [http://perma.cc/FZN4-KHR6]. As of Sept. 29, 2015, there had been 526 prosecutions in fiscal year 2015 for violations of 18 U.S.C. § 924, which prohibits, inter alia, the falsification of Form 4473.

[17] 18 U.S.C. § 923(g)(1)(A) (2012).

[18] 27 C.F.R. § 478.125(e) (2010).

[19] Throughout this Article, "FFL" will be used to refer to both the actual licenses and the individuals who possess them.

[20] 18 U.S.C. § 922(b)(3) (2012). The prohibition was ruled unconstitutional in *Mance v. Holder*, 74 F. Supp. 3d 795 (N.D. Tex. 2015), *appeal docketed* No.15-10211 (5th Cir. Apr. 14, 2015).

[21] The 1968 GCA had originally allowed interstate long gun purchases only between contiguous states. Pub. L. No. 90-351, § 902, 82 Stat. 197, 228 (1968), *amended by* Pub. L. 90-

Under the GCA, private sales may only take place between residents of the same state. "Private sales" are sales not involving an FFL—as when a person sells a rifle to a fellow member of his gun club.

The congressional regulation of firearms retailers via the interstate commerce power has a fairly close connection to interstate commerce: every firearms retailer receives firearms in interstate commerce. There are no gun stores that sell only firearms manufactured in-state. Appropriately, Congress did not extend the 1968 system to private sales within a single state. The decision made sense because the interstate commerce power is finite.[22] Pursuant to the GCA, a lawful private sale is by definition not "among the several States." Although the firearm at one time may have been shipped in interstate commerce (e.g., from a Massachusetts manufacturer to a Tennessee wholesaler to a Utah retailer), the firearm likely remained in a single state for years or decades after the initial retail sale.[23]

The 1968 GCA system for retail sales had a practical problem: although it facilitated prosecutions of people who falsified Form 4473, the retailer had no ability to know whether the customer's answers on the form were truthful. Thus, if a prohibited person was willing to take the risk of a perjury prosecution, the GCA system would not prevent him from purchasing a gun in a store.

The GCA did not preempt state laws,[24] and some states had (or later created) mechanisms that attempted to prevent ineligible buyers from acquiring guns in the first place. Typically, the mechanisms only applied to handguns (which are disproportionately used in gun crimes),[25] but in a few states they also applied to long guns. Some states had a "waiting period," by which a sale could not proceed until after a certain number of days.[26] In the

618, § 102, 82 Stat. 1213, 1216 (1968). That restriction was removed in 1986. Pub. L. 99-308, § 102, 100 Stat. 449, 451 (1986).

[22] *See* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban*, 30 Conn. L. Rev. 59, 68 (1997).

[23] Professor David Engdahl derides "the herpes theory" of interstate commerce, that once an item has traveled in interstate commerce, it forever after retains an "interstate" character that subjects it to congressional control. *See* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Pol'y 107, 120 (1998); David E. Engdahl, Review, *Casebooks and Constitutional Competency*, 21 Seattle U. L. Rev. 741, 784 (1998).

[24] 18 U.S.C. § 927 (2012).

[25] *See*, *e.g.*, District of Columbia v. Heller, 554 U.S. 570, 695–98 (2008) (Breyer, J., dissenting) (citing numerous studies and reports).

[26] Five states currently have waiting periods for all guns, and five others have waiting periods for handguns. *See* Cal. Penal Code §§ 26815(a), 26950–27140, 27540(a), 27600–27750 (all guns, ten days); D.C. Code Ann. § 22-4508 (all guns, ten days); Fla. Const. art. VIII, § 5(b); Fla. Stat. Ann. § 790.0655(1) (handguns, three business days); Haw. Rev. Stat. Ann. § 134-2(e) (all guns, fourteen days; but no wait for a long gun purchased within a year of a long gun purchase that had the wait); 720 Ill. Comp. Stat. 5/24-3(A)(g) (seventy-two hours for handguns and twenty-four for long guns); Iowa Code § 724.20 (handguns, three days); Md. Code Ann., Pub. Safety §§ 5-123–5-125 (handguns, seven days); Minn. Stat. § 624.7132, subds. 4, 12 (seven days for handguns and "assault weapons"); N.J. Stat. Ann. §§ 2C:58-2a(5)(a), 2C:58-3f (handguns, seven days); R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-35.1, 11-47-35.2 (seven days).

interim, the retailer would notify local law enforcement, which could veto the sale. Some other states required persons to first obtain a license before buying guns.[27] A few required an advance purchase permit for every handgun.[28]

These alternative systems were also flawed. As of 1968, and for years afterward, the main source of information available to local law enforcement was the FBI's fingerprint-based Interstate Identification Index.[29] The Index generally recorded arrests, and frequently omitted dispositions. Because convictions, not arrests, are what matter in determining whether someone is a prohibited person, law enforcement often could not know for certain whether a person was prohibited merely by looking at the Index. If law enforcement ordered a retailer not to proceed with a sale, based only on an arrest, then the rights of a law-abiding citizen were violated. Some licensing or permit-to-purchase systems were operated fairly, but others were not, with police chiefs refusing to issue permits to applicants who met all the legal requisites.[30] Waiting periods could be very inconvenient for people who did not live near a gun store, and they could be fatal for persons who needed a firearm for immediate self-defense. For example, because of Wisconsin's forty-eight-hour waiting period, Bonnie Elmasri was killed by her stalker before she could take possession of the handgun she was attempting to purchase.[31]

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[27] For example, starting in 1967, Illinois began requiring that would-be gun owners must first obtain a Firearms Owner's Identification card. Act of Aug. 3, 1967, 1967 Ill. Laws 2600.

[28] *E.g.*, N.J. STAT. ANN. § 2C:58-3 (2015).

[29] *See Five Key Services*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/ngi_services [https://perma.cc/34K4-Z543].

[30] For example, New York's handgun law has no requirement that an applicant prove a "need" for a handgun. Yet the New York City Police Department imposed such a requirement, and kept enforcing it notwithstanding repeated court orders. *See generally* Livingston v. Codd, 403 N.Y.S.2d 662 (N.Y. Sup. Ct. 1978) (overturning police refusal to issue pistol purchase permit to gun collector to purchase "curios and relics" because applicant had made "no showing of need"); Archibald v. Codd, 395 N.Y.S.2d 336 (N.Y. Sup. Ct. 1977) (overturning police refusal to allow a person to purchase a second handgun because of "insufficient need"); Turner v. Codd, 378 N.Y.S.2d 888 (N.Y. Sup. Ct. 1975) (enjoining NYC police policy of refusing to issue pistol permits if the police decided that a qualified applicant did not "need" a pistol); Klapper v. Codd, 356 N.Y.S.2d 431 (N.Y. Sup. Ct. 1974) (overturning police refusal to issue handgun permit because applicant "had a number of jobs in the last several years"). *Cf.* Savitch v. Lange, 493 N.Y.S.2d 889 (N.Y. App. Div. 1985) (overturning refusal to issue permit because police commissioner had, without providing any reason, recommended denial); Charbonneau v. Brown, 415 N.Y.S.2d 126 (N.Y. App. Div. 1979) (overturning Saratoga County revocation of handgun licensee because licensee had displayed his handgun when someone ran him off the road and attempted to rob him); Hochreich v. Codd, 417 N.Y.S.2d 498 (N.Y. App. Div. 1979) (overturning police refusal to issue a permit for applicant to purchase a handgun for hunting, unless applicant disposed of one of his three other handguns). Similar abuses took place in St. Louis, when Missouri had a permit-to-purchase law for handguns. *See infra* Part VI.A.

[31] *See* DAVID B. KOPEL, *Waiting Periods*, *in* GUNS: WHO SHOULD HAVE THEM? 61, 61–62 (David B. Kopel ed., 1995). The Wisconsin waiting period was repealed in 2015. S.B. 35, 2015–16 Leg. Sess. (Wis. 2015), https://docs.legis.wisconsin.gov/2015/related/acts/22 [https://perma.cc/M72P-VP5U].

In 1993, Congress attempted to improve the system. Form 4473 was retained, but firearms retailers would also have a new requirement: before proceeding with the sale, the retailer would have to contact the FBI or a state counterpart for an "instant check."[32] The National Instant Criminal Background Check System ("NICS") went into effect in 1998;[33] initially, checks were conducted by telephone,[34] but today they are often conducted via the Internet.[35] By default, the FBI handles all checks, but states can choose to instead establish a state "Point of Contact."[36] Seven states use the FBI only for long guns, and use the state Point of Contact for handguns.[37] Because much-improved computer databases now exist, the FBI or its state counterpart can usually issue within a few minutes the instruction that the retailer proceed or not proceed with the sale.[38] To protect customer privacy, the retailer is not informed about the reason for an instruction not to proceed.[39] If the sale is denied, the would-be buyer is given some papers with instructions about how to appeal.[40]

The availability of NICS has led some states to repeal waiting periods, licensing, and permitting laws for firearms purchases.[41] These old-fashioned means of conducting a check now seem unnecessarily cumbersome, given that a superior, comprehensive check is available at the point of purchase.

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[32] 18 U.S.C. § 922(t); Pub. L. 103-59, Title I, § 102(a)(1), (b), Title III, § 302(a)–(c) (Nov. 30, 1993), 107 Stat. 1536, 1539, 1545.

[33] *NICS Turns 15*, Fed. Bureau of Investigation (Nov. 29, 2013), https://www.fbi.gov/news/stories/2013/november/nics-15th-anniversary-stats-show-success-of-gun-background-check-system [https://perma.cc/78X9-R3ES] ("Fifteen years ago, on November 30, 1998, the FBI flipped the switch on the National Instant Criminal Background Check System . . . .").

[34] Fed. Bureau of Investigation, Criminal Justice Info. Servs. Div., National Instant Criminal Background Check System (NICS) Operations Report (November 30, 1998–December 31, 1999) 5 (Mar. 1, 2000), https://www.fbi.gov/about-us/cjis/nics/reports/98-99-operations-report/ops_report_98_99.pdf [https://perma.cc/8NRZ-285J] ("[T]he FFL contacts the NICS at the FBI, via a toll free telephone number.").

[35] Fed. Bureau of Investigation, Criminal Justice Info. Servs. Div., National Instant Criminal Background Check System (NICS) Operations 2014, at 13 (2014), https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report [https://perma.cc/LWU8-X5HT] (detailing growth of NICS E-Check: 3,772,583 firearms E-Checks in 2014).

[36] *Participation Map*, Fed. Bureau of Investigation, https://www.fbi.gov/about-us/cjis/nics/general-information/participation-map [https://perma.cc/L9MN-7RG5] (relaying that thirty-six states and territories use the FBI for all checks; thirteen states run all checks themselves).

[37] *Id.*

[38] In 2014, the FBI's "Immediate Determination Rate" was ninety-one percent. National Instant Criminal Background Check System (NICS) Operations 2014, *supra* note 35, at 10.

[39] *NICS Guide for Appealing a Firearm Transfer*, Fed. Bureau of Investigation (Sept. 2013), https://www.fbi.gov/about-us/cjis/nics/appeals/nics-guide-for-appealing [https://perma.cc/D3HX-L923] ("You may request the reason for your denial or delay from the FBI in writing by mail, facsimile, or on-line. Due to the Privacy Act of 1974, the reason for the denial or delay cannot be disseminated to you via the telephone.").

[40] For the brochure used in states where the FBI conducts all the checks, see *id.*

[41] *E.g.*, An Act of July 19, 1995, Ch. 729, § 1, 1995, Or. Laws 2222; S.B. 35, 2015–16 Leg. Sess. (Wis. 2015); 2009 S.D. ALS 122.

NICS is not perfect. Although the check itself is rapid, the federal or state systems sometimes take hours or days before they even begin processing a check; this is particularly true at times when gun sales volume is large (e.g., on weekends, shortly before hunting season, or when anti-gun proposals are in the news).[42] Some purchases are denied because of mistaken identity, while other times a denial is based on an arrest, rather than conviction. In Colorado, over half of denials are appealed, and over half of appeals are successful.[43]

Finally, the NICS check has an inherent weakness. The persons who will submit to a NICS check are those who think that they will pass the check; they believe that they are lawful gun buyers. NICS will prevent a purchase by someone who did not realize that her thirty-year-old felony conviction for marijuana possession prohibits her from owning a gun for the rest of her life. Although NICS may deter a person who was recently released from prison for armed robbery from attempting a retail purchase, retailers have never been a major source of firearms for such people.[44]

Under federal law and the laws of most states, the NICS process is required for retail sales only. Private sales within a single state may simply take place without paperwork and without contacting the FBI or a state counterpart. However, federal and state laws criminalize any private sale if the seller knows or has "reasonable cause to believe" that the buyer is a prohibited person.[45]

President Obama is among the many gun control advocates who have asserted that forty percent of firearms sales have no background check. However, the study on which this claim is based was conducted before NICS became operational.[46] The *Washington Post* has given the modern use of this claim "Three Pinocchios" for being misleading.[47]

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[42] *See*, *e.g.*, *Firearm Statistics*, COLORADO BUREAU OF INVESTIGATION (2013), https://www.colorado.gov/pacific/sites/default/files/2013%20Stats.pdf [https://perma.cc/AU79-RN7V] (noting average queue time of six days, twenty-one hours, fifty-four minutes for Internet requests and forty-five minutes for phone requests in January).

[43] Transcript of Record at 1109, Colorado Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050 (D. Colo. 2014) (No. 13-1300), http://coloradoguncase.org/trial%20transcripts/ap042014outfittersctrl5.pdf [http://perma.cc/869E-KMN4] (James Spoden, Colorado Bureau of Investigation, testifying that fifty-four percent of appeals are successful and over fifty percent of denials are appealed).

[44] *See*, *e.g.*, JAMES D. WRIGHT & PETER ROSSI, ARMED & CONSIDERED DANGEROUS 183–84 (2d ed. 2008) (surveying felons in eleven state prisons).

[45] 18 U.S.C. § 922(d) (2012).

[46] PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 5–7 (1997), https://www.ncjrs.gov/pdffiles/165476.pdf [https://perma.cc/G39W-5ZCM] (relying on telephone survey conducted in 1994).

[47] Glenn Kessler, *Obama's continued use of the claim that 40 percent of gun sales lack background checks*, WASH. POST (Apr. 2, 2013), http://www.washingtonpost.com/blogs/fact-checker/post/obamas-continued-use-of-the-claim-that-40-percent-of-gun-sales-lack-background-checks/2013/04/01/002e06ce-9b0f-11e2-a941-a19bce7af755_blog.html [http://perma.cc/R346-JQFU]. "Three Pinocchios" represent "[s]ignificant factual error and/or obvious contradictions." Glenn Kessler, *About The Fact Checker*, WASH. POST (Sept. 11, 2013), http://

Surveys of prisoners have long indicated that firearms retailers are a minor source of criminals' guns.[48] A larger source of guns is personal theft by criminals themselves.[49] But by far the largest source of criminal guns is purchases from the criminal's acquaintances.[50] As the black market has long supplied criminals with cocaine, heroin, methamphetamine, and other illegal drugs, it also supplies them with firearms. It is likely that a significant number of those firearms have previously been stolen by someone else; many other firearms might have been legally acquired at some point, but their sellers did not care that they were selling to criminals.

Thus, a system of background checks on private sales would affect primarily law-abiding sellers (who do not wish to sell to a criminal), who are willing to sell to a stranger (so they do not know if the buyer is a prohibited person), and who are willing to undergo the process of obtaining a background check. There is no data about the size of this group, and there is no evidence that this particular group is a significant source of guns used in crime. However, this Article will assume that there would be some benefit from requiring background checks on these sales and that requiring such checks would not violate the Second Amendment.[51] Similarly, this Article

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www.washingtonpost.com/blogs/fact-checker/about-the-fact-checker/#pinocchio [http://perma.cc/3WPU-UK8B]. Mr. Bloomberg's organization also claims that Michigan police records support the forty percent claim, although the organization has never identified which particular records contain the supposed data. *See* Mayors Against Illegal Guns, *Felon Seeks Firearm, No Strings Attached: How Dangerous People Evade Background Checks and Buy Illegal Guns Online,* Everytown for Gun Safety (Sept. 16, 2013), http://everytownresearch.org/reports/felon-seeks-firearm-no-strings-attached/ [http://perma.cc/TH6B-D29E].

[48] *See e.g.*, WRIGHT & ROSSI, *supra* note 44.

[49] *Id.*

[50] *Id.*

[51] In *Printz v. United States*, Justice Thomas's concurring opinion suggested the possibility that a mandatory check on "purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections." 521 U.S. 898, 938 (1997) (Thomas, J., concurring). This view is supported by the Supreme Court's opinion in *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). There the Court provided a list of "longstanding" laws that were permissible gun controls. *Id*. The inclusion of each exception to the right to keep and bear arms provides guidance about the scope of the right itself. *Id*.

Thus, the Court affirmed "prohibitions on the possession of firearms by felons and the mentally ill." *Id*. Felons and the mentally ill are exceptions to the general rule that individual Americans have a right to possess arms. *Id.* at 626. The exception only makes sense if the general rule is valid. After all, if no one has a right to possess arms, then there is no need for a special rule that felons and the mentally ill may be barred from possessing arms.

The second exception to the right to keep and bear arms is in favor of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* This exception proves another rule: Americans have a general right to carry firearms. If the Second Amendment only applied to the keeping of arms at home, and not to the bearing of arms in public places, then there would be no need to specify the exception for carrying arms in "sensitive places."

The third *Heller* exception is for "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. The word "commercial" was not inserted purposelessly. Once again, the exception proves the rule. The Second Amendment allows "conditions and qualifications" on the commercial sale of arms. The Second Amendment does not allow Congress to impose "conditions and qualifications" on non-commercial transactions.

will also assume that if congressionally imposed, such checks would be within Congress's interstate commerce power.

B. The Bloomberg System for Private Sales, Loans, and Returns

Mr. Bloomberg's organization promotes its legislation as addressing the issue of private gun sales that are transacted with no formal background check.[52] Yet the legislation covers far more than gun sales. It applies to every firearms "transfer." Normally in firearms law, the word "transfer" has been interpreted according to dictionary definitions; a "transfer" means a permanent disposition, such as a sale or gift.[53] However, the Bloomberg laws contain a special definition, which defines "transfer" to mean every time a firearm passes from one person to another, even momentarily. For example, the Washington state law says that "'Transfer' means the intended delivery of a firearm to another person without consideration of payment or promise of payment including, but not limited to, gifts and loans."[54] In other words, it applies to sharing a gun while target shooting on one's own property, or to lending a gun to a neighbor for a weekend hunting trip.

Further, the textual definition of "transfer" as any "delivery of a firearm to another person" is broad enough to encompass the return of a lent firearm. In a typical backyard target shooting scenario, the gun owner hands his rifle to a friend, who will take five shots with the gun; that is one transfer. When the friend hands the gun back to the owner, that action is a second transfer. Likewise, giving the neighbor a rifle for a hunting trip is one transfer, and the return of the rifle after the hunting trip is over is a second transfer.

Under the Bloomberg federal model, there are a few types of transfers that do not require FFL processing.[55] Within a nuclear family (spouses and parent/child), persons may make permanent gifts of firearms to each other.[56] However, intra-family lending or selling are not exempted, and so require FFL processing.[57] Also under the Bloomberg model, individuals may transfer firearms while at an established shooting range owned by a corporation or a government for use at the range.[58] When hunters are actually in the field,

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[52] *Background Checks*, Everytown for Gun Safety, http://everytownresearch.org/issue/background-checks/ [http://perma.cc/54VT-C6SB] (last updated Oct. 10, 2015).

[53] *See* Chow v. State, 903 A.2d 388, 402 (Md. 2006) (holding that "transfer" means "a *permanent* exchange of title or possession and does not include gratuitous temporary exchanges or loans" (emphasis in original)).

[54] WASH. REV. CODE § 9.41.010(25) (2015).

[55] The analysis of the federal Bloomberg model is based on S. 374, introduced in February 2013. Fix Gun Checks Act of 2013, S. 374, 113th Cong. § 202(a)(4). Perhaps because the Everytown organization and its congressional allies are concentrating on bills which might have a greater chance of passage in the current Congress, the bill has not yet been reintroduced in the 2015–16 Congress.

[56] *See id.*

[57] *See id.*

[58] *See id.*

they may temporarily transfer firearms to each other—such as when hunter A climbs over a fence and temporarily hands his gun to hunter B for safety.[59]

As enacted (in Colorado, Washington, Oregon) or as a proposed ballot issue (in Nevada), the exceptions are sometimes broader, as will be detailed in Part III. Even so, the Bloomberg system still requires FFL processing for huge numbers of loans and returns.

Under the Bloomberg system, transfers may only take place at a gun store (an FFL's business premises).[60] The transfer must be conducted exactly as if the retailer were selling a firearm out of her inventory.[61] So the transferee (the neighbor borrowing the hunting gun) must fill out ATF Form 4473,[62] the retailer must contact the FBI or its state counterpart for a background check on the transferee, and then the retailer must take custody of the gun and record the acquisition in her Acquisition and Disposition book.[63] Finally, the retailer hands the gun to the transferee and records the disposition in her Acquisition and Disposition book.[64] A few days later, after the hunting trip is over, the process must be repeated for the neighbor to return the gun to the owner; this time, the owner will be the "transferee," who will fill out Form 4473 and undergo the background check.

The FBI does not charge a fee for conducting background checks, but some states that have a state Point of Contact require a fee.[65] So the transfer of a loan and then a return would require two separate background check fees.

The paperwork process is time-consuming for the FFL. When the FFL sells a firearm out of her own inventory, she can mark up the wholesale price to a retail price at a level to cover her costs, including the time cost of

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[59] *See id.* One of the well-known rules of hunter safety is to not carry a gun when climbing a fence. After hunter A is on the other side of the fence, hunter B hands his own gun and A's gun to hunter A. Then hunter B climbs the fence. Afterward, A hands B's gun back to B. *See, e.g.*, *Chapter 6—Hunting Safety*, TEX. PARKS & WILDLIFE DEP'T, https://tpwd.texas.gov/education/hunter-education/online-course/hunting-safety [https://perma.cc/F3LE-3ZYK].

[60] *See, e.g.*, COLO. REV. STAT. § 18-12-112(1)(a)(II) (2013) (stating that a transferor must "[o]btain approval of a transfer from the bureau after a background check has been requested by a licensed gun dealer, in accordance with section 24-33.5-424, C.R.S."); *id.* at (2)(a) ("A prospective firearm transferor who is not a licensed gun dealer shall arrange for a licensed gun dealer to obtain the background check required by this section.").

[61] *See, e.g.*, COLO. REV. STAT. § 18-12-112(2)(b) ("A licensed gun dealer who obtains a background check on a prospective transferee shall record the transfer, as provided in section 12-26-102, C.R.S., and retain the records, as provided in section 12-26-103, C.R.S., in the same manner as when conducting a sale, rental, or exchange at retail. The licensed gun dealer shall comply with all state and federal laws, including 18 U.S.C. sec. 922, as if he or she were transferring the firearm from his or her inventory to the prospective transferee.").

[62] *See* 27 C.F.R. § 478.124(a) (2015).

[63] *See* 27 C.F.R. § 478.125(e) (2015).

[64] *See* ATF Proc. 2013-1 (Mar. 15, 2013).

[65] *Is there a charge for NICS checks*, BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, https://www.atf.gov/firearms/qa/there-charge-nics-checks [https://perma.cc/D45A-4GDK] (last updated Sept. 14, 2015). For an example of state point of contact fees, see *Firearms Instant Check System (FICS)*, OREGON.GOV, http://www.oregon.gov/osp/id/pages/fics.aspx [http://perma.cc/LDQ6-9GR3] (stating a fee of $10 per transaction).

processing the paperwork. But for private sales and transfers, the FFL is not selling anything. Processing the private sale, loan, or return takes up time that the FFL could spend on something profitable, such as attending to another customer who might purchase something from the FFL's inventory. Accordingly, most FFLs are unwilling to process private transfers unless they can charge a fee which compensates them for their time. Typically, the FFL will set a fee of $20 to $50 per transfer.[66] If a state law forbids fees, or sets a price cap lower than $20, very few FFLs will choose to offer transfer services.[67] In Colorado, where the price cap is $10, only about fifteen firearms stores in the entire state are willing to process private transfers for this amount.[68]

III. Negative Effects of the Bloomberg Laws

The Bloomberg laws treat most temporary loans of firearms and returns of loaned firearms as if they were gun sales, with a requirement that they be processed by a firearms dealer. As will be detailed in this section, the treatment of loans and returns as if they were sales has severe consequences for self-defense, safety instruction, hunting, target shooting, museums, safe storage, and law enforcement. Furthermore, the Bloomberg laws make it impos-

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[66] In Colorado, many stores are willing to process private interstate sales of firearms, for which stores can set the service price freely. Hardly any stores are willing to process private intrastate sales (or loans and returns) for the $10 fee cap mandated by Colorado's Bloomberg law. *See* Attachment A in Reply Brief for Appellants Nonprofit Organizations et al. at 1, Colorado Outfitters Ass'n v. Hickenlooper, No. 14-1290 (10th Cir. May 29, 2015), http://coloradoguncase.org/reply-attachment-A-maps.pdf [http://perma.cc/U43G-VTEU].

[67] For example, the owner of Rocky Mountain Shooter Supply, a Colorado gun store, testified that he had analyzed the labor cost for his clerks to process a private sale or loan. The cost was $40, and since Colorado capped the fee at $10, his store would not process such transactions. Transcript of Record at 702–07, Colorado Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 2d 1050 (D. Colo. 2014) (No. 13-1300), http://coloradoguncase.org/trial%20transcripts/ap032014outfittersctrl4.pdf [http://perma.cc/WCV8-LTRZ]. John Burrud, owner of Jensen Arms, testified that his store's fee for processing private interstate sales was $25. The Colorado version of the Bloomberg law caps the fee for processing of *intra*state private sales, loans and returns at $10, which was too low for him to be able to offer the service. *Id.* at 755–58.

[68] *See* Reply Brief for Appellants Nonprofit Organizations, Disabled Firearms Owners and Firearms Manufacturers and Dealers at 7–12, *Colorado Outfitters Ass'n* (No. 14-1290), http://coloradoguncase.org/reply-nonprofits-disabled-manufacturers-dealers.pdf [http://perma.cc/JL6C-KM3D]; Attachment A in Reply Brief for Appellants Nonprofit Organizations et al., *supra* note 68, at 1; Attachment B in Reply Brief for Appellants Nonprofit Organizations, Disabled Firearms Owners and Firearms Manufacturers and Dealers at 1, *Colorado Outfitters Ass'n* (No. 14-1290), http://coloradoguncase.org/reply-attachment-B-CBI-background-data.pdf [http://perma.cc/LM2R-NNJ7].

For an actual private sale, there can be additional costs, such as sales tax or use tax. The Washington State version of the Bloomberg law exempts private sales from the state sales tax, but not from the state use tax. *See* Wash. I-594, *supra* note 5, at § 10. The latter tax is 7.0% to 9.6% of the item's price, depending on the locality. *See Local Sales & Use Tax Rates Excel Format: 2015 Quarter 4*, Wash. Dep't of Revenue, http://dor.wa.gov/Content/GetAFormOrPublication/FormBySubject/forms_LSUExcel.aspx [http://perma.cc/WQ7B-FDVQ]. Since the Bloomberg system registers every transfer with the state, attempts to evade paying the use tax would appear to be unwise.

sible for young adults, aged eighteen to twenty, to lawfully purchase handguns.

Is the damage intentional? The criticisms of the damage caused by Bloomberg proposals have been around for years, as long as the proposals themselves. While every state-level iteration of the Bloomberg bills has its variations, successive iterations do little or nothing to fix the problems that have been pointed out about previous versions. This could indicate that the damage done is intentional.

A. Self-Defense

The Second Amendment includes "the core lawful purpose of self-defense."[69] As will be detailed in Part VI, the Uniform Firearms Act, the model gun control law of the 1920s and 1930s, imposed new controls on retail handgun sales and was designed to protect "the lending of a weapon by one citizen to another in case of emergency."[70]

Under the Bloomberg laws, such lending is mostly forbidden. In the Bloomberg federal model, there is no allowance for lending a firearm to a citizen in case of emergency.[71] Under the proposed Nevada initiative, the latest version of the Bloomberg laws, a firearm may be loaned if the loan "is necessary to prevent imminent death or great bodily harm" and the loan "lasts only so long as immediately necessary to prevent such imminent death or great bodily harm."[72] Whatever "imminent" means, the loan is allowed only as long as "immediately necessary."

This exemption is exceedingly narrow. If people in a house were attacked by rioters, the exemption would allow the sharing of all arms within the house. But the exemption does not allow for a much more common self-defense situation: a former domestic partner threatening a woman and her children. An attack might come in the next hour, or the next month, or never. The victim and her children cannot know. Because the attack is uncertain—and is certainly not "immediate"—the woman cannot borrow a handgun from a neighbor for her defense. Many domestic violence victims do not have several hundred spare dollars so that they can buy their own gun.

In abortion jurisprudence, the Supreme Court has distinguished permissible regulations from those "designed to strike at the right itself."[73] The Second Circuit has applied this language and principle to the Second

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[69] District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

[70] Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 768 (1926) (description of the Act by Chairman of the Committee on Firearms Laws of the National Commissioners on Uniform State Laws). The Uniform Firearms Act is discussed at length below in Part VI of this Article.

[71] *See* S. 374, 113th Cong. § 202(a)(4)(t)(2) (2013) (describing exceptions for family gifts, inheritances, transfers in the home, and for "hunting or sporting purposes").

[72] Nev. Background Check Initiative § 6(5) (Aug. 11, 2014).

[73] Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007).

Amendment.[74] In regard to self-defense, the Bloomberg laws strike at the right itself.

B. Museums

Unlike self-defense, the display of historic firearms in museums is not the core of the Second Amendment. But those displays implicate the Second Amendment, because the Second Amendment contains more than solely the core (the core protects "a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home"[75]). And of course museums have First Amendment rights, which can be violated, inter alia, by forcing the removal of items from museum display.[76] Typically, museums own some of their exhibit items, and borrow others for temporary, special exhibits. This latter activity is another casualty of the Bloomberg laws.

In Washington State, voters approved the Bloomberg law, Initiative 594, by a fifty-nine to forty-one percent margin in the November 2014 election.[77] It became operative on December 4, but its first effect came sooner. The Lynden Pioneer Museum, in Bellingham, announced that it would re-

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[74] United States v. Decastro, 682 F.3d 160, 168 n.6 (2d Cir. 2012) (stating that federal statute setting procedures for importing out-of-state handguns was "not designed to strike at the heart of the right itself").

[75] McDonald v. City of Chicago, 561 U.S. 742, 780 (2010). The right is "personal" in the sense that it belongs to persons, rather than being a "collective right" which no person has a right to exercise. The "collective right" theory was popular in some circles for several decades in the twentieth century, but in *Heller*, all nine Justices brusquely rejected it. *See* David B. Kopel, *The Great Gun Control War of the 20th Century—and its Lessons for Today*, 39 FORDHAM URB. L.J. 1527, 1547–50 (2012).
The "personal right" would not seem to depend on whether persons act by themselves, as individuals, or act through a partnership, corporation, or other form of legal personhood: "a supplier of firing range facilities is harmed by the firing range ban and is permitted to 'act[ ] as [an] advocate[ ] of the rights of third parties who seek access to' its services." Ezell v. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011) (alterations in original) (quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976)). Similarly, museums and museum patrons would have the same First and Second Amendment rights, regardless of whether the museum is organized as a sole proprietorship, a partnership, a corporation, or so on.

[76] *See* Brooklyn Inst. of Arts & Sci. v. City of New York, 64 F. Supp. 2d 184, 199 (E.D.N.Y. 1999); Cuban Museum of Arts & Culture, Inc. v. City of Miami, 766 F. Supp. 1121, 1125 (S.D. Fla. 1991).

[77] *November 4, 2014 General Election Results: Initiative Measure No. 594 Concerns background checks for firearm sales and transfers*, WASH. SEC'Y OF STATE ELECTIONS & VOTING, http://results.vote.wa.gov/results/20141104/State-Measures-Initiative-Measure-No-594-Concerns-background-checks-for-firearm-sales-and-transfers.html [http://perma.cc/8YB9-GZZ9] (last updated Nov. 25, 2014).

move eleven historic rifles.[78] The rifles were part of an exhibit titled "Over the Beach: The WWII Pacific Theater."[79]

The museum staff explained: "The museum will be returning these guns to their owners because as of Dec 4th, we would be in violation of the law if we had loaned firearms that had not undergone the background check procedure. Nor would we be able to return those firearms unless the owners completed the back ground [sic] check procedure."[80] The museum, which is a small nonprofit, said that it did not have the financial resources to purchase the firearms, nor to pay for the background checks that would be necessary (after December 4, 2015) to return the guns to their owners.[81] Fortunately, a local pawnshop, after learning of the museum's problems, stepped forward and offered to perform the requisite background checks at its own expense, allowing the museum to keep many but not all of the historic firearms until the exhibit ended in May 2015.[82]

A spokesperson for the Bloomberg initiative said, "You can't craft every possibility into every law."[83] This may be true. It is a good reason that laws sold to the public as covering "background checks on private sales" should be written to apply only to private sales and not to loans.

C. Firearms Safety Instruction

While museum-held firearms might not be the first issue that springs to mind when considering the criminalization of firearms loans, short-term loans for firearms safety training is an obvious issue. Any sensible firearms policy should encourage, and not impede, safety instruction. The Bloomberg laws do just the opposite. Even momentary firearms transfers are generally prohibited, unless they take place at a corporate target range.[84]

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[78] Some of the guns included in the museum's exhibit were a rare Johnson M1941, a Reising submachine gun, and a 1935 Japanese 7.7mm Type 99 machine gun, captured by American soldiers. *Law forces Washington museum to remove WWII weapons*, N.Y. POST (Nov. 20, 2014), http://nypost.com/2014/11/20/law-forces-washington-museum-to-remove-wwii-weapons/ [http://perma.cc/8D2R-46UZ]; Ralph Schwartz, *Wary of new gun law, Lynden museum to pull WWII rifles from exhibit*, BELLINGHAM HER. (Nov. 21, 2014), http://www.bellinghamherald.com/news/local/article22259031.html [http://perma.cc/FAV4-BTCZ]; *see also* Chris Eger, *Background Check Expansion Forces Museum to Return Firearms to Donors*, GUNS.COM (Nov. 20, 2014), http://www.guns.com/2014/11/20/background-check-expansion-forces-museum-to-return-firearms-to-donors/ [http://perma.cc/J4AY-L29W].

[79] *See* Eger, *supra* note 78.

[80] Lynden Pioneer Museum, Facebook (Nov. 13, 2014, 4:32 PM), https://www.facebook.com/lyndenpioneermuseum/posts/10152557345669790 [https://perma.cc/8NQC-VNZC].

[81] *See* Schwartz, *supra* note 78.

[82] *Lynden museum to keep WWII gun display after pawn shop offers to do I-594 paperwork*, BELLINGHAM HER. (Nov. 21, 2014), http://www.bellinghamherald.com/news/local/article22259799.html [http://perma.cc/UHF7-H9VR].

[83] *Law forces Washington museum to remove WWII weapons*, *supra* note 78.

[84] *See* S. 374, 113th. Cong. § 202(a)(4) (2013) (covering nearly all transfers, but excluding transfers "at a shooting range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms").

Some safety courses do include a "live fire" component, in which students fire guns at a range under the supervision of the instructor.[85] However, even the courses that have live fire also have an extensive classroom component. Some introductory courses are classroom-only. In the classroom, dozens of firearms transfers will take place. Many students may not yet own a firearm; even if a student does own a firearm, many instructors choose to allow only their personal firearms in the classroom, as the instructor may want to teach particular facts about particular types of firearms. The instructor also wants to use firearms that he is certain are in good working order. In any classroom setting, functional ammunition is absolutely forbidden.[86]

In the classroom, students are taught how to handle guns safely. Some safety skills can be taught with inert, plastic replicas—for example, the lesson that a person should always keep the gun pointed in a safe direction, or that a person should keep her finger off the trigger until the gun is on target. Learning other safety skills, though, requires using a real gun. For example, when a person hands a gun to someone else, she must first make sure that the gun is unloaded, that the safety is "on," and that the gun is inoperable because the "action" is open. For this latter requirement, this would mean that a double-barreled shotgun is broken open, so that the hinged barrels are not aligned with the rest of the gun. For a semi-automatic gun, it would mean that the slide is locked back into the open position. For a revolver, it would mean that the cylinder is swung open, and not inside the rest of the gun. Teaching students how to do this requires using real guns.

Another element of safety instruction is teaching students how to safely load and unload a gun. This is typically done by using real guns along with inert dummy ammunition. During the course of instruction, the instructors and students may transfer firearms dozens of times, with each transfer lasting only a few minutes or less.

Under the Bloomberg laws, the above activities are allowed only if they take place at a firing range owned by a corporation. Pre-Bloomberg, these classes had been commonly offered in office buildings, churches, schools, and homes. Limiting the classes only to target ranges makes the classes much more inconvenient. Target ranges are often located on the outskirts of town, not where most people live. In rural areas, there might be many places where shooting is lawful and safe, but the nearest corporate-owned shooting range might be far away. The likely result will be fewer people taking safety classes.

In Washington, the state government now claims that volunteer hunter education instructors teaching the course required by the Washington De-

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[85] *See, e.g.*, Mass Basic Firearms Safety Course, Mass Firearms Sch., http://www.massfirearmsschool.com/class/mass-basic-firearms-safety-course/ [http://perma.cc/U985-JLTT].

[86] *See, e.g.*, *NRA Basic Pistol Training Department: Standard Operating Procedures*, Nat'l Rifle Ass'n (2015), www.shongum.org/images/NRABasicPistolSOP.pdf [http://perma.cc/2QPL-KD8T].

partment of Fish and Wildlife are exempt because the Department is a law enforcement agency.[87]

Even with this exemption for hunter safety instructors, those instructors cannot allow students to "transfer" firearms to each other by practicing how to safely hand a gun back and forth.[88] Nor does the exemption help the many instructors and students who take courses other than the State's hunter safety program. These non-exempted instructors teach courses for students who are not interested in obtaining a hunting license, but who are interested in learning how to own and use firearms responsibly.

Also criminalized is the informal safety training which has always been a traditional part of normal use of firearms; for example, inviting a friend to one's home and teaching him how to handle an unloaded firearm.[89] As with museums, the effect of the Bloomberg laws on safety training is purely destructive. Impeding safety training harms public safety and provides no benefits.

The purpose of the Bloomberg laws is, supposedly, to prevent prohibited persons from obtaining firearms, since prohibited persons are more likely to perpetrate firearms crimes. In formal or informal safety training, there is no realistic risk that a student who holds a firearm for a few moments, before transferring it to another student or the instructor, is going to use that firearm in a violent crime.

D. Families

Proponents of the Bloomberg laws point out that the laws have exemptions for "family." This is politically sensible, since many voters do not believe that the government should meddle in innocent intra-family activities. The family exemption also makes sense criminologically. A person who privately sells a gun to a stranger may have no idea whether that stranger is a prohibited person. But when people sell (or loan) to individuals whom they personally know, the risks of unintentionally giving a gun to a prohibited person are much less. So it is reasonable that rules on private sales/loans among strangers should be different from the rules for sales/loans among people who know each other. Family members likely know each other better than they know anyone else.

All versions of the Bloomberg laws have some form of family exemption, but they are unreasonably narrow. The Bloomberg laws allow family

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[87] Memo from David Whipple, Hunter Education Division Manager, to Hunter Education Instructors, Analysis of Initiative 594 (Dec. 2, 2014), http://hunting-washington.com/smf/index.php?topic=166188.0 [http://perma.cc/JD6Y-D875].

[88] *See id.* ("[I]t does not initially appear that student-to-student transfers of firearms would fall within the general WDFW exemption for law enforcement agencies.").

[89] *Compare* S. 374, 113th Cong. § 202(2)(C) (2013) (allowing transfers of up to seven days within a home or its curtilage), *with* Wash. I-594, *supra* note 5, at § 3.

members to make a "bona fide gift" of a firearm to each other.[90] In the federal proposal, this exception includes only spouses, parents, children, grandparents, and siblings.[91] In Washington, it also includes aunts, uncles, nieces, nephews, and first cousins.[92] The federal and Washington models take care of gifts, but they forbid family members from lending guns to each other, or from selling guns to each other. The federal law has no provision for this type of transfer, while the Washington law allows temporary transfers only between spouses and domestic partners.[93] The proposed Nevada language is somewhat broader, covering "sale or transfer," and also specifies that step-relations, adopted children, and half-blood relations are part of a family.[94] In none of the Bloomberg laws are in-laws considered to be a member of one's family.

E. Minors and Young Adults

The federal GCA prohibits FFLs from transferring handguns to persons under twenty-one and long guns to persons under eighteen.[95] The proposed Bloomberg laws require that all firearms transfers be routed through an FFL. Thus, it is legally impossible to transfer a handgun to an eighteen-to-twenty-year-old or any gun to a minor.

This proscription represents a major expansion of the category of persons who are prevented from possessing firearms. Laws specifically about gun possession by persons under twenty-one have not gone so far. Federal law limits but does not forbid handgun possession by persons under eighteen.[96] Thirty-seven states have some law creating a minimum age to purchase, or a minimum age to possess; some of these laws are only for handguns, and others are for all guns.[97] Federal law has no special limits on handgun possession by eighteen-to-twenty-year-olds. Again, most state laws are similar.[98] Federal law imposes no restrictions on long gun possession by persons under eighteen, and the same is mostly true at the state level.[99]

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[90] S. 374 § 202(2)(A); Wash. I-594, *supra* note 5, at § 3(4)(a).

[91] S. 374 § 202(2)(A).

[92] Wash. I-594, *supra* note 5, at § 3(4)(a).

[93] *Id.* § 3(4)(f)(i).

[94] Nev. Background Check Initiative, § 6(3) (Aug. 11, 2014).

[95] 18 U.S.C. § 922(c)(1) (2012).

[96] 18 U.S.C. § 922(x) (2012).

[97] *See Minimum Age to Purchase & Possess Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 1, 2013), http://smartgunlaws.org/minimum-age-to-purchase-possess-firearms-policy-summary [http://perma.cc/WM6W-QKPN].

[98] Nine states set a minimum age of twenty-one for handgun possession; New Mexico's is nineteen. *See id.*

[99] Illinois forbids long gun possession by persons under twenty-one; fifteen states have a minimum age of eighteen; two of sixteen; and one of fourteen. Most of these laws have exceptions for when the person's parent or guardian is present or has authorized the possession, or while hunting or target shooting. *See id.*

In the firearms policy debate, there is room for discussion of these topics and legislative changes if a majority supports such a change. The Bloomberg laws, however, impose major prohibitions on persons under twenty-one, and do so sub silentio, without public debate. By mandating that all firearms acquisitions must pass through an FFL, the Bloomberg laws exploit the special rules for FFLs, and thereby make gun acquisition nearly impossible for persons under twenty-one (handguns) or under eighteen (all guns).

In the new Washington law (and its proposed federal counterpart), only a "bona fide gift" between family members is allowed. If family members want to loan guns to each other, they must have the loan processed by a gun store. If the family member is under twenty-one (for handguns) or under eighteen (for all guns), the gun store cannot process the transfer, and thus the loan is impossible. So a mother may not loan her handgun to her twenty-year-old daughter to take for protection on a camping trip. Nor to her eighteen-year-old son, who wants to go to a target range for the afternoon. A seventeen-year-old may have a hunting license in many states. But his father may not loan him a shotgun to use for hunting.

The exceptions in the Bloomberg laws are insufficient. In Washington, loans of firearms to minors are allowed if the person will be "under the direct supervision and control" of a person over twenty-one.[100] This presumes that persons of college age, some of whom have served in the military, lack the maturity to go hunting or camping with friends their own age, without the supervision of an older person.

The Nevada proposal, allowing intra-family loans and sales (and not just "bona fide" gifts) is better.[101] But like all versions of the Bloomberg laws, it does not address the problem of young people who want to buy a firearm. Under the federal GCA, persons under twenty-one cannot buy handguns from gun stores, but they can buy handguns from private individuals. The same is true for persons under eighteen purchasing long guns. By requiring that all purchases be routed through a gun store, the Bloomberg laws make these purchases impossible.

Can a parent buy a handgun for a twenty-year-old son or daughter? The Bloomberg model does allow parents to make "a bona fide gift" of a firearm to a child. But if the child gets involved in picking out the gun, this can be considered a "straw purchase" under federal law.[102] Under the GCA, it is unlawful to purchase a firearm on behalf of another person, even if the other person is also legally qualified to own the firearm.[103]

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[100] WASH. REV. CODE. ANN. § 9.41.113 (West 2015).

[101] Nev. Background Check Initiative, § 6(3) (Aug. 11, 2014).

[102] *See, e.g.*, United States v. Moore, 109 F.3d 1456 (9th Cir. 2007); *cf.* Abramski v. United States, 134 S. Ct. 2259 (2014) (discussing case in which law enforcement officer, using a discount available only to law enforcement officers, purchased a firearm to sell it to his uncle—both lawful gun-owners—yet still holding Abramski was guilty of felony as a straw purchaser).

[103] ATF Form 4473, *supra* note 11 (asking in Question 11.a., "Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you

Finally, not all persons under twenty-one are dependents of a parent who would buy them a firearm. Some of them are legally emancipated. The Bloomberg proposals make it impossible for them to purchase a gun. Although existing federal law would not allow an emancipated twenty-year-old woman to purchase a handgun in a retail store, she would be allowed to purchase the handgun in a private sale, but for the Bloomberg laws. As will be discussed in Part VII, it is perfectly possible to have background checks on private sales without requiring that the check be conducted on the business premises of a retail gun store. It is the Bloomberg requirement that FFLs be the chokepoint for all firearms transfers that is responsible for thwarting arms acquisition by persons under twenty-one, including borrowing a gun for a few hours of sport.

F. Firearms Sharing on One's Property

One very common activity of gun owners is sharing their firearms on their own property. A person who owns thirty acres might have a small target range set up. He invites some friends over for the afternoon, shoots at targets with rifles or handguns, and lets the friends use the family's guns. Or a farm family might have a skeet or trap thrower, which flings clay disks into the air. For this type of shooting, shotguns, which fire several dozen small, round pellets, are used. Informal shooting events like this are at the heart of American gun culture. They promote friendship, community, and practice in the safe handling of firearms.

They are also criminalized by some versions of the Bloomberg laws. For example, the Washington provision has no exemption for sharing a firearm on one's property.[104] Sharing does not have to involve firing a gun. Inside the home, an owner might allow a visitor to handle his unloaded gun. Perhaps the visitor is interested in buying a new gun like the gun the owner owns. Or the visitor is just interested in guns. Or the gun might benefit from an adjustment that the visitor knows how to perform well, but the owner does not. Again, this type of innocent sharing is criminalized in Washington. Sharing may take place at a corporate or government target range, but never on one's property.

Instead, the owner and the visitor are supposed to travel to a gun store to get permission, fill out all the paperwork, and pay the fees before the gun is handed over. When the visitor is done with the gun, everyone must return to the gun store and repeat the process, before the gun can be returned to its owner.

The problem is worst in Washington state, where Initiative 594 has no exemptions for the above ordinary activities. In the federal model, there is an

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are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.").

[104] Wash. I-594, *supra* note 5.

exemption for sharing a firearm within one's own home or curtilage.[105] This takes care of letting a friend examine one's new firearm. But if the friend brings his new gun to someone else's house, it is a federal felony if he lets that person handle that gun for a few minutes.

The federal version has an exemption for sharing inside the home and its "curtilage." Definitions of "curtilage" vary, but none of them would include the typical location of an outdoor firing range. By some definitions, the curtilage must be enclosed (as with an interior courtyard); others would encompass unenclosed areas "around the dwelling house, and generally include the buildings used for domestic purposes in the conduct of family affairs" (e.g., an outhouse, a detached garage).[106]

If the two friends then go target shooting on the owner's property, that is also a federal felony. The way to avoid the felony would be to stand on the porch while target shooting, thus remaining in the "curtilage." Questions about the definition often arise in search and seizure law; the Supreme Court has held that a barn sixty yards away from the house was not within the curtilage.[107] For obvious safety reasons, most people set up their target ranges away from the house and do not use the curtilage as a shooting platform.

The Nevada proposal addresses the above problems with an exemption for any transferee "[w]hile in the presence of the transferor."[108] This provision could be read with flexibility—for example, so that the transferor can step out of the room to take a phone call, or can leave the backyard shooting range to go in the house for several minutes. If applied flexibly, the Nevada exemption would be helpful.

But even the Nevada language does not help farmers and ranchers. Firearms transfers at farms and ranches are a routine part of operations. Some of these might last for only a few hours, while others last for several weeks—as when a ranch hand takes a gun to guard a flock night and day during calving season. The farmer or rancher will not stay in the hand's "presence." The hand needs to do work in one location, and the farmer or rancher in another.

Under the Bloomberg laws, for a farmer or rancher to lend a firearm to an employee, they both must travel to a gun store to process the transaction. When the employee returns the firearm, everyone must return to the gun store. Because few farms and ranches are located near gun stores, the process typically requires hours of travel time for the loan, and hours more for the return. This takes the farmer, the rancher, and their hands away from the farm or ranch during what may be the busiest period of the year, when everyone needs to work from sunup to sundown.

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[105] S. 374, 113th Cong. § 202(2)(C) (2013).
[106] *Curtilage*, Black's Law Dictionary (5th ed. 1979).
[107] United States v. Dunn, 480 U.S. 294, 296 (1987).
[108] Nev. Background Check Initiative § 6(6)(c)(v) (Aug. 11, 2014).

G. Firearms Sharing on Public Lands

The Bloomberg laws contain exemptions for firearms sharing at some target ranges. In the federal bill, the shooting range must be owned or operated by a corporation.[109] In Washington, it must be "an established shooting range authorized by the governing body of the jurisdiction."[110] Nevada copies the Washington language.[111]

Not everyone has access to an "established" target range. In rural areas with low population density, the nearest established range may be many miles away. In urban areas, the waiting lists for membership in a gun club may stretch out for years. Established public ranges exist, but in many areas, there are few, if any; and those that do exist may be a long ways away, or may be crowded. Accordingly, it has always been common in America for people to engage in target practice at informal ranges on public lands. Many of these lands are owned by the U.S. National Forest Service, the Bureau of Land Management, or a state or local equivalent.[112]

The general rule is that shooting is lawful anywhere on these lands, except for certain specified areas which are off-limits, such as areas near buildings or roads.[113] Of course one must always obey all safety rules, which includes ensuring that there is a safe backstop to the target, such as a mound of dirt.

The public lands are not "established" ranges. Thus, it is illegal to share guns there as well. During a debate on the Washington State initiative for the Bloomberg law, NRA representative Brian Judy pointed out the problem. Initiative spokesperson Cheryl Stumbo did not dispute the accuracy of his claim, but retorted that it would be safer to shoot only on formal ranges.[114]

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[109] S. 374, 113th Cong. § 202(2)(D)(i) (allowing transfers "at a shooting range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms").

[110] Wash. I-594, *supra* note 5, at § 3(4)(f)(ii).

[111] Nev. Background Check Initiative § 6(6)(c)(i) (Aug. 11, 2014).

[112] *See*, *e.g.*, Jamie Schwartz, *Shooting Sports*, U.S. Forest Serv., http://www.fs.fed.us/recreation/programs/trails/welcome.shtml [http://perma.cc/BK3S-U5FR] (last updated Mar. 28, 2013) ("The only regulations specific to use of weapons imposed by the Forest Service is that you cannot discharge a weapon within 150 yards of any structure/development or occupied area, within or into a cave, across or on a road or body of water, or in any manner that endangers a person."); *Bipartisan Sportsmen's Act of 2015: Hearing on S. 556 Before the S. Comm. on Energy & Natural Resources*, 114th Cong. 2 (2015) (statement of Steve Ellis, Deputy Director for Operations, Bureau of Land Management), http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=4a53cafd-87f5-4a30-a593-87156773f6a7 [http://perma.cc/923V-BWFM] ("BLM already regards public lands as open to fishing, hunting, and shooting unless it is demonstrated that the activity could result in unacceptable resource damage or create a public health and safety hazard.").

[113] Schwartz, *supra* note 78.

[114] *The Seattle Times Editorial Board: Debate Between Proponents and Opponents of I-594*, TVW (June 26, 2014, 1:00 PM), http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014060083 [http://perma.cc/CET4-MUW2].

But the Bloomberg laws are not presented to the public as proposals to outlaw gun sharing on public lands and on private property. Nor are they presented as bills to prevent persons under twenty-one years old from borrowing firearms for sporting purposes. Rather, the bills are sold to the public by the bait-and-switch method: proponents promise that the bills are only about background checks on private sales, but the reality is that they criminalize a huge amount of responsible activity that has nothing to do with firearms sales.[115]

H. Safe Storage

Before the Bloomberg law went into effect in Colorado in 2013, Colorado State University ("CSU")—like many colleges and universities nationwide—allowed students to store their hunting guns with campus police. When a student wanted to use the gun for hunting, he could check out the gun from the campus police. After the hunting trip, he would return the gun to them for storage. Because of the Bloomberg law, such an arrangement has become impossible, and the safe storage program was ended.[116] In order to give the gun to the student, a campus police officer would have to travel with the student to a gun store, where the store would process the student's gun acquisition as if selling a firearm out of its inventory, with all the associated paperwork. Later, when the hunting trip was completed, the student and the campus police officer would have to return to the gun store to repeat the process, this time treating the officer as if he were buying a gun from the retailer. Because the CSU police did not have extra officers on hand to go through this process for all relevant students, CSU was forced to shut down its safe storage program.

This difficulty is not just a campus problem. Consider a person who will be away from home for an extended period, such as a member of the armed services being deployed overseas, a person going away to school, a person going on a long vacation, or a person evacuating her home due to a natural disaster. Such persons might wish to store firearms with a trusted friend or family member for months or years. This type of storage should be encouraged. Guns are less likely to be stolen by burglars, and then sold into

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[115] *See Background Checks*, EVERYTOWN FOR GUN SAFETY, http://everytownresearch.org/issue/background-checks [http://perma.cc/JZ5Q-FXKP] (failing to mention loans); *see also Colorado Gun Case,* INDEPENDENCE INST., http://coloradoguncase.org [http://perma.cc/M2LL-2HW7] (providing full transcripts of legislative hearings and debate on Colorado law HB 13-1229; no proponent of the law advocated for or addressed any alleged benefits or rationale for restricting loans and returns).

[116] *See* Transcript of Record at 813–14, Colorado Outfitters Assoc. v. Hickenlooper, 24 F. Supp. 3d 1050 (D. Colo. 2014) (No. 13-CV-1300-MSK-MJW), http://coloradoguncase.org/trial%20transcripts/ap032014outfittersctrl4.pdf [http://perma.cc/XB5R-RGWX]; *see also* David Kopel, *Safe storage of firearms: The harms from Bloomberg's strange background check system*, WASH. POST. (Nov. 3, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/03/safe-storage-of-firearms-the-harms-from-bloombergs-strange-background-check-system/ [https://perma.cc/B2DY-Y9P5].

the black market, if they are kept in a neighbor's home rather than left in a house that will be unoccupied for six weeks. If the law says that neighbor A can only store neighbor B's guns if both persons go to a gun store, fill out extensive paperwork for every gun to be stored, pay per-gun fees to the government and the gun store, and then repeat the process when the firearms are returned, many fewer people will go through all that trouble. So more guns will be left in unoccupied dwellings; they will be at greater risk of being stolen and thus of being supplied to the criminal black market. Discouraging the safe storage of firearms is one way the Bloomberg laws affirmatively harm public safety.

I. Hunting

Announcing the 2013 version of the federal Bloomberg bill, Senator Schumer promised that it would not affect "your ability to borrow your Uncle Willie's hunting rifle."[117] This assertion is true if your Uncle Willie hands you his rifle while the two of you are out in the field hunting deer. However, if Uncle Willie stays home and just lets you borrow his rifle when you go hunting for the weekend, then both of you are guilty of a federal felony—the same felony as if each of you had knowingly sold a gun to a convicted violent felon.[118]

Suppose that you go hunting with Uncle Willie, and return to a motel after a day of hunting. You would like to help Uncle Willie clean his gun. Or maybe his gun has a malfunction, and you would like to fix it. That would be against the law. The hunting exception only applies "while hunting if the hunting is legal in all places where the person to whom the firearm is transferred possesses the firearm."[119] Motel rooms are not legal places for hunting. You and Uncle Willie are both criminals.

J. Law Enforcement

The Colorado version of the Bloomberg law has no exception for law enforcement officers acting during the course of their official duties.[120] Yet firearms transfers are a routine part of ordinary law enforcement operations. The following examples are common for officers:

- Returning a lost or stolen firearm to its rightful owner;

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[117] *Sen. Kirk, Colleagues Seek Deal on Gun Background Checks*, CRAIN'S CHI. BUS. (Feb. 8, 2013), http://www.chicagobusiness.com/article/20130208/NEWS02/130209776?template=printart [http://perma.cc/65BD-PTD3].

[118] *Compare* S. 374, 113 Cong. § 202(2)(D), *with* CAL. PENAL CODE § 27950 (2015) (allowing loan of long guns for duration of relevant hunting season in state with statute—not drafted by Bloomberg organization—requiring background checks on private sales of firearms).

[119] Wash. I-594, *supra* note 5, at § 3(4)(f)(v).

[120] COLO. REV. STAT. § 18-12-112 (2015).

- Taking a firearm from the scene of an auto accident, and later returning the firearm to the victim;
- Taking a firearm as evidence from the scene of a crime, or from a criminal suspect;
- Transferring a firearm to the law enforcement office's evidence custodian, to a new evidence custodian, or to a temporary custodian when the regular custodian is absent;
- Transferring firearms to or from regional crime labs;
- Transferring firearms from the office armory to officers for long-term use;
- Taking custody of an officer's personally-owned duty firearm, when the deputy is involved in a shooting, and later returning the firearm to the officer; and
- Taking custody of all office-owned firearms whenever an officer is under investigation.

Under the Bloomberg law in Colorado, the above transfers may only take place at the business premises of an FFL. As with other firearms transfers under the Bloomberg system, the FFL must process the transfer as if he were selling a firearm out of his own inventory.

A volunteer FFL could not provide this service at a law enforcement agency office. It would be a federal felony for an FFL to transfer firearms at a sheriff's office or a police department. FFLs may only conduct firearms transfers at the single business premises specified on their license, or at a gun show.[121] This is a pointless restriction; a person who is federally licensed to process firearms transfers should be allowed to process them in all legitimate locations.

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[121] 18 U.S.C. §§ 923(d)(1)(E), 923(j) (2012); 27 C.F.R. § 478.100 (2015).

The above crimes may not normally be prosecutorial priorities for District Attorneys, but law enforcement officers must model law-abiding behavior, and serve as examples for the general public. Two months after Colorado sheriffs filed a lawsuit against the Colorado Bloomberg law, the Colorado Bureau of Investigation sent an email attachment with no letterhead to the police chiefs and sheriffs; it purported to invent a new exception to HB 13-1229 for some of the above law enforcement activities, namely providing agency arms to officers. As officers were background-checked before they were hired, "*CBI believes that it is unnecessary* for a Law Enforcement Agency to conduct an additional NICS background check by an FFL before transferring a firearm to a POST Certified Peace Officer employed by the agency for official use. As always, *agencies may wish to seek guidance from their legal advisor*." Fifty-Five Colorado Sheriffs' Response Brief to Defendant's Motion to Dismiss Them in Their Official Capacities at 21, Cooke v. Hickenlooper, No. 13-CV-1300-MSK-MJW (D. Colo. Aug. 22, 2013) (quoting email sent from CBI to police chiefs and sheriffs), http://coloradoguncase.org/Sheriffs-response-to-MTD.pdf [http://perma.cc/BJV8-DX8N]; *see also* Transcript of Record, *supra* note 116, at 1361–63 (testimony of CBI Director Ronald Sloan), http://coloradoguncase.org/trial%20transcripts/ap072014outfitters6.pdf [http://perma.cc/5UJ3-XJW6].

The informal expression of an unpublished, non-binding belief by a bureau without enforcement authority is small comfort. Nor does CBI's expressions of what it "believes" is "unnecessary" address many of the situations described above.

K. Unreasonable Penalties for Easily Violated Laws

The penalties for violating the Bloomberg laws are severe. Federally, the proposed penalty is the same as for giving a firearm to a person known to be a convicted violent felon.[122] In Colorado, the first offense is a Class 1 misdemeanor (the highest level) with automatic forfeiture of the right to keep and bear arms for two years.[123] In Washington, the first conviction is a gross misdemeanor (up to ninety days in jail and a $1,000 fine). A second violation is a Class C felony (up to five years in prison and a $10,000 fine).[124] As with other crimes, the second conviction can arise out of the same transaction as the first and need not be preceded by a conviction—for example, loaning two firearms to a friend in a single event, or "transferring" one firearm to a student at a gun safety class and then receiving the "transfer" of the firearm back from the student during the same class. Felony convictions automatically prohibit a person from possessing a firearm for the rest of her life.[125]

The Washington State Law Enforcement Firearms Instructors Association opposed the Bloomberg proposal, Initiative 594.[126] They wrote that "I594 is a law so broadly written that it clearly is designed to make criminals of all recreational shooters and most law enforcement officers."[127] Further, it "is a law that will be impossible to police, intended to criminalize only good citizens, a costly misdirection of scarce [law enforcement] resources and funds, and a statute so broadly written that many of your own activities will become crimes."[128] In short, "I594 transforms casual, innocent, ordinary, non-criminal behavior into a misdemeanor or felony."[129] For similar reasons, the large majority of Colorado's sheriffs filed a civil rights lawsuit against the Colorado version of the Bloomberg law.[130]

Aggravating problems for the law-abiding, the Bloomberg laws allow prosecution of compliant gun owners; the exceptions (e.g., a parent-to-child gift) are structured as an "affirmative defense."[131] An "affirmative defense" is no defense at all until trial. A person can be indicted and then put on trial for the crime of giving her adult son a shotgun. After the prosecution's case

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[122] *See* S. 374, 113th Cong. § 203(b) (2013).

[123] COLO. REV. STAT. § 18-12-112(9)(a) (2015).

[124] Wash. I-594, *supra* note 5, at § 9.

[125] 18 U.S.C. § 922(g).

[126] Phil Shave, *In Harm's Way—I594 & Law Enforcement*, WASH. ST. L. ENF. FIREARMS INSTRUCTORS ASS'N, http://wslefia.com/mobile/index.cfm?zone=/unionactive/view_page.cfm&page=I2D59420and20Law20Enforcement [http://perma.cc/ZCD7-RS8L].

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See* Opening Brief of Sheriffs and David Strumillo, Beicker v. Hickenlooper, No. 14-1292 (10th Cir. Jan. 16, 2015), http://coloradoguncase.org/Appeal/Sheriffs-opening-brief-Final.pdf [http://perma.cc/B8CT-6XJF] (noting that litigants are fifty-four elected county sheriffs, and twenty-four retired sheriffs.).

[131] Wash. I-594, *supra* note 5, at § 9.

has been completed, then and only then can the defendant raise the "affirmative defense" about inter-family gifts.

One might hope that such a case would never be brought in the first place. Indeed, as will be described in the next section, the only substantive response to most of the above criticisms has been that law enforcement will not actually enforce the law.

L. Responses to the Above Criticisms

Cheryl Stumbo, one of Mr. Bloomberg's staffers in Washington State, dismissed the above concerns as "one in a million hypotheticals," as if loaning a gun to a neighbor who was a domestic violence victim were a bizarre and unusual activity.[132] The chief spokesman for Washington's I-594 was Dan Satterberg, the King County Prosecutor.[133] Satterberg acknowledged that the text of I-594 does outlaw sharing among family and friends.[134] Yet at a *Seattle Times* debate on I-594, he dismissed the problem as "an absurd hypothetical."[135] He insisted that personal loans were not the point of the initiative.[136]

That was a strange claim by an experienced prosecutor. The law is whatever the law says, and the law outlaws almost all sharing of firearms. A law which was about background checks on private sales, but not about loans, would have an exemption like that in California—where loans of up to thirty days are allowed between people who personally know each other.[137]

During the I-594 campaign, proponents also argued that, no matter what the law actually said, prosecutors would not bring cases against persons for obviously benign temporary loans and returns.[138] They also asserted that the law would be applied according to its "intent," covering only transfers in the ordinary sense of firearms law (permanent dispositions).[139] But this argument ignored the special, extremely broad definition of "transfer" that was written into the law itself. And as soon as I-594 became law, it was

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[132] *The Seattle Times Editorial Board: Debate Between Proponents and Opponents of I-594*, *supra* note 114.

[133] *See id.* King County includes Seattle and a huge region of suburbs to the north, south, and east. As revealed during the *Seattle Times* debate, Satterberg had privately said that I-594 would be a waste of prosecutorial and police resources—an ineffective law that would be ignored by gang members and drug dealers. Yet Satterberg felt that he had to support it because he himself would also be on the ballot in November 2014. This turned out to be good political strategy. Perhaps as a result of Satterberg taking the lead on gun control, the Democrats did not run an opponent against him. *Id.*

[134] *Id.*

[135] *Id.*

[136] *See id.*

[137] CAL. PENAL CODE § 27885 (2015).

[138] Joseph O'Sullivan, *Semantics Triggers Opposition to I-594's Gun-Sale Checks,* SEATTLE TIMES (Sept. 21, 2014), http://www.seattletimes.nwsource.com/html/localnews/2024590815_594transfersxml.html [http://perma.cc/957B-63GW].

[139] *Id.*

the law's text that mattered, not its supposed intent. That is why firearms safety classes and museum displays of firearms were the first things to be constricted by I-594.[140]

Hypothesizing that most law enforcement officers will simply ignore the text of the laws, and instead enforce the law based on their discernment of the proponents' intent, the text of the Bloomberg laws still provides law enforcement officers with the nearly limitless ability to arrest and prosecute gun owners selectively—perhaps to harass a person for being politically outspoken, or because of a personal grudge, or to make a political point, or for any other reason.[141]

As Justice O'Connor explained for the Supreme Court, the Constitution is violated when a criminal statute permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[142] She observed that this principle can be traced back to the Supreme Court's 1875 statement in *United States v. Reese*: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[143]

Most importantly, the primary mechanism by which gun laws are enforced is that law-abiding people self-enforce them. If a particular portion of public lands are posted as off-limits to target shooting, then the vast majority of gun owners will not shoot there, even if they believe that the posting is mistaken because the area is perfectly safe. Many people carry concealed handguns in areas where they have a permit to do so, and they do not carry in areas where carry is not permitted. Although they know that the chance of being caught and prosecuted for carrying a *concealed* handgun is essentially nil, they choose to obey the law. Because most gun owners are scrupulous about gun law compliance, the Bloomberg laws damage responsible gun ownership.

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[140] *See supra* Part III.B–C.

[141] A U.S. Senate subcommittee investigation found that "approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations." S. COMM. ON THE JUDICIARY, 97TH CONG., REP. ON THE RIGHT TO KEEP AND BEAR ARMS, U.S. GOV'T PRINTING OFF. REP. NO. 88-618 O (1982), http://www.constitution.org/2ll/2ndschol/87senrpt.pdf [http://perma.cc/J38B-3FK3]; *see also* Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities For Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007).

[142] Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Gougen, 415 U.S. 566, 575 (1974)).

[143] 461 U.S. at 358 n.7 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)). The *Reese* language has been quoted in thirteen subsequent opinions, including most recently in Skilling v. United States, 561 U.S. 358, 425 (2010) (Scalia, J., concurring in part and concurring in judgment); *see also* Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 330 (2006).

IV. Federal Courts on When a Gun Control Law is "Longstanding"

In *Heller*, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[144] A footnote adds: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[145] Commentators and lower court judges have been kept busy trying to discern the implications of this dictum.[146] The Bloomberg laws are not among the particular types of laws that the Court described as "presumptively lawful." They do not involve the "commercial" sale of firearms, and they extend to transfers which are not sales. Do the Bloomberg laws fit within the general category of "longstanding"?

They do not. They are far outside the mainstream of traditional American gun control. This section summarizes lower court opinions of what makes a gun control "longstanding." Part V will examine such laws through the nineteenth century. Part VI will do so for the first third of the twentieth century. Although not middle-of-the-road, the Bloomberg laws do have some analogues in historical practice.

What is "longstanding"? Several lower federal courts have engaged the question in depth. The first appellate court to do so was the First Circuit in *United States v. Rene E.*, examining restrictions on transferring handguns to juveniles.[147] The First Circuit explained that it would "look to nineteenth-century state laws imposing similar restrictions, as the *Heller* Court did."[148] States with such restrictions in the nineteenth century were Alabama (1856), Tennessee (1856), Kentucky (1873), Indiana (1875), Georgia (1876), Pennsylvania (1881), Delaware (1881), and Kansas (1883).[149] In addition, the First Circuit pointed out two municipal ordinances, apparently enacted in the

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[144] 554 U.S. 570, 626–27 (2008).

[145] *Id.* at 617 n.26.

[146] For example, if a type of statute is "presumptively lawful," is the presumption irrebuttable? The better answer would be "no." Say that a regulation requires that when the owner of a retail gun store goes home for the night, the store must have security devices to prevent or deter theft, and that guns must be locked up. This is an easy fit with the *Heller* dicta and can speedily be held as lawful.

But suppose that the anti-theft rule is that every gun in the store must be disassembled before the store closes at night. Or that the gun store may only be open for business five hours per week. Or that only persons with a college degree may work in a gun store. All of these would be "conditions and qualifications on the commercial sale of arms." These laws are manifestly oppressive, extreme, and unreasonable. They should be subject to heightened scrutiny, and with heightened scrutiny applied, should be ruled unconstitutional.

[147] United States v. Rene E., 583 F.3d 8 (1st Cir. 2009) (examining 18 U.S.C. § 922(x)(2) (2006)).

[148] *Id.* at 12.

[149] *Id.* at 13–15. *United States v. Rene E.* cites the following cases:

early part of the 1910s.[150] The First Circuit then explained that it had evaluated the federal statute "in light of the state laws of the nineteenth century regulating juvenile access to handguns."[151] Taking into account the "narrow scope" of the federal statute and its "important exceptions" for hunting, self-defense in the home, and other activities, the statute was held constitutional.[152]

The D.C. Circuit examined gun registration in *Heller II*.[153] The court explained that "a regulation that is 'longstanding,' which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right."[154] So a "longstanding" law would be presumed not to violate the Second Amendment, but "[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right."[155]

After the Supreme Court decided *District of Columbia v. Heller* in 2008, the D.C. Council had enacted a new gun control law. Among other things, it had required registration of all firearms.[156] The D.C. Circuit held that long gun registration was "novel, not historic."[157] For handguns, "basic registration" *was* longstanding; basic registration was giving the government "a modicum of information about the registrant and his firearm."[158] In addition to basic registration for handguns, Washington, D.C., also had many other requirements to register handguns or long guns. So the D.C. Circuit remanded those issues.[159] There, the government would have the opportunity

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1850s: State v. Callicutt, 69 Tenn. 714 (1878) (upholding Tenn. Code § 4864, enacted by ch. 81, 1855–56 Tenn. Acts 92 (Feb. 26, 1856)); Coleman v. State, 32 Ala. 581 (1858) (finding that defendant's conduct comes within the scope of an 1856 statute).

1870s: Spires v. Goldberg, 106 S.E. 585, 586 (Ga. 1921) (discussing a negligence per se action based on violation of Ga. Penal Code § 350; referencing 1910 Code, but statute was first enacted by 1876 Ga. Acts 112); Tankersly v. Commonwealth, 9 S.W. 702, 702 (Ky. 1888) (dismissing on procedural grounds appeal of conviction on state statute; statute first appears in 1 Gen. Stats. of Ky. 359 (1873) (Crimes and Punishments, art. 29, § 1)); State v. Allen, 94 Ind. 441 (1884) (reversing the quashing of an indictment for violating section 1986 of the Indiana Code, which had been enacted by 1875 Ind. Laws 59).

1880s: McMillen v. Steele, 119 A. 721 (Pa. 1923) (upholding 1881 statute); State v. Quail, 92 A. 859, 859 (Del. 1914) (quoting 1881 statute, originally enacted by An Act Providing for the Punishment of Persons Carrying Concealed Deadly Weapons, ch. 548 § 1, 1881 Del. Laws 716 (Apr. 8, 1881)); Parman v. Lemmon, 244 P. 227, 228 (Kan. 1926) (negligence claim based on violation of 1883 statute).

[150] *Rene E.*, 583 F.3d at 13, 15 (citing Biffer v. City of Chicago, 116 N.E. 182, 184–85 (Ill. 1917)) (upholding 1912 Chicago ordinance against issuing concealed handgun carry permits to minors); Schmidt v. Capital Candy Co., 166 N.W. 502, 503 (Minn. 1918) (discussing a St. Paul ordinance against giving certain arms and explosives to minors; sparklers held not to be within scope; enactment date of ordinance not stated; case arose from conduct in 1915).

[151] *Rene E.*, 583 F.3d at 16.

[152] *Id.* at 14, 16.

[153] Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1254 (D.C. Cir. 2011).

[154] *Id.* at 1252.

[155] *Id.*

[156] *Id.* at 1255.

[157] *Id.*

[158] *Id.* at 1253.

[159] *Id.* at 1260, 1264.

to prove them constitutional, using the ordinary rules of heightened scrutiny.[160]

Regarding basic handgun registration, the D.C. Circuit found that it had been "accepted for a century in diverse states and cities."[161] As historical evidence, the court pointed to an Illinois statute from 1881, as well as four state statutes from the 1910s, two from the 1920s, and a D.C. statute from 1932.[162]

The Seventh Circuit examined a ban on municipal target ranges in *Ezell v. Chicago*.[163] There were some old laws that regulated target ranges inside of cities, but these were not prohibitions.[164] There were other laws that were municipal prohibitions, but they were for the purpose of fire prevention.[165] The only historic laws that banned municipal target ranges and were not about fire prevention were those enacted in Baltimore (1826) and Ohio (1831). These two examples were not sufficient to exempt similar, modern-day laws from heightened scrutiny, with the burden of proof on the government.[166]

Two federal district courts have examined the meaning of "longstanding" in detail. The court in *Silvester v. Harris* looked at California's ten-day waiting period on firearms purchases.[167] Citing circuit court cases, *Silvester* explained that the government bears the burden of proving that a gun law is "longstanding."[168] The government failed to satisfy its burden because there were no waiting period laws "around 1791 and 1868," the dates when the Second Amendment was enacted and then made binding on the states.[169] Today, there are only ten states with waiting periods, so "they are not common now."[170] In 1923, California enacted a one-day wait for retail purchases of handguns; but according to the court, that was not comparable to California's current ten-day wait for all guns, including private sales.[171] Thus, the California waiting period would be subjected to heightened scrutiny.[172]

The court in *Mance v. Holder* found that the federal ban on interstate handgun purchases, which was enacted in 1968, was not "longstanding."[173]

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[160] *Id.*

[161] *Id.* at 1254.

[162] *Id.* (noting statutes in Georgia (1910), New York (1911), Oregon (1917), California (1917), Michigan (1927), Territory of Hawaii (1927), District of Columbia (1932)).

[163] 651 F.3d 684 (7th Cir. 2011).

[164] *Id.* at 705–06.

[165] *Id.*

[166] *Id.*

[167] 41 F. Supp. 3d 927 (E.D. Cal. 2014).

[168] *Id.* at 963.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] Applying this scrutiny, the court held the waiting period unconstitutional to the full extent that the plaintiffs had requested: that it not apply to someone who has already passed the background check, if that person already owns another gun.

[173] 74 F. Supp. 3d 795 (N.D. Tex. 2015).

The first residency-related gun control law was West Virginia's in 1909;[174] however, "looking back only to 1909, today, omits more than half of America's history and belies the purpose of the inquiry."[175] In support of this approach, the *Mance* court cited *Heller*'s statement that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[176]

Although there are differences in the various ways in which lower courts have defined "longstanding," the results are consistent. Synthesizing these cases, we can discern some general principles:

- The only laws that the lower courts have held to be long-standing were initially enacted in the nineteenth century.
- Laws which first appeared in the nineteenth century can be buttressed by laws enacted in the early twentieth century.
- The latest time-wise that a court can go is debatable; the First Circuit went as far back as 1918, while the D.C. Circuit went to 1932.
- The laws need not have been enacted everywhere; in two cases, seven or eight states were sufficient.[177]
- Courts compare and contrast the breadth, stringency, and purpose of older and modern laws. Narrow, older laws do not justify more restrictive, newer ones. A one-day retail wait for handguns does not justify a ten-day wait for all firearms. Fire prevention laws do not justify laws not involving fire prevention. Regulations do not justify prohibition.
- Courts are cognizant of the historical tradition that handguns have been regulated more rigorously than long guns. Older laws about handguns cannot be used to justify modern laws about long guns.[178]

One other factor in whether something is "longstanding" is, necessarily, whether the law is still "standing." A law which was later repealed may have had a long period when it was in effect, but nothing that has been repealed can be said to be "longstanding." After all, something that is "longstanding" has two characteristics: being "long" and being "standing."[179] If a law has been repealed, it is not "standing." Of course if a particular statute were replaced by something similar during a recodification, that law could be "longstanding," even if the current statutory language were different from the original enactment.

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[174] *Id.*

[175] *Id.* at 805.

[176] *Id.* (citing *Heller*, 554 U.S. 570, 634–35 (2008)).

[177] Counting territories and the District of Columbia as "states" for this purpose.

[178] This difference in treatment is empirically supported by the data in Justice Breyer's *Heller* dissent, showing handguns to be much more of a crime problem than long guns. *See* 554 U.S. at 695–98 (Breyer, J., dissenting).

[179] *See* 1 SHORTER OXFORD ENGLISH DICTIONARY 1625 (1993) ("[*A*] *dj.* Of long standing; that has existed a long time, not recent.").

What kinds of historical laws would be analogous to the Bloomberg laws? Laws that said that some sort of permission was needed before a person could have a gun.[180] Part V describes such laws from the nineteenth century and earlier.

V. Gun Possession Permission Systems in the Nineteenth Century and Earlier

Until the early twentieth century, there were no laws that required that individuals receive government permission before purchasing or borrowing a firearm. However, there were many states that had permission requirements for slaves and free blacks. Not all states had permission systems. Some states prohibited people of color from possessing arms. Other states just left the issue to the master's discretion.[181] The next two sections describe some of these government permission statutes. They are the only pre-twentieth century analogues to the Bloomberg laws.

A. Colonial Period

The first law requiring government permission to possess a firearm was enacted in the Colony of Virginia in 1619. Blacks and Indians who were "not house-keepers, nor listed in the militia" were generally prohibited from bearing arms.[182] However, these Blacks and Indians living on frontier plantations could possess arms if they were granted a license "to keep and use guns, powder, and shot . . . ."[183]

Maryland mandated "[t]hat no Negro or other slave, within this Province, shall be permitted to carry any Gun or any other offensive Weapon, from off their Master's Land, without Licence from their said Master . . . ."[184] South Carolina in 1740 required a master's written permission for blacks to possess firearms.[185] A 1755 Georgia statute, reenacted in 1768, followed the South Carolina model.[186]

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[180] The nineteenth century had bans on some arms (e.g., bowie knives). It also had restrictions on gun carrying in public (e.g., open, rather than concealed). *See infra* Part V.B–C.

[181] Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 335–38 (1991).

[182] William Waller Hening, 4 The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 131 (1823).

[183] *Id.*

[184] 75 Archives of Maryland 268 (William Hand Browne ed., 1885) (enacted 1715).

[185] An Act for the better Ordering and Governing Negroes and other Slaves in this Province, Act of May 10, 1740, no. 695, § 23, *in* 1731–1743 S.C. Pub. Laws 163, 168–69. Blacks could also possess arms while hunting under the supervision of a white person aged at least sixteen years. Even with a license, carrying guns away from home was forbidden from sundown Saturday to sunrise Monday. *Id.*

[186] The Colonial Records of the State of Georgia 76–78, 117–18 (Allen D. Candler ed., 1904).

B. Early Republic Until the Civil War

In the new United States, several states enacted legislation requiring that free blacks and/or slaves could possess firearms only if they were granted a license. The first session of Mississippi's territorial legislature declared in 1799 that "[n]o negro or mulatto shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive."[187] However, "the commanding officers of legions" could grant free black householders up to a twelve-months license to own and carry arms; slaves could also receive a permit, "on application of their owners, shewing sufficient cause . . . why such indulgence should be granted."[188] In 1822, a statutory revision gave licensing powers to the justices of the peace (for slaves) and to county courts (for free blacks) and did not limit the duration of the licenses.[189] The licensing system was replaced by a prohibition in 1852.[190]

Maryland's 1806 statute forbade "any negro or mulatto within this state to keep any dog, bitch, or gun."[191] However, a free "negro or mulatto" could apply to a justice of the peace for a license, valid for no more than one year, to keep one dog or to carry a gun.[192] Also in 1806, Louisiana's comprehensive Black Code forbade all slave possession of firearms.[193] The only exception to the code was for slaves hunting within "the limits of the plantation of the owners" if the slaves were carrying written permission from their owner.[194] "[F]ree colored people, who carry arms" also had to carry "a certificate of a justice of the peace, attesting their freedom."[195] If a free person of color was not carrying the freedom certificate, the firearm was forfeit.[196]

South Carolina's 1819 firearms ban for slaves made exceptions if the slave was "in the company and presence of some white person" or with "a ticket or license in writing from his owner or overseer."[197] In 1827, Delaware provided that no slave may carry an arm "without special permission of his or her master or mistress."[198] In 1828 Florida allowed justices of the

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[187] A Law for the regulation of Slaves, 1799 Laws of the Miss. Terr. 112, 113 (Mar. 30, 1799). Slaves were also forbidden to keep dogs. *Id.* at 118.

[188] *Id.*

[189] An Act to reduce into one, the several acts, concerning Slaves, Free Negroes, and Mulattoes, 1822 Miss. Laws 179, 181–83, §§ 10, 12 (June 18, 1822).

[190] An Act to prohibit Magistrates from issuing license to negroes to carry and use firearms, ch. 206, 1852 Miss. Laws 328 (Mar. 15, 1852).

[191] An Act to restrain the evil practices from negroes keeping dogs, and to prohibit them from carrying guns or offensive weapons, ch. 81, §§ 1–2, 1806 Md. Laws (Jan. 4, 1807).

[192] *Id.*

[193] Act of June 7, 1806, ch. 33, § 19, 1806 La. Acts 150, 160.

[194] Act of June 7, 1806, ch. 33, § 20, 1806 La. Acts 150, 162–64.

[195] Act of June 7, 1806, ch. 33, § 21, 1806 La. Acts 150, 164.

[196] Act of June 7, 1806, ch. 33, §§ 19, 21, 1806 La. Acts 150, 160–62, 164.

[197] An Act to provide for more effectual performance of Patrol Duty, 1819 S.C. Acts 29, 31.

[198] An Act concerning certain crimes and offences committed by slaves, and for the security of slaves properly demeaning themselves, ch. 50, § 8, 1827 Del. Laws 125, 125–26.

peace to grant licenses to free "negroes" and "mulattoes" to carry fire arms, but this was repealed in 1831.[199]

North Carolina in 1841 required that all free persons of color must have an annual license from the Court of Pleas and Quarter Sessions in order to own or carry firearms, swords, daggers, or bowie knives.[200] The law was challenged and upheld in the 1844 case *State v. Newsom*.[201] Reversing the trial court, the North Carolina Supreme Court explained that "free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation."[202] It was up to "the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall."[203] Likewise, the Georgia Supreme Court stated in 1848 that "[f]ree persons of color" were not citizens, and thus "not entitled to bear arms."[204]

The North Carolina and Georgia approach foreshadowed the U.S. Supreme Court's 1856 decision in *Dred Scott v. Sandford*, which held that free blacks were not citizens of the United States.[205] Otherwise, warned the Court majority, free blacks would be entitled to the "privileges and immunities of citizens," including the right to "carry arms wherever they went."[206]

C. Reconstruction

After losing the Civil War, the former Confederate States grudgingly accepted the abolition of de jure slavery, via the Thirteenth Amendment. However, they aimed to keep the former slaves in a condition of de facto servitude. The antebellum laws about slaves and free blacks were reenacted as Black Codes—imposing many of the "incidents" of slavery on the freedmen.[207] Among these incidents were prohibitions on arms possession without advance permission from the government.

Not all black codes had exemptions. For example, Georgia comprehensively outlawed firearms possession by free persons of color. *See* An Act concerning free persons of Colour, their Guardians, and Coloured Preachers, § 7, 1833 Ga. Acts 226, 228 (cited in McDonald v. City of Chicago, 561 U.S. 742, 845 (2010) (Thomas, J., concurring)).

[199] An Act Relating to crimes and misdemeanors committed by slaves, free negroes and mulattoes, § 9, 1828 Fla. Laws 174, 177; Act of Jan. 12, 1828, § 9, 1827 Fla. Laws 97, 100; An Act to amend an act relating to Crimes and Misdemeanors committed by slaves, free negroes and mulattoes, 1831 Fla. Acts 30 (1831).

[200] An Act to prevent Free Persons of Colour from carrying Fire-arms, ch. 30, 1840–41 N.C. Laws 61–62 (1841).

[201] 27 N.C. (5 Ired.) 250 (1844).

[202] *Id.* at 252.

[203] *Id.*

[204] Cooper v. City of Savannah, 4 Ga. 68, 72 (1848) (upholding municipality's special tax on free persons of color who moved into the city).

[205] *See* 60 U.S. 393 (1856).

[206] *Id.* at 417.

[207] Section Two of the Thirteenth Amendment empowers Congress to abolish "all badges and incidents of slavery." Civil Rights Cases, 109 U.S. 3, 4 (1883).

The first session of the Florida legislature following the Confederate defeat provided that "it shall not be lawful for any negro, mulatto, or other person of color, to own, use or keep in his possession or under his control, any Bowie-knife, dirk, sword, fire-arms or ammunition of any kind."[208] There was an exception if a probate judge had issued a license, based on "the recommendation of two respectable citizens of the county certifying the peaceful and orderly character of the applicant."[209] The penalty was forfeiture of the weapon, plus thirty-nine lashes, or one hour in the pillory.[210]

Mississippi required a license from the county board of police.[211] If the defendant could not pay the fine, he would be "hired out" for labor to a white person who paid the fine.[212] Some other states, such as Alabama, simply prohibited arms possession by freedmen.[213]

Congress responded forcefully to the Black Codes. Much of the defeated South was under martial law, enforced by the Union Army, and so the Second Freedmen's Bureau Act (1866) ordered the President to extend "military protection and have military jurisdiction" whenever "any of the civil rights belonging to white persons, [including] full and equal benefit of all laws and proceedings for the security of person and estate *including the constitutional right to bear arms* . . . are refused or denied to negroes, mulattoes, freedmen or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude."[214] This was the first-ever congressional enactment to protect the Second Amendment from state government infringements.

Since the South would not be under martial law forever, a permanent, national change was enacted: the Civil Rights Act of 1866, the foundational statute for federal civil rights law, providing a legal cause of action for violations of any of the guarantees of the Bill of Rights.[215] To provide the Civil Rights Act with a secure constitutional foundation, the Fourteenth Amendment was passed by Congress in 1866 and ratified by the States in 1868.

Broadly speaking, the aim of the Reconstruction Congresses was to demolish the bases on which the "Slave Power" had rested,[216] to undo the

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[208] An Act prescribing additional penalties for the commission of offenses against the State and for other purposes, ch. 1,466, no. 3, § 12, 1865 Laws of Fla. 25 (1865).

[209] *Id.* at 27.

[210] *Id.* at 25.

[211] An Act to punish certain Offences therein named, and for other purposes, ch. 23, § 1, 1865 Miss. Laws 165.

[212] Ch. 23, § 5, 1865 Miss. Laws 165, 166–67.

[213] CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).

[214] 14 Stat. 173, 176–77 (1866) (emphasis added).

[215] 14 Stat. 27 (1866). For more on the author of the Civil Rights Act, see David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOYOLA U. CHI. L.J. (forthcoming 2016), http://ssrn.com/abstract=2564819 [http://perma.cc/K227-JMPR].

[216] From the 1830s onward, anti-slavery advocates, especially Republicans, believed in "[t]he idea of a southern 'Slave Power' that dominated national politics—with the goal of not just preserving slavery in the South, but of nationalizing the institution." Sandra L. Rierson, *The Thirteenth Amendment as a Model For Revolution*, 35 VT. L. REV. 765, 801 (2011).

effects of *Dred Scott*, and to guarantee full civil rights regardless of color. In particular, this included protecting the Second Amendment rights of freedmen. For example, Rep. Sidney Clarke (R-Kan.), speaking in support of the Civil Rights Act, stated: "I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . ."[217] The U.S. Supreme Court's 2010 decision in *McDonald v. Chicago* detailed the intent of the Reconstruction Congresses to require states to obey the Second Amendment.[218] Justice Thomas's concurrence cited several of the antebellum and postbellum laws described above.[219]

In sum, the history of American gun control laws from the first days of the Virginia colony, through the nineteenth century, reveals no example of any law requiring that persons with full civil rights request government permission before obtaining a firearm. To the contrary, such laws were exclusively for persons who on account of their status were treated as inferiors in society, not entitled to the rights of ordinary citizens. The Supreme Court's *Heller* decision took an expansive view of the original meaning of the Second Amendment, looking backward to British and colonial antecedents and forward as far as Reconstruction; the Court found an unchanged core of the Amendment, guaranteeing the natural right to arms for self-defense.[220]

VI. The Early Twentieth Century: Handgun Permission vs. Notification

Unlike the nineteenth century, the twentieth century offers examples of gun permission laws that were not expressly racial. Permission laws were the exception, not the norm, in the early twentieth century. These laws were mostly about handguns. In the states that enacted handgun purchasing laws, there were two models. One was the New York "Sullivan Law" of 1911.[221] The other was the less-restrictive alternative created by the United States Revolver Association.[222] The latter law developed into the Uniform Firearms Act, adopted by the National Commissioners on Uniform State Laws.[223]

Although this Article describes legislation through 1936, some of these laws are past the cut-off dates for "longstanding" in federal decisions. The cut-offs have been 1909 (too late in *Mance*),[224] 1918 (last citation in *Rene*

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[217] Cong. Globe, 39th Cong., 1st Sess. 1838 (1866).
[218] McDonald v. City of Chicago, 561 U.S. 742, 769–78 (2010).
[219] *Id.* at 844–50 (Thomas, J., concurring).
[220] *See* District of Columbia v. Heller, 554 U.S. 570, 577–619 (2008).
[221] *See* Sullivan Dangerous Weapons Act, 1911 N.Y. Laws ch. 195, sec. 1, § 1897 (codified as amended at N.Y. Penal Law §§ 265.01(1), 265.20(a)(3)).
[222] *See infra* Part VI.B.
[223] *See id.*
[224] *See supra* Part IV.

E.),[225] 1923 (too late in *Silvester*), and 1932 (last citation in *Heller II*).[226] This article goes up to 1936, beyond the margin of "longstanding."

As previously stated, the absence of longstanding historical predecessors does not mean that the Bloomberg laws are necessarily unconstitutional.[227] The government still has the opportunity to meet its burden of proving constitutionality through the ordinary process of heightened scrutiny.[228]

Broad social concerns of the early twentieth century provided some of the motivation for gun control laws, as well as for many other civil liberties restrictions, including limits on public assemblies, labor organizing, and so on. In the late nineteenth and early twentieth centuries, large waves of immigrants from Eastern and Southern Europe had flooded into America. The percentage of the U.S. population that was foreign-born reached a high never matched before or since. There was much hostility towards legal immigrants.[229]

The Ku Klux Klan had been wiped out by President Ulysses Grant in the early 1870s. However, the 1915 hit movie *Birth of a Nation* romantically portrayed the Klan as having protected Southern white women from the depredations of corrupt whites and bestial blacks.[230] This resulted in the resurgence of the Klan that year, and soon the Klan was a major political force throughout the United States, reaching a peak in the early and mid-1920s.[231]

Nativist hostility was aggravated by immigrant behavior: the immigrants were often involved in labor strikes or other unrest, and some aliens were sympathetic to violent revolutionary communists, socialists, or anarchists.

Fear of immigrants and revolution intensified after the 1919 Bolshevik revolution brought Lenin into power in Russia, and several other revolutions were attempted in Central and Eastern Europe. Fear of revolution led to the first modern English laws on handguns and rifles, in 1921, and to similar laws in the Dominions (such as New Zealand) and in the colonies.[232] During the "Red Scare" of 1919–20, Woodrow Wilson's Attorney General A.

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[225] *See id.*

[226] *See id.*

[227] *See id.*

[228] *See*, *e.g.*, United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 702–03 (7th Cir. 2011); United States v. Reese, 627 F.3d 792 (10th Cir. 2010).

[229] *See generally* Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE L.J. 561 (1916).

[230] *See* SEYMOUR STERN, D.W. GRIFFITH'S 100TH ANNIVERSARY THE BIRTH OF A NATION (2014). The movie was an adaptation of the novel THOMAS DIXON, THE CLANSMAN (1905).

[231] THOMAS R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920s (2011).

[232] DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 73–74, 237–38 (1992).

Mitchell Palmer rounded up and deported or imprisoned many alleged subversives, often on flimsy or non-existent evidence.[233]

A third factor was national alcohol prohibition; it had been imposed by the Volstead Act in 1919, after the ratification of the Eighteenth Amendment authorized Congress to pass such a law. The result was a boon to organized crime. The organized criminals often shot each other, in disputes over territories and other issues. Understandably, this raised concerns about trying to keep guns out of the hands of criminals.

An amicus brief by Mr. Bloomberg's organization argued that the Colorado version of his law was constitutional because it was longstanding.[234] This Part of the Article examines all of the statutes discussed in that brief, and others.

A. Before the Revolver Association Act

The following is a brief catalog of state gun laws in the years prior to the enactment of the Revolver Association Act.

Delaware 1911. Retail handgun sellers were required to obtain a license. They could not sell a handgun "until the purchaser ha[d] been positively identified."[235] There was no need for government permission for the sale. A 1919 revision demanded that the positive identification of handgun buyers be made by "two freeholders," whose names and addresses should be recorded by the dealer. One of the freeholders could be a store employee or the store owner. As in the 1911 enactment, no government permission was needed.[236]

Colorado 1911–14. Colorado in the early twentieth century was the scene of much conflict between the labor movement and the government. Strikes were frequent, especially by miners, who were mostly recent immigrants from Southern and Eastern Europe. A 1911 statute required that persons engaged "in the retail sale, rental or exchange" of handguns keep records of the transactions, and that the record books be open to police inspection.[237] The worst labor violence in the state's history began in 1913 in the southern Colorado coal fields; on Orthodox Easter Sunday in 1914, company goons machine-gunned and set ablaze a tent colony of striking miners

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[233] *See generally* Harlan Grant Cohen, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. Rev. 1431 (2003).

[234] Brief for Everytown for Gun Safety as Amicus Curiae Supporting Defendant-Appellee and Affirmance, Colorado Outfitters Ass'n v. John W. Hickenlooper, Nos. 14-1290, 14-1292 (10th Cir. Apr. 29, 2015), http://coloradoguncase.org/Bloomberg-amicus.pdf [http://perma.cc/8GSS-8XYP].

[235] An Act regulating the sale of deadly Weapons and providing a Special License therefor, 26 Del. Laws 28, 28–29, §§ 1, 2, 4 (1911).

[236] An Act to amend Chapter 6 of the Revised Code of the State of Delaware in relation to the sale of deadly weapons, 30 Del. Laws 55, 55–56, § 1 (Apr. 10, 1919) (special sessions).

[237] An Act relating to the sale, rental and giving away of firearms in the State of Colorado, 1911 Colo. Laws 408.

and their families at Ludlow, Colorado.[238] The legislative reaction to the Ludlow Massacre was to give the governor authority to declare any or all of Colorado to be in a state of riot or insurrection, allowing him to ban all firearms sales, carrying, and use within the region.[239] The statute was later repealed.[240]

New York 1911. The Sullivan Act required a government permit for handgun possession, purchases and carrying.[241] The law was favored as a means of cracking down on recent immigrants, particularly Italians.[242]

Oregon 1913. It was illegal "to sell at retail, barter, give away, or dispose" of a handgun unless the purchaser had a permit from a municipal judge, city recorder, or county judge.[243] The applicant for a permit had to present two affidavits attesting to the applicant's "good moral character" and signed by "reputable freeholders."[244] The permit-to-purchase law was repealed in 1925, replaced by the Revolver Association Act.[245]

California 1917. "Every person in the business of selling, leasing or otherwise transferring" handguns had to keep records of the business transactions.[246] On the day of the sale, a copy of the record had to be mailed to local law enforcement.[247]

Montana 1918. Montana had a long history of labor unrest and xenophobia that was aggravated by World War One. The 1918 extraordinary legislative session enacted one of the broadest anti-sedition bills in American history. Senate Bill 2 defined "Criminal syndicalism" as any advocacy of

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[238] *See* THOMAS G. ANDREWS, KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR (2010); SCOTT MARTELLE, BLOOD PASSION: THE LUDLOW MASSACRE AND CLASS WAR IN THE AMERICAN (2008).

[239] An Act in Relation to Fire Arms and Ammunition, ch. 2, 1914 Colo. Laws 4.

[240] The repeal left in place only one part of the statute: the section that said the statute should not be construed to transgress the state constitutional right to arms. Today the statute reads, in its entirety, "[n]othing in this part 2 shall be construed so as to call in question the right of any person to keep and bear arms in the defense of his home, person, or property or in aid of the civil power when thereto legally summoned." C.R.S. § 24-20-203; An Act Concerning declarations of a state of emergency, ch. 343, 2003 Colo. Laws 2176, 2176-72.

[241] Sullivan Dangerous Weapons Act, 1911 N.Y. Laws ch. 195, sec. 1, § 1897 (codified as amended at N.Y. Penal Law §§ 265.01(1), 265.20(a)(3)).

[242] *See e.g.*, Robert J. Cottrol & Raymond T. Diamond, *"Never intended to be applied to the white population": Firearms regulation and racial disparity—The redeemed south's legacy to a national jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1334 (1995) ("[T]he Sullivan Law was aimed at New York City, where the large foreign born population was deemed peculiarly susceptible and perhaps inclined to vice and crime."); Editorial, *Concealed Pistols*, N.Y. TIMES (Jan. 27, 1905), http://query.nytimes.com/gst/abstract.html?res=9C03E4D8163DE733A25754C2A9679C946497D6CF [http://perma.cc/XMJ8-9GVB] (touting a proposal similar to the Sullivan Act as "corrective and salutary in a city filled with immigrants and evil communications, floating from the shores of Italy and Austria-Hungary").

[243] An Act Forbidding the sale, barter, giving away, disposal of or display for sale of pocket pistols and revolvers, and fixing a penalty for violation thereof, ch. 256, § 1, 1913 Or. Laws 497.

[244] Ch. 256, § 2, 1913 Or. Laws 497.

[245] *See* An Act to control the possession, sale and use of pistols and revolvers, to provide penalties, ch. 260, 1925 Or. Laws 468.

[246] Act of Jul. 27, 1917, ch. 145, § 7, 1917 Cal. Laws 221, 222–23.

[247] Ch. 145, § 7, 1917 Cal. Laws 221, 223.

"unlawful acts or method . . . as a means of accomplishing or effecting industrial or political ends."[248] Straightforwardly, it would have made the advocacy of tactics later used in the Civil Rights Movement, such as lunch counter sit-ins, or Rosa Parks refusing to yield her bus seat, into a felony. While the civil disobedience of the Civil Rights Movement involved committing some small misdemeanors (such as trespass at lunch counters), the Montana law made mere advocacy of such activities a felony. Eventually, the U.S. Supreme Court would begin to hold such statutes to be violations of the First Amendment, starting with *DeJonge v. Oregon* in 1937.[249]

Montana's 1918 Senate Bill 4 required a permit for the purchase of a firearm from a seller outside of Montana.[250] Further, all Montanans were supposed to register with their county sheriff all of their "fire arms and weapons."[251] If the firearm was sold or transferred to another person, a new registration record had to be submitted.[252] Firearms dealers (including pawnbrokers and the like) had to keep records of all firearms sales; the dealer records were open to inspection, but did not have to be sent to the government.[253] Senate Bill 4 was repealed in its entirety in the 1921 legislative session.[254]

North Carolina 1919. A new law, which as amended is still in effect, made it "unlawful for any person, firm or corporation . . . to sell, give away or dispose of . . . any pistol, so-called pump gun,[255] bowie knife, dirk, dagger or metallic knucks" without a permit from the clerk of the superior courts.[256] Dealers (but not private sellers) had to keep records. The statute was later amended to exempt purchases by persons who have a concealed handgun carry permit.[257] Another amendment eliminated the "so-called pump gun" from coverage.[258] North Carolina was the only U.S. jurisdiction ever to have special restrictions on pump action guns. Taxpayers who owned the aforesaid items had to list them along with "other personal property for taxes."[259]

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[248] Act of Feb. 21, 1918, ch. 7, 1918 Mont. Laws 14, 14–15.

[249] DeJonge v. Oregon, 299 U.S. 353 (1937).

[250] Act of Feb. 20, 1918, ch. 2, § 3, 1918 Mont. Laws 6 (Feb. 20, 1918).

[251] *Id.* §§ 1–2.

[252] *Id.* § 1.

[253] *Id.* §§ 5–6.

[254] An Act Relating to the Codification and General Revision of the Laws of Montana, ch. 109, § 5, 1921 Mont. Laws 112, 114 (1921).

[255] In a pump action rifle or shotgun, the user ejects the used, empty shell casing, and loads a fresh round into the firing chamber, by pulling and then pushing a pump located underneath the barrel. Among the types of long guns not covered by the North Carolina statute would be semi-automatic action, lever action, slide action, and double-barreled or single shot guns.

[256] An Act to Regulate the Sale of Concealed Weapons in North Carolina, ch. 197, § 1, 1919 N.C. Sess. Laws, 397, 397 (1919).

[257] N.C. Gen. Stat. § 14-402(a) (2011).

[258] An Act to Require That Weapons Permits Be Obtained from the County of Residence of the Purchaser, ch. 894, § 1, 1979 N.C. Sess. Laws 1230, 1230 (1979).

[259] An Act to Regulate The Sale Of Concealed Weapons in North Carolina, ch. 197, § 6, 1919 N.C. Laws 397, 399 (1919).

The permit form made it clear that the law was about permanent dispositions, not temporary loans; the form was for a person to obtain permission "to purchase one pistol (or) _____ from any person, firm, or corporation authorized to dispose of the same."[260] Although the statutory language did not have exceptions, a 1982 Attorney General Opinion stated that pawnshops did not need a permit in order to take in handguns, and that handgun dealers did not require a permit in order to acquire inventory.[261]

Missouri 1921. Other than the 17th–19th century statutes aimed at blacks, this was the first American statute whose literal text could be construed to cover non-commercial firearms loans. "No person . . . shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive" any handgun to a person without a permit.[262] The statute would be repealed in 2007.[263]

Although the statute could be read to apply to all loans, it was construed by the Missouri judiciary and attorney general to only apply to handgun transfers involving a change in title or right of possession. According to the Missouri Court of Appeals, a "literal construction . . . would reach an absurd and unreasonable result."[264] The court favored "the manifest intent"

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[260] *Id.* § 2(blank space in original); *see also* THOMAS FAULK, FIREARMS LAWS OF NORTH CAROLINA 140 (2006) ("The statute does not seem to apply to *loaned* or *rented* firearms." (emphasis in original)).

[261] 51 N.C. Op. Att'y Gen. 71 (1982).

[262] An Act to provide for the public safety by requiring each pistol, revolver, or other firearm of a size which may be concealed upon the person, to be stamped with the description of the same, and a record of all sales thereof to be kept by all dealers therein, and regulating the buying, selling, borrowing, loaning, giving away, trading, bartering, delivering or receiving of such weapons, and prescribing punishments for the violation thereof, and with an emergency clause, § 2, 1921 Mo. Laws 691, 692 (Apr. 7, 1921).

[263] One article suggested that the repeal resulted in an increase in homicides and in illegal gun trafficking. *See generally* Daniel Webster, Cassandra Kercher Crifasi & Jon S. Vernick, *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH 293 (2014). The data tables on which the article is based contain hundreds of errors, due to the erroneous transposition of some data columns. *See* Transcript of Record at 1282–86, Colorado Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050 (D. Colo. 2014), http://coloradoguncase.org/trial%20transcripts/ap072014outfitters6.pdf [http://perma.cc/J3PX-NNLW]. Second, the trafficking findings are based on firearms trace data from the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the use of such data is contrary to a federal government warning that the data are inappropriate for drawing conclusions such as those drawn by the article:

> Law enforcement agencies may request firearms traces for any reason. . . . The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.

Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, § 514 (2013).

[264] Taylor v. McNeal, 523 S.W.2d 148, 151 (Mo. Ct. App. 1975) (noting that "[m]ere seizure by the police, which involves only temporary custody, does not change title nor right of possession to the property seized;" statute does not apply to police seizures of handguns, nor to the return of seized handguns, nor to giving a handgun to a gunsmith and later picking it

of the legislature over a "literal construction," because "[c]onstruction of statutes should avoid unjust, unreasonable, absurd or confiscatory results."[265] A 2003 treatise on Missouri firearms law observed that "very few persons have been charged with this obscure crime."[266]

One reason that the statute was eventually repealed was frequent abuse by various sheriffs' offices. Many demanded advance information about the specific handgun to be purchased, and about the seller, although the statute required none of this information; in fact, requiring the information was a misdemeanor.[267] St. Louis for many years demanded that married women provide a permission slip from their husbands, and that some applicants (especially Blacks) provide letters of recommendation.[268] St. Louis also insisted that the permittee provide a reason for acquiring the handgun, and self-defense was not accepted as a legitimate reason.[269]

Arkansas 1923. This statute required that all present and future handgun owners register their handguns with the county clerk. Handgun owners had to apply for an ownership permit, which needed be renewed annually.[270] According to the *A.B.A. Journal*, "[t]his law was found so impracticable in enforcement" that it was repealed in 1925.[271] At a meeting of the National Commissioners on Uniform State Laws, a commissioner from Arkansas explained that the act "proved a complete failure; that scarcely anybody registered his pistols and it was realized that it worked an injustice to the few who did so."[272]

B. The First Uniform Firearms Act

State laws requiring a permit to purchase or a permit to possess a handgun were a rarity as of the early 1920s. North Carolina also required a permit

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up from the gunsmith); *see also* Mo. Op. Att'y Gen. 174–96 (1996) (explaining that the statute does not apply to redeeming one's handgun from a pawnbroker); Mo. Op. Att'y Gen. 137 (1964) (explaining that if coroner came into possession of decedent's handguns, he can give them to the estate administrator or executor); *cf.* Mo. Op. Att'y Gen. 99 (1956) (qualifying that statute does cover transfer of handguns by inheritance or bequest, which is a permanent transfer of title).

[265] *Taylor*, 523 S.W.2d at 151–52.

[266] KEVIN L. JAMIESON, MISSOURI WEAPONS AND SELF-DEFENSE LAW 92 (2003). The one reported prosecution is State v. Yates, 982 S.W.2d 767 (Mo. Ct. App. 1998) (discussing how Jackson loaned Yates his handgun, ostensibly for target practice; Yates was investigated after he open-carried the handgun at a convenience store).

[267] JAMIESON, *supra* note 266, at 93.

[268] *Id.*

[269] *Id.*

[270] An Act to regulate the Ownership of Pistols and Revolvers, Act 430, 1923 Ark. Acts 379 (1923).

[271] An Act to Repeal Act No 430, of the General Acts of Arkansas of 1923, Act 351, 1925 Ark. Acts 1047 (1925); Imlay, *supra* note 70, at 768.

[272] *Third Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms*, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING DENVER, COLORADO JULY 6–12, 1926, at 571, 572 (1926).

for long guns, namely the "so-called pump gun."[273] In 1922, the leaders of the United States Revolver Association decided that the permitting system should not be allowed to spread.[274] So they drafted their own model gun control law and began promoting it around the country.[275] They won immediate success, beginning in 1923.[276] The Revolver Association presented its model to the National Conference of Commissioners on Uniform State Laws, and in 1926 the Revolver Association Act (also called the Uniform Revolver Act) became the Uniform Firearms Act.[277] The Commissioners explained that they used the Revolver Act because of its good draftsmanship, and because it had already been adopted in several states.[278]

The lead drafter of the Revolver Association Act was Karl T. Frederick, who was chosen as a special consultant by the National Conference of Commissioners.[279] Frederick was a New York City lawyer and a Harvard Law School graduate.[280] He won three gold medals in pistol at the 1920 Summer Olympics, held in Antwerp, Belgium.[281]

Frederick and his colleagues loathed the Sullivan Act, the 1911 New York law requiring a permit to purchase or possess a handgun. As described by Frederick, the act was ignored in rural New York; in most of the rest of the state, it was applied fairly, with local judges issuing the permits.[282] But in New York City, the police department was in charge of the permits.[283] The police commissioners took the view that citizens should not have handguns, and so no matter the reason a New York City applicant might give for wanting a handgun (e.g., target shooting, self-defense), the applicant would be told that the reason was not good enough.[284] A determined applicant might make his way through the police gauntlet; even then, a person would not be allowed to possess more than one handgun.[285]

In 1927, NRA members elected Frederick to the NRA Board of Directors. He served as NRA President in 1934–35, and remained active with the NRA and with handgun competition for the rest of his life.[286]

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[273] An Act to Regulate The Sale Of Concealed Weapons in North Carolina, ch. 197, § 1, 1919 N.C. Laws 397, 397 (1919).

[274] KARL T. FREDERICK, PISTOL LAW (1964). The book is based on a series of articles that Frederick wrote for the NRA magazine *The American Rifleman* in 1930–31.

[275] *Id.*

[276] *See infra* Part VI.C.

[277] Imlay, *supra* note 70, at 767.

[278] *Third Report*, *supra* note 272, at 571–72.

[279] *Id.*

[280] FREDERICK, *supra* note 274.

[281] He won the individual medal in fifty-meter free pistol, plus team medals in thirty-meter military pistol and fifty-meter free pistol. *Medalist Search Result: Karl Frederich*, OLYMPIC, http://www.olympic.org/content/results-and-medalists/searchresultpercountry/?athletename=karl%20frederick [https://perma.cc/4JXC-QFPQ].

[282] FREDERICK, *supra* note 274, at 23–26.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] FREDERICK, supra note 274.

Because of the influence of the Uniform Firearms Act, it is worthwhile to summarize the provisions, as adopted by the National Commissioners in 1926. The Act applies to pistols and revolvers, which means any firearm with a barrel less than twelve inches.[287] For simplicity's sake, this Article generally refers to "handguns" rather than to "pistols or revolvers." Key provisions were:

- Extra punishment for use of a handgun in a violent crime.[288]
- In a prosecution for a violent crime, the defendant's carrying of a handgun without a carry permit was prima facie evidence of intent to use the handgun in the crime.[289]
- Persons convicted of a crime of violence could not possess a handgun.[290]
- No restrictions on open carrying of guns, but a permit was required for carrying a concealed handgun in public places.[291]
- Regarding minors, "No person shall sell, barter, hire, lend, or give any pistol or revolver to any person under the age of eighteen years."[292]
- Regarding adults, no one could transfer, even by lending, a firearm to a person whom "he has reasonable cause to believe has been convicted of a crime of violence."[293]

The sales controls, which are the topic most relevant to this Article, were set forth in sections nine to eleven. Handgun retailers had to have licenses.[294] Local governments were to grant the retail handgun licenses; mandatory conditions on the license included that the handgun be delivered unloaded and securely wrapped.[295]

No "seller" could deliver a pistol or revolver on the day of purchase. The purchaser had to sign a form affirming that he has not been convicted of a crime of violence, and providing his "name, address, occupation, color,

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[287] Uniform Firearms Act § 1 (1926).

[288] *Id.* § 2.

[289] *Id.* § 3.

[290] *Id.* § 4.

[291] *Id.* § 5. No permit was needed for concealed carry in one's home, lands, or place of business. *Id.* Some persons, such as military and law enforcement, did not need a permit. *Id.* § 6. There was no need for a carry permit to transport pistols and revolvers as merchandise (e.g., wholesaler to retailer), nor to take unloaded pistols and revolvers to and from gun stores, firearms repair shops, nor while moving one's abode or place of business.

How does one obtain a concealed handgun carry permit? The relevant local officials "shall" issue a carry license valid for up to one year to an applicant who has good reason to fear injury to his person or property, "or has any other proper reason for carrying a pistol or revolver." *Id.* § 7. The applicant must be "a suitable person to be so licensed." *Id.* § 7. As adopted by states, the "shall" was often changed to "may." Beginning in the late 1980s, there has been a national trend to replace "may issue" with "shall issue." Today, only a few states have not adopted this model. Kopel, *supra* note 75, at 1602, 1611.

[292] Uniform Firearms Act § 8 (1926).

[293] *Id.* § 9.

[294] *Id.* § 10.

[295] *Id.* § 11.

and place of birth," plus the make, model, and serial number of the handgun.[296] Within seven days, the seller had to forward copies to the Secretary of State and to local law enforcement.[297]

The Uniform Firearms Act ("UFA") superseded "any local law or ordinance."[298] This is an early version of the preemption laws now in effect in every state (except Hawaii), which prohibit or limit local gun control laws more restrictive than the state law.[299]

In choosing to follow the Revolver Association Act, the Commissioners had followed "the almost universal system of regulation which has prevailed in the various states": a license was required in order to carry a concealed pistol; no license was required to purchase or possess.[300] As the National Commissioners explained, "the license to purchase would not prevent criminals from obtaining arms but would make it difficult for law-abiding citizens to obtain arms for their protection."[301] Detailing the UFA in an article for the *A.B.A. Journal*, Commissioner Charles Imlay elaborated on the rejection of requiring permits to purchase or possess a firearm: such laws "would no doubt be followed by an era of pistol bootlegging similar to the liquor bootlegging which followed Prohibition."[302] The criminal records of New York "amply demonstrate" the failure of the Sullivan Act, which required permits to purchase and possess.[303]

Rather, Imlay explained, "one of the best safeguards against crime is consciousness on the part of the criminal that the householder possesses arms."[304] Requiring a permit to purchase "might render it impossible for a citizen to obtain a pistol when he might need it the most; the requirement of a license to possess would forbid his borrowing a pistol from a neighbor at the moment of a pressing emergency. He would be unarmed as against a criminal in defiance of the law."[305] Thus, under the Uniform Firearms Act, "A seller may not transfer a weapon on the day of purchase," but this does

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[296] *Id.* § 10. It was illegal to supply false information on the handgun form, or on the concealed carry permit application. *Id.* § 12. It was illegal to obliterate the serial number on a handgun. *Id.* § 13.

[297] *Id.* § 10.

[298] *Id.* § 16.

[299] Besides Frederick's articles, the main sources about the 1926 Uniform Firearms Act are the 1926 report of the National Commissioners explaining their adoption of the model law, plus an article that year in the *A.B.A. Journal* on the Uniform Firearms Act, which was also adopted by the American Bar Association in 1926. The article was written by Charles V. Imlay, a D.C. attorney who was a National Commissioner, and who had served on the committee that drafted the Uniform Firearms Act. *See* Imlay, *supra* note 70; *see also National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong. 67–68 (1934); HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS AND PROCEEDINGS OF THE FORTIETH ANNUAL CONF. 533, 568–69 (1930).

[300] Imlay, *supra* note 70, at 768.

[301] *Third Report*, *supra* note 272, at 574.

[302] Imlay, *supra* note 70, at 768.

[303] *Id.*

[304] *Id.*

[305] *Id.*

"not forbid the lending of a weapon by one citizen to another in case of emergency."[306]

Some thought that the Revolver Association Act went too far. Indeed, Arizona Governor George W. P. Hunt[307] vetoed it as an invasion of personal liberties.[308]

C. Through 1929

To the extent that laws from the 1920s provide information about what types of gun controls are "longstanding," the 1920s offer much support for laws that require handgun dealer licensing and recordkeeping. Five of the then-forty-eight states added laws requiring a permit for retail handgun purchases, and one state repealed such a law. Three of the five permit-to-purchase states also required a permit for private purchases. Two of them applied this to private loans. Three other states required that private persons not sell or transfer handguns to strangers. Long guns remained almost entirely out of the picture for sales or transfer laws. This period also demonstrates the general preference for the UFA over the Sullivan Act, in the minority of states which enacted gun control laws.

North Dakota 1923. This was the first law based on the Revolver Association Act.[309] Going further than the Model Act, North Dakota banned handguns not just for felons, but also for every "unnaturalized foreign-born person."[310]

For handgun sales recordkeeping, North Dakota required the "nationality" of the purchaser.[311] Since only sales to American citizens were allowed, the recordkeeping may have aimed to track Americans of supposedly suspicious heritage (e.g., Italian-Americans, Russian-Americans).

Post-*Heller*, courts have ruled that state laws imposing special gun restrictions on legal resident aliens are unconstitutional; all courts to address the issue are unanimous.[312] These are easy cases under modern Supreme

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[306] *Id.* at 769.

[307] A Democrat and progressive, Hunt was Arizona's first Governor, and served a total of seven two-year terms, not all contiguous. He supported "organized labor, women's suffrage, secret ballots, income tax, free silver coinage, and compulsory education. He was also an opponent of capital punishment . . . ." *George W. P. Hunt: First Governor of Arizona and Father of Arizona State Museum*, ARIZ. ST. MUSEUM, http://www.statemuseum.arizona.edu/about/history/hunt—george_w_p.shtml [http://perma.cc/95A7-CHHG].

[308] Veto Messages, at 11–16, Mar. 19, 1927 (cited in Charles V. Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799, 801 (1930)).

[309] An Act To Control the Possession, sale, and use of pistols and revolvers, to provide penalties, and for other purposes, ch. 266 § 5, 1923 N.D. Laws 379, 380.

[310] *Id.*

[311] § 10, 1923 N.D. Laws at 381–82.

[312] *See supra* Part IV.

Court doctrine prohibiting almost all forms of state discrimination against legal aliens.[313]

Again adding language beyond the Model Act, North Dakota restricted private handgun sales, albeit only between strangers: "When neither party holds a dealer's license, no person shall sell or otherwise transfer a pistol or revolver to any person not personally known to him."[314]

California 1923. Like North Dakota, California banned handgun possession by unnaturalized aliens.[315] For retail handgun purchases, the dealer must mail a notice to the local police on the day of the sale.[316] The buyer may pick up the handgun the day after the sale.[317]

As in prior California law, to carry a concealed handgun, a person needed a permit issued by the county sheriff. No permit was needed when handguns were "carried openly in a belt holster."[318]

Although the Revolver Association Act was written by people who were aiming to respect constitutional rights, not every provision in it should automatically be considered constitutional. For example, one provision of the Revolver Association Act enacted by California in 1923 is currently subject to a legal challenge: the mandate that handgun retailers may not display handguns where they "can readily be seen from outside."[319] Thus far, the U.S. District Court has determined that the display law is very likely unconstitutional based on current Supreme Court precedents about commercial speech; however, the court declined to issue a preliminary injunction, so as not to disturb the status quo.[320]

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[313] Except in a few matters such as voting rights or some types of government employment. One of the foundational cases of the Court's modern doctrine on the issue was *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (holding that California may not prohibit legal resident aliens from acquiring commercial fishing licenses).

The modern doctrine is different from the early twentieth century. In 1914, the Supreme Court ruled that states could ban long gun possession by aliens, because the gun ban helped to preserve game for the citizens. There was no Fourteenth Amendment violation because "[t]he prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense." Patsone v. Pennsylvania, 232 U.S. 138, 143 (1914). North Dakota did the opposite, by banning handguns for aliens, while imposing no restrictions on aliens' long guns. Sometimes, laws against firearms possession by legal aliens were ruled unconstitutional on the basis of the state constitutional right to arms provisions. *See* People v. Zerillo, 219 Mich. 635 (1922); People v. Nakamura, 62 P.2d 246 (Colo. 1936).

[314] § 10, 1923 N.D. Laws at 381–82.

[315] An act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person [. . .], ch. 339, § 2, 1923 Cal. Stat. 695, 695–96.

[316] § 9, 1923 Cal. Stat. at 699.

[317] §§ 10–11, 1923 Cal. Stat. at 701.

[318] § 5, 1923 Cal. Stat. at 697. There was a similar exemption for "knives which are carried openly in sheaths suspended from the waist of the wearer." *Id.*

[319] § 11, 1923 Cal. Stat. at 701.

[320] Order, Tracy Rifle & Pistol LLC. v. Harris, No. 14-02626 (E.D. Cal., July 16, 2015). The display ban is currently codified at CAL. PENAL CODE § 26820.

New Hampshire 1923. Following the Revolver Association Act, handgun dealers needed to obtain a license and keep records of sales. Within one week after a sale, a copy of the record of sale had to be sent to local officials.

A permit to purchase a handgun was required only if the buyer were a convicted felon or an unnaturalized alien.[321] New Hampshire did not follow California and North Dakota in prohibiting handgun possession by such persons entirely. There was no waiting period for handgun sales. For citizens who were not convicted felons, there was no requirement for prior authorization for handgun purchases.

Connecticut 1923. A police permit was required for retail handgun purchases.[322] All transfers of handguns to aliens by anyone were banned.[323]

Oregon 1925. The 1913 requirement for a permit to purchase a retail handgun was abolished. Instead, the new law affirmed that persons needed "no permit or license to purchase, own, possess or keep" a handgun in their residence or place of business. As the National Conference of Commissioners on Uniform State Laws pointed out, Oregon was rejecting its 1913 statute, which had been similar to New York's Sullivan Act; Oregon was replacing it with the Revolver Association Act.[324]

Handgun dealers were required to keep records of their sales, and to mail sales records to the municipal police department or the county clerk on the evening of the sale. The handgun could be delivered to the customer the next day.

"When neither party to the transaction holds a dealers' license, no person shall sell or otherwise transfer" a handgun to someone "who is not personally known to the vendor."[325] This was similar to North Dakota law.

Like North Dakota and California, Oregon outlawed handguns for aliens. Like California, Oregon specified that a concealed handgun carry permit was not needed for handguns "carried openly in a belt holster."[326] Since a holster does cover part of a firearm, the language made it clear that holsters were considered to be a means of open carry, not of concealed carry.

Indiana 1925. A person may not transfer a handgun "to a person he has reasonable cause to believe is not a citizen."[327] There was a one-day waiting period for retail handgun sales, and dealers had to keep records. The dealer

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[321] An Act to Control the Possession, Sale, and Use of Pistols and Revolvers, ch. 118, §§ 9–10, 1923 N.H. Laws 138, 139–40.

[322] An Act Concerning the Possession, Sale and Use of Pistols and Revolvers, ch. 252, § 7, 1923 Conn. Pub. Acts 3707, 3708–09.

[323] *Id.*

[324] *Third Report*, *supra* note 272, at 572; An Act to control the possession, sale and use of pistols and revolvers, to provide penalties, ch. 260, 1925 Or. Laws 468.

[325] § 10, 1925 Or. Laws at 473.

[326] § 5, 1925 Or. Laws at 469–70.

[327] An Act to regulate and control the possession, sale and use of pistols and revolvers in the State of Indiana, to provide penalties, and for other purposes, ch. 207, 1925 Ind. Acts 495, 497–98.

was required to transmit the record of sale to the clerk of the county circuit court within one week of the sale.

Indiana followed the North Dakota and Oregon language allowing private handgun sale or transfer only between people who personally knew each other.

Michigan 1925. Michigan partly followed the Revolver Association Act, but went considerably further. To begin with, the Michigan statute also applied to rifles or shotguns with a total length under thirty inches.[328] This was a predecessor of the National Firearms Act of 1934, which applies to very short rifles or shotguns, and not to the vast majority of rifles and shotguns.[329]

The Michigan Act was repealed entirely in 1927. The 1925 law was troubled from the start, due to an unusual provision: all persons currently in possession of handguns, short rifles, or short shotguns had to register them with local law enforcement.[330] The National Conference of Commissioners on Uniform State Laws called the Michigan registration provision "radical" and noted the failure of a similar law in Arkansas.[331] A 1926 issue of the *A.B.A. Journal* reported that "the registration feature had upon last information not yet been put into effect, because of technical difficulties."[332]

Michigan 1927. The 1927 repeal[333] appears somewhat cynical. In the replacement statute, the 1925 registration requirement was labeled as a "safety inspection." Current owners, as well as persons later "coming into possession" of handguns or short rifles/shotguns had to present the weapon to law enforcement, for a safety inspection on which records would be kept.[334]

For purchases, a person needed a license issued by local law enforcement. The license was valid for ten days. "Purchaser" was defined to include someone "who receives a pistol by purchase, gift, or loan."[335] The actions of the Michigan legislature in 1925 and 1927 may have been partly in response to the Michigan Supreme Court's 1922 decision *People v. Zerillo*: the court struck down a near-prohibitory licensing law against arms possession by non-citizens, as violating the State Constitution right to arms.[336] Perhaps the registration, inspections, and permits were attempts to find another means of controlling arms among the foreign-born.

The "safety inspection" requirement was later repealed.[337] The permit-to-purchase requirement was also eventually loosened, so that no permit was

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[328] Act no. 313, § 1, 1925 Mich. Pub. Acts 473, 473.
[329] National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).
[330] § 11, 1925 Mich. Pub. Acts 473, 475.
[331] *Third Report*, *supra* note 272, at 572.
[332] Imlay, *supra* note 70, at 768.
[333] § 17, 1927 Mich. Pub. Acts 887, 893 (1927).
[334] *Id.* § 8, at 891.
[335] *Id.* §§ 1–2, at 887–88.
[336] People v. Zerillo, 219 Mich. 635 (1922).
[337] S.B. 370, H.Bs. 4490 & 4491 (2008).

needed for persons who already had a concealed carry license.[338] Eventually, the permit-to-purchase requirement was eliminated for retail transactions; the modern statute still requires a permit to purchase for private transactions.[339]

Massachusetts 1926. Since 1922, handgun dealers had been required to keep records of sale and deliver them to the police once a week.[340] Starting in 1926, retail handgun purchasers needed a permit, except that persons with a concealed carry permit did not. A handgun could not be delivered on the day of sale, except to a person with a carry permit.[341] In 1927, the law was amended so that it also covered machine guns.[342]

Massachusetts law forbade the issuance of carry permits to aliens. This was later held to be unconstitutional, as a violation of the Equal Protection Clause.[343]

New Jersey 1927. Firearms dealers (not only handgun dealers) needed a license.[344] A retailer could sell handguns only to persons who had a permit to purchase, or who had a concealed carry permit. There was a seven-day waiting period.[345] For private sales of handguns, the purchaser also needed a permit.[346] The requirements for handguns also applied to long guns less than twenty-six inches long.[347]

In exempting persons with handgun carry permits, Massachusetts and New Jersey recognized that the issuance of a carry permit constituted a police determination that a person was suitable to possess a handgun. Accordingly, restrictions on that person's handgun acquisitions would be pointlessly burdensome.

Hawaii 1927. Although Hawaii adopted language from the UFA, Hawaii went much further. A license was required to possess or carry a handgun; people who already owned handguns and kept them at their home or place of business did not need to obtain a license.[348] The permit requirement

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[338] 2000 Mich. Pub. Acts 381.

[339] 2012 Mich. Pub. Acts 377.

[340] An Act relative to the sale, rental, leasing, and carrying of certain firearms, ch. 485, 1922 Mass. Acts 560 (1922); An Act relative to the sale, rental, leasing, and carrying of certain firearms, ch. 284, 1925 Mass. Acts 323 (1925).

[341] An Act regulating the sale, rental and leasing of certain firearms, and prohibiting loans of money thereon, ch. 395, § 1, 1926 Mass. Acts 485, 485–86 (1926).

[342] An Act relative to machine guns and other firearms, ch. 326, § 1, 1927 Mass. Acts 413, 413 (1927).

[343] Fletcher v. Haas, 851 F. Supp. 2d 287 (D. Mass. 2012).

[344] A Further Supplement to an Act entitled "An Act for the Punishment of Crimes" (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety eight, ch. 321, § 6, 1927 N.J. Laws 742, 744 (1927).
The bill's title was a reference of New Jersey's comprehensive 1898 recodification of its criminal law. The only firearms provision was that a person under fifteen could not use firearms, "except in the presence of his father or guardian." An Act for the punishment of crimes (Revision of 1898), ch. 235, § 95, 1898 N.J. Laws 794, 821 (1898).

[345] 1927 N.J. Laws at 744–45.

[346] *Id*. § 9, at 746.

[347] *Id.* § 11, at 748.

[348] Small Arms Act, ch. 206, § 51, 927 Laws of Haw. 209, 210–11.

encompassed "transfer by way of sale, gift, loan or otherwise."[349] Registration was required for all firearms and all ammunition.[350]

Why was this unusual law enacted? Hawaii was a territory, a formerly independent republic which had been annexed in 1898. The population was majority non-white. Under *The Insular Cases*, decided two decades previously, many constitutional protections did not apply in the islands (such as Hawaii and Puerto Rico) that the United States had acquired in the late 19th century; according to the Court, the Bill of Rights was only meant for the inhabitants of the contiguous mainland United States.[351] Although the D.C. Circuit in *Heller II* cited Hawaii laws in a litany of "longstanding" ones,[352] this may not have been appropriate, given that the Hawaiian government of the time was only partially constrained by the U.S. Constitution.

D. The 1930 Uniform Firearms Act

After the UFA was approved by the National Commissioners in 1926, the New York City police administration led the presentation of objections at the 1927 annual conference. So the National Commissioners withdrew the final adoption of the 1926 text and sent it back to committee.[353] After further study, the Commissioners made some revisions and adopted a final version in 1930.[354] The committee reported its "unanimous belief" that the UFA "should be confined entirely to the pistol."[355]

The broadest restriction on firearms transfers was to prohibited persons. "No person shall deliver a pistol" to someone under the age of 18, or to someone the deliverer "has reasonable cause to believe" has been convicted of a crime of violence, "or is a drug addict, an habitual drunkard, or of unsound mind."[356]

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[349] *Id.* § 9, at 211.

[350] *Id.* §§ 18–26, at 213–17.

[351] *See* Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903) (holding that Sixth Amendment requirement for unanimous jury not applicable in territory of Hawaii; only "fundamental" constitutional rights apply in the territories); De Lima v. Bidwell, 182 U.S. 1 (1901) (holding that Puerto Rican goods imported to the states are not subject to the tariff applicable to foreign imports); Dooley v. United States, 182 U.S. 222 (1901) (holding that goods transported from the states to Puerto Rico were not subject to tariff applicable to foreign imports to Puerto Rico); Downes v. Bidwell, 182 U.S. 244 (1901) (finding that in taxing imports from Puerto Rico to the states, Congress need not obey the constitutional requirement that taxes imposed by Congress be uniform throughout the United States).

[352] *Heller II*, 670 F.3d 1244, 1254 (D.C. Cir. 2011).

[353] Charles V. Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799, 800 (1930) (citing 1927 Nat'l Conf. of Commissioners 866–77).

[354] *Report of Committee on an Act to Regulate the Sale and Possession of Firearms: Third Draft*, 1930 ANNUAL CONF. OF COMM'RS ON UNIFORM STATE LAWS 530, 568–69 (1930) [hereinafter 1930 ANNUAL CONF.].

[355] *Id.* at 531.

[356] Uniform Firearms Act § 8, at 565 (1930). Of the persons listed above, only persons convicted of a crime of violence were forbidden to possess handguns. *Id.* § 4.

The rules for handgun sales stated: "No seller shall deliver a pistol to the purchaser thereof" without following certain conditions. This required a forty-eight-hour waiting period, a sales form, and sending the records within six hours to local law enforcement and the secretary of state.[357] As Karl T. Frederick explained, this gave local law enforcement time to stop the sale by telephoning the handgun dealer, if the purchaser were a prohibited person.[358] Although the language about the "seller" could be read to encompass private sales, that was not necessarily the intended interpretation. Frederick described the UFA as regulating sales by a "dealer."[359] None of the commentary from the National Commissioners addresses the issue of private sales. As discussed above, when adopting the UFA, North Dakota, Oregon, and Indiana did want to control private sales, and so they added language (not contained in the UFA) requiring that private handgun sales only take place between people who know each other.[360]

Separately, the UFA required that a "retailer dealer" be licensed.[361] In addition to the above rules on sales, retailer dealers were subject to certain controls on their business premises, such as not displaying handguns that are visible to the outside.[362]

According to the "Explanatory Statement," the Commissioners had again rejected "the comparatively rare provision of a license to purchase" and "extreme theories of regulation," such as "state-wide registration of pistols."[363] Although a handful of states had permit-to-purchase laws, "the rank and file of the states in this country are opposed to it."[364]

A new section was titled "Certain Transfers Forbidden." It forbade making "any loan secured by a mortgage, deposit, or pledge of a pistol; nor shall any person lend or give a pistol to another or otherwise deliver a pistol contrary to the provisions of this act."[365]

According to the National Commissioners' "Explanatory Statement," the section "prohibiting a loan of a pistol secured by any of the methods mentioned is intended primarily to prohibit dealing in pistols by pawnbrokers."[366] Pawnbrokers were viewed as too often being unscrupulous about receiving and providing stolen goods, or being otherwise indifferent to the legality of their transactions. By forbidding persons to "lend . . . give . . . or otherwise transfer . . . contrary to the provisions of this act," the UFA ensured that pawnbrokers could not deal in pistols, no matter how the transaction was structured.

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[357] *Id.* § 9, at 565.
[358] FREDERICK, *supra* 274, at 30.
[359] *Id.*
[360] *Id.*
[361] Uniform Firearms Act § 10, at 565 (1930).
[362] *Id.* § 11, at 565–66.
[363] *Id.* at 570.
[364] Imlay, *supra* note 353, at 800.
[365] Uniform Firearms Act § 12, at 566 (1930).
[366] *Id.* at 573.

While the language was "primarily" about pawnbrokers, it could have other applications. For example, another provision of the act imposed certain requirements on the "seller" of a handgun. A seller could not evade these requirements by claiming that he was just lending a handgun for an indefinite period, with the first three years' rent paid in advance.

The Everytown organization argues that the above provision covers every type of private transfer.[367] This seems to be an over-reading. It ignores the statutory language that it is unlawful to "lend . . . give . . . or otherwise deliver" a handgun when doing so is "contrary to the provisions of this act."

Some deliveries are necessarily lawful. For example, a package delivery service delivers a handgun from a repair store to a customer. The deliveryman made a "delivery." Common sense dictates that the deliveryman is not supposed to go through the entire process that would be mandatory if he were selling a handgun to someone.[368]

The statutory language "lend . . . give . . . or otherwise deliver . . . contrary to the provisions of this act" prevents circumvention of the other provisions of the Uniform Firearms Act. It does not impose a new law that people may not lend handguns to each other in the ordinary ways that they always have—such as friends and family borrowing a gun for hunting or target practice for several hours or days.

Requiring paperwork, mailing records to the police, and a forty-eight-hour wait (the rules for sales) for loans would be much more burdensome than requiring that all current handgun owners register their guns with the police. The National Commissioners thought that such registration was "extreme."[369] The Commissioners said that a license to purchase was "inconvenient."[370] There is no reason to suppose that the Commissioners adopted the extreme inconvenience of making every handgun transfer be treated like a sale.

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[367] Brief for Everytown for Gun Safety as Amicus Curiae Supporting Defendant-Appellee and Affirmance, at 12, *Colorado Outfitters Ass'n*, Nos. 14-1290, 14-1292 (10th Cir. Apr. 29, 2015).

[368] *Cf.* Strickland v. State, 72 S.E. 260 (Ga. 1911) (stating that a "narrow and literal" construction of a statute on unlicensed gun carrying would be incorrect: "a similar construction might make it impossible for the carrier to deliver them to the dealer, or the dealer to deliver them to the customer"). Similarly, the Texas statute against unlicensed carry did not apply to "momentary possession of a pistol." Davis v. State, 237 S.W. 925 (Tex. Crim. App. 1922). There are "numerous instances wherein the holding of a pistol in the hands and even firing it with no intent to carry it have been held not within the terms of the statute." *Id.* at 925 (citing nine Texas precedents); *see also* Rosebud v. States, 87 Tex. Crim. 267 (1920) (borrowing handgun from brother, and taking it thirty miles back to bailee's residence); State v. Underwood, 89 W.Va. 548 (1921) (same). *Davis*, *Rosebud*, and *Underwood* are cited by the National Commissioners as part of the legal background to the Uniform Firearms Act. *See* 1930 ANNUAL CONF., *supra* note 354, at 543, 544.

[369] *Id.* at 570.

[370] *Id.*

E. Through 1936

Several states during this period considered to what extent they would follow the UFA.

Pennsylvania 1931. The legislature followed the new UFA closely, except for a broader definition of what was covered. The UFA was for handguns (anything under twelve inches). The Pennsylvania statute used a special definition of "firearm" that was a pistol or revolver with a barrel less than twelve inches, a rifle with a barrel less than fifteen inches, or a shotgun with a barrel less than twenty-four inches.[371]

These latter two would soon be covered by the National Firearms Act of 1934. Federal registration was required, supposedly for the purpose of collecting the new federal tax of $5 per short gun. Short rifles and shotguns were defined as those having barrels less than eighteen inches.[372] The concern was that sawed-off shotguns were often misused by criminals; if sawed off, they were nearly as concealable and portable as a large handgun, and far more lethal.[373]

Texas 1931. Texas did not follow the UFA. Rather, to purchase a handgun, a person had to have been issued a "certificate of good character" from a justice of the peace or judge.[374] No one could "sell, rent, or lease" handguns to minors, or to a person in the "heat of passion."[375] The law was later declared void and unenforceable by an opinion of the Texas Attorney General.[376]

District of Columbia 1932. A congressional statute for the District partly followed the UFA for handguns, requiring the forty-eight-hour waiting period, with no need for police permission.[377] The purchaser had to de-

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[371] An Act Regulating and licensing the sale, transfer, and possession of certain firearms, no. 158, § 1, 1931 Pa. Laws 497, 491 (1931).

[372] Later reduced to sixteen inches for rifles.

[373] During the first half-century of the statute, there were no reported cases related to firearms loans. In a 1991 case in which a person had allegedly loaned a firearm to a criminal who shot a police officer, Pennsylvania's intermediate court of appeals held that the statute absolutely prohibits all handgun loans—even for persons who complied with all the procedures relevant to sales, such as registering the transaction with law enforcement. Commonwealth v. Corradino, 588 A.2d 936, 941 (Pa. Super. Ct. 1991). In 1995 the Pennsylvania legislature amended the statute to authorize loans of a "firearm" (a handgun or a short rifle or shotgun) if the parties have concealed carry permits, for safety training, and in various other situations. Act 1995-17, P.L. 1024, No. 17 (Spec. Sess. No. 1), § 8 (June 13, 1995) (codified at 18 PA. CONS. STAT. § 6115).

[374] Occupation Tax on Sale of Pistols, ch. 267, § 4, 1931 Tex. Gen. Laws 447, 447–48 (May 28, 1931).

[375] *Id.* at 447.

[376] Att'y Gen. Op. WW 917 (Aug. 23, 1960), http://texashistory.unt.edu/ark:/67531/metapth267529/m2/1/high_res_d/WW0917.pdf [http://perma.cc/E3F4-WPBC]. The opinion was based on a recent appellate opinion holding that another provision of the 1931 statute could not be enforced because the provision had not been expressed in the bill's title. Doucette v. Texas, 317 S.W.2d 200 (Tex. Crim. App. 1958). As the Attorney General explained, the same was true for the certificate of good character provision.

[377] 47 Stat. 650 (1932).

liver the sales record to the police; all other UFA states allowed it to be mailed.

Unlike in the UFA, there was a special definition for sales, which were said to include "letting on hire, giving, lending, borrowing, and otherwise transferring."

The D.C. law also applied to "machine guns," which were defined so as to cover mainly firearms that are not machine guns. A D.C. "machine gun" was any firearm that fired semi-automatically more than twelve shots without reloading.[378] This included a large number of ordinary rifles, then as now.

For a "machine gun, sawed-off shotgun, or blackjack," the sale could not be consummated until the seller had received permission from the police.[379]

Although the D.C. law was passed by Congress, it was not necessarily enacted with the Second Amendment in mind. The Second Amendment refers to "the security of a free State."[380] So does the Second Amendment only apply in the fifty states, and not in the District? The D.C. Attorney General made precisely this argument in *Heller*.[381] Although the argument found no support from the Supreme Court, in the D.C. Circuit, one of the three judges on the panel found it persuasive.[382] Harvard professor Laurence Tribe also argued that the Second Amendment does not apply in the national capitol.[383] More generally, congressional rule of the city, via the House and Senate Committees on the District of Columbia, was often criticized for being high-handed and semi-colonial. Although the District had enjoyed some self-government from 1820–71, as of the 1930s, District residents could not vote for any office, including for local positions such as school board directors.[384] So it was not surprising that when Congress passed national gun legislation—the National Firearms Act of 1934, and the Federal Firearms Act of 1938—the legislation included no restrictions on handguns or other semi-automatic firearms.[385]

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[378] *Id.*

[379] *Id.*

[380] U.S. CONST., amend. II.

[381] Brief of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[382] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller (Henderson, J., dissenting).

[383] Laurence H. Tribe, *Sanity and the Second Amendment*, WALL ST. J., Mar. 4, 2008, at A16.

[384] *See, e.g.*, Editorial, *D.C.—Last Colony*, WASH. POST, Feb. 7, 1970, at A14.

[385] The NFA set up a tax and registration system for machine guns, short rifles, short shotguns, silencers, and a few other items. National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236. The FFA required a license to engage in interstate firearms commerce, and forbade delivery of firearms to convicted felons. There was no requirement for government permission for the sale of any firearm, and no restriction on particular types of firearms. Federal Firearms Act of 1938, Pub. L. No. 785, 52 Stat. 1250.

South Dakota 1935. South Dakota closely followed the 1930 UFA.[386] Unlike Pennsylvania or D.C., South Dakota did not make the statute applicable to any long guns.

Washington 1935. This was nearly the same as the South Dakota law, also for handguns only.[387] In 1961, the statute was amended to add clarifying language before the section about handgun sales: "Sales by dealers shall be regulated as hereinafter provided."[388] This explanation ended any ambiguity about whether the statute applied to private sales.

Licensed dealers were exempted from the prohibition of using handguns to secure "a mortgage, deposit, or pledge . . . ."[389] The Washington 1935 statute had ambiguous language about handgun loans "contrary to the provisions of this act."[390] The language was removed in 1961, and replaced by clear language simply forbidding use of handguns as security for loans.[391]

Alabama 1936. This law was nearly identical to South Dakota's.[392]

F. Summary and Analysis

The above survey of state laws provides additional support for *Heller II*'s conclusion that de minimis handgun registration, accomplished by the dealer mailing a copy of a sales record to the government, qualifies as "longstanding."

Recordkeeping, waiting periods, permits to purchase, or similar controls for ordinary long guns are not longstanding. Only two statutes covered what we today would consider to be ordinary long guns: those of D.C. (1932, for semi-automatics) and North Carolina (1919, "so-called pump gun"). Neither of those statutes is still standing.

Three statutes covered short rifles and short shotguns: Michigan, New Jersey, and Pennsylvania (1925, 1927, and 1931, respectively). The National Firearms Act of 1934 adopted the idea that short rifles and short shotguns were subject to a specially restrictive system of regulation. Nothing in the history above supports the idea that purchase controls on long guns as a general class are longstanding. The same is true for non-sale loans of long guns.

For handguns, government permits to purchase were required by New York (1911), Oregon (1913, repealed 1925), North Carolina (1919), Missouri (1921, repealed 2007), Connecticut (1923), Michigan (1927, partially repealed by several steps in early twenty-first century), Hawaii (1927), New

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[386] Adopting Uniform Firearms Act, ch. 208, § 9, 1935 S.D. Sess. Laws 355, 356.
[387] Short Firearms, ch. 172, § 9, 1935 Wash. Sess. Laws 599, 601–02.
[388] Act of Mar. 16, 1961, ch. 124 § 7, 1961 Wash. Sess. Laws 1638, 1641.
[389] § 12, 1935 Wash. Sess. Laws at 603.
[390] *Id.*
[391] § 9, 1961 Wash. Sess. Laws at 1642.
[392] Act of Apr. 6, 1936, no. 82, 1936 Ala. Laws 51 (extra session). In 2015, Alabama law was amended to eliminate handgun registration. ALA. CODE § 13A-11-79 (2015).

Jersey (1927), and Texas (1931, later declared void). This amounts to six still-standing state laws that have been in effect for at least eighty-eight years.

North Dakota (1923), Oregon (1925), and Indiana (1925) did not adopt any permit-to-purchase system, but they did require that private sellers and buyers know each other personally.

For loans of handguns, a requirement for advance government permission appeared only in Missouri (1921, later repealed), Michigan (1927, later reformed), and in the Territory of Hawaii (1927). No provision anywhere required that loans could only be transacted via both parties going to a gun store.

The most repressive laws were usually enacted in places where the legislature could sincerely consider itself unconstrained by any right of citizens to keep and bear arms. The Second Amendment did not apply in Hawaii, and its application in the District of Columbia was at least questionable. As for the states, according to the 1886 Supreme Court decision in *Presser v. Illinois*, the Second Amendment did not directly apply to the states, and did not apply to the states via the Fourteenth Amendment's Privileges or Immunities Clause.[393] Although many state constitutions had a right to arms provision, there was no such provision, as of 1936, in New York or New Jersey.[394]

In retrospect, the UFA was successful at its primary objective: preventing the spread of New York-style permit-to-purchase laws. The UFA proposal for enhanced penalties for use of a firearm in a violent crime was adopted everywhere. The UFA model of statewide preemption of local firearms laws also proved popular. Today, the majority of states preempt all local gun controls; every state except Hawaii preempts some types of local controls.

The UFA placed no limits on open carrying of firearms, while the 1930 version set up a discretionary licensing system for concealed carry. The discretionary system did not work well in practice; carry permits were often given to political cronies, celebrities, and the like, but were denied to people in greatest need, such as crime witnesses who were receiving death threats. The modern movement towards objective licensing began with Washington State in 1961.[395] Today, the large majority of states have objective systems for concealed carry licensing.

The state laws based on the final, 1930 version of the UFA, are less than eighty-five years old, and are too recent to be "longstanding." The 1920s laws based on the Revolver Association Act are a closer case, but the better argument is that they are not "longstanding" either—especially for the provisions that have no nineteenth-century predecessors.

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[393] *See generally* Presser v. Illinois, 116 U.S. 252 (1886).

[394] Nor in California, although its laws for the period were not so aberrant as New York or New Jersey.

[395] § 6, 1961 Wash. Sess. Laws at 1640–41.

Justice Breyer's dissent in *Heller* criticized the majority's list of "longstanding" gun controls that were "presumptively constitutional," since none of them had colonial analogues.[396] The majority replied:

> Justice Breyer chides us . . . for not providing extensive historical justification for those regulations of the right that we describe as permissible . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than Reynolds v. United States, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.[397]

If we say that the UFA is "longstanding," the problem remains that the large majority of states in the 1920s and 1930s did not adopt the UFA, nor did they adopt the less-favored New York model. The typical state gun laws of the 1920s and 1930s were less restrictive than either the UFA or the New York model.

Supreme Court statements about legal history are not infallible. The "longstanding" approach is not needed to support laws against gun possession by convicted felons. Such a statute has been upheld in Missouri, where a recent state constitutional amendment required judicial strict scrutiny for nearly all forms of gun control.[398] The other items in the Supreme Court's list of permissible controls can also be tested under heightened scrutiny and would probably pass, especially if the particular statute in question were carefully tailored.

VII. Fixing the Problems

As described in Part III, the Bloomberg laws impose severe burdens on ordinary firearms activities. Many of these burdens fall on persons who are not privately selling firearms. The burdens fall on the sheriff's deputy who is returning a gun to a victim of an auto accident, on firearms safety instructors and their students, on museums, and on persons who loan firearms for a few moments or a few days to family members and friends. All of these problems could easily be avoided, if the objective of the Bloomberg laws were to require background checks on the private sale of firearms, rather than to damage lawful firearms activities.

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[396] District of Columbia v. Heller, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).
[397] *Id.* at 635.
[398] *See* State v. Merritt, No. SC 94096, 2015 WL 4929765 (Mo. Aug. 18, 2015).

A. Exempt Loans and Returns

Rather than applying only to the private sales of firearms, the Bloomberg laws apply to all "transfers," expansively defined to include loans and returns. The simplest solution would be to revise the wording of the laws so that they apply only to sales and other permanent dispositions.

The objection can be raised that a rule about temporary transfers is necessary to avoid sham transactions; e.g., "I will lease you this handgun for the next 30 years for $500." Addressing sham transactions does not require that a state criminalize letting a friend hold one's gun while you are both on your own property, nor does it require prohibiting loaning a hunting rifle to a friend for a week.

In Colorado, the Bloomberg proposal was amended to exempt all temporary transfers of less than seventy-two hours.[399] This at least helps with firearms safety classes. In California, persons who know each other may loan firearms for up to thirty days.[400] Further, Californians may loan hunting rifles and shotguns for the "duration of the hunting season for which the firearm is to be used."[401] To pass the Bloomberg law in Delaware, proponents allowed fourteen-day loans between persons who personally know each other.[402] These exemptions solve some but not all of the problems. The seventy-two-hour exemption is helpful for firearms safety classes, but not for stalking victims. As detailed in Part III, even a thirty-day exemption discourages the safe storage of firearms with family or friends when a person will be away from home for an extended period.

The Bloomberg requirement that the return of a loaned firearm must undergo the same process as the sale of a firearm makes no sense at all. It has no possible connection to avoiding sham transactions. It imposes a pointless burden on law-abiding gun owners and should be eliminated.

B. Exempt Persons Who Have Already Passed a Background Check

All fifty states and the District of Columbia issue permits to carry a concealed handgun. The permitting process is much more extensive than that involved for buying a firearm in a store. Both the retail purchase and the carry permit involve checks on databases that list persons who are prohibited from owning firearms. Typically, the carry permit system has additional requirements: biometric identity verification, such as fingerprint cards which are sent to the FBI and its state counterpart; a requirement that the applicant provide proof of safety training; and some discretion by the permitting agency to deny an applicant who may have a clean record, but who is known

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[399] COLO. REV. STATS. § 18-12-112(6)(h) (2013).
[400] CAL. PENAL CODE § 27880 (2014).
[401] CAL. PENAL CODE § 27950 (2012).
[402] DEL. CODE ANN. tit. 11, § 1448B(b)(2) (2013).

to be unsuitable to carry a handgun. Thus, twenty-two states exempt retail sales from background checks if the buyer has a carry permit.[403] As discussed above, exemptions for persons with carry permits are nearly as old as the idea of regulating handgun sales, with Massachusetts leading the way with its 1926 statute.[404]

One objection to exempting persons with carry permits is that the person might become a prohibited person during the term of the permit (which is usually three to five years). The objection ignores the fact that permitting agencies revoke the permits of persons who have become prohibited.[405]

C. Do Not Require Dealer Processing

To accomplish background checks, there is no need to require that participants in a private sale (or a loan and return) must travel to a gun store. First of all, law enforcement agencies conduct background checks all the time. Some or many law enforcement agencies would be willing to conduct such checks as a community service, or for a nominal fee to cover their costs. As long as law enforcement agencies were not required to keep extensive records and forms, these costs would likely be minimal.

More generally, law enforcement ought to be entirely exempted from the Bloomberg laws. Some law enforcement transfers of firearms, such as giving an agency firearm to an officer, involve recipients who have already passed background checks in order to be hired by law enforcement. Other transfers, such as to a technician at a regional forensic laboratory, may not involve recipients who have passed the background check to become a certified law enforcement officer, but there is very little risk that recipients employed by law enforcement agencies will use the gun to commit a crime.

As for returning lost, stolen, or temporary custody firearms to their rightful owners, law enforcement agencies should be allowed to use their discretion. If the agency prefers that the owner be background-checked before receiving her own gun back, the agency ought to be able to conduct the check itself—rather than having to send an officer and the owner to a gun store.

Nor is there any need for sales between ordinary private citizens to be consummated at a gun store. Using telephones or the Internet, private citizens ought to be able to contact the appropriate state agency directly for a

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[403] *Permanent Brady Permit Chart*, BUREAU OF ALCOHOL, TOBACCO, & FIREARMS OFFICE OF ENFORCEMENT PROGRAMS AND SERVS., https://www.atf.gov/content/firearms/firearms-industry/permanent-brady-permit-chart [http://perma.cc/FDV6-5RF3] (last updated June 10, 2014).

[404] *See supra* Part VI.C.

[405] *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013) (explaining the stringency of the Colorado process for issuance of the license, and the "state flagging system" to revoke licenses of persons who are arrested).

background check on a firearms buyer. Indeed, Massachusetts and Connecticut already have telephone/online systems for some private sales.[406]

Following the Supreme Court's example in *Heller*, courts have often relied on First Amendment analogies to decide Second Amendment cases. The most apt analogy for the Bloomberg laws comes from the Supreme Court's 2014 decision in *McCutcheon v. Federal Election Commission*.[407] The Court held that laws which capped how much a person could donate to federal election campaigns, by donating the maximum allowed amount to multiple candidates, violated the First Amendment.

Chief Justice Roberts's opinion for the Court explained:

> Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.
>
> A final point: It is worth keeping in mind that the base limits themselves are a prophylactic measure. As we have explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements." . . . The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit. . . .
>
> Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights.[408]

The *McCutcheon* analogy to the Bloomberg laws is straightforward: there is a government interest in preventing something (quid-pro-quo political corruption; violent gun crime). So there is a prophylactic measure (a cap

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[406] MASS. GEN. LAWS ch. 140, §§ 128A, 131E (2015) (making this process available for long guns, and for handguns if the purchaser has a carry permit); CONN. GEN. STAT. §§ 29-33(c), 29-36.l, 29-37a(e) (2013); *cf.* MASS. GEN. LAWS ch. 140 § 121 (2015) (specifying that "firearm" means handguns, but not long guns, other than short rifles and short shotguns).

Procedures can be adopted to avoid potential abuse of the system, such as a father calling in a background check on his daughter's boyfriend, by claiming to be selling the boyfriend a gun. Use of the system for anything other than a background check on gun sales should be a criminal offense, and should also be a civil offense, so that the subject of an improper check can recover statutory damages and attorney's fees.

[407] *See generally* McCutcheon v. Federal Election Comm'n, 134 S. Ct. 1434 (2014).

[408] *Id.* at 1458.

on donations to individual candidates; a prohibition on gun possession by certain persons). Then there is a second prophylaxis to enforce the first prophylaxis (mandatory reporting of campaign contributions; background checks on gun buyers). But by the time we get to prophylaxis upon prophylaxis upon prophylaxis (the aggregate limit on donations to multiple candidates), the law has become disproportionately burdensome and excessively distant from the government interest at hand. When a law requires that firearms loans, and the return of loaned firearms, may only take place at gun stores, and must be processed as if they were firearms purchases, the law is prophylaxis for its own sake, far distant from any legitimate government interest and far too burdensome on the ordinary exercise of Second Amendment rights.

VIII. Conclusion

As detailed in Part III, the Bloomberg laws severely burden the core of the Second Amendment right. "One cannot exercise the right to keep and bear arms without actually possessing a firearm."[409] Requiring two trips to a gun store for the loan and return of a firearm is a further burden.[410] In historical perspective—presented in Parts V and VI—the Bloomberg laws are extreme outliers in the tradition of American gun control; their historical analogues are the limitations on arms acquisitions by free blacks and by slaves, and these restrictions were abolished by the Fourteenth Amendment and related congressional statutes. For the reasons discussed in Part VII, the Bloomberg laws are unnecessarily oppressive. There is no reason to require that firearms loans of a few minutes or several days, between people who know each other, must be treated as if they were firearms sales. There is no reason to require that the return of a loaned firearm be treated like a firearms sale. There is no reason to require trips to a gun store and extensive paperwork for the ostensible purpose of conducting a background check on someone who, by being issued a concealed carry permit, has already passed a much more stringent background check than the store can offer. There is no reason to require anyone to travel to gun stores for background checks when such checks can be accomplished by telephone or the Internet.

The Bloomberg laws criminalize the common activities of the vast majority of law-abiding gun owners, including the large majority of them who will never sell a firearm in their lives. The most charitable explanation of this massive criminalization would be drafting ineptitude. When drafters are unfamiliar with an activity and dislike it, unintended collateral damage can

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[409] Silvester v. Harris, 41 F. Supp. 3d, 927, 962 (E.D. Cal. 2014); *see also* Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (regarding the right to acquire firearms).

[410] *Cf. Silvester*, 41 F. Supp. 3d at 944 ("The multiple trips required to complete a transaction can cause disruptions in work and personal schedules, extra fuel expense, and wear and tear on a car depending upon where a firearm or a firearms dealer is located in relation to the purchaser.").

be an expected result; if one hired Marxist-Leninists to draft banking regulations, some of the resulting harms to ordinary banking activities might not be intended. Yet even the 2015 version of the Bloomberg proposal, drafted for a generally "pro-gun" electorate, retains many of the problems that have been previously pointed out—most egregiously, making it nearly impossible to loan a firearm for lawful self-defense in an emergency.

In the *Heller* litigation, Mr. Bloomberg filed an amicus brief arguing the Second Amendment does not pertain to ordinary Americans.[411] Poughkeepsie, New York, Mayor John Tkazyik quit Mr. Bloomberg's organization because he said that he had realized that the organization's agenda was not keeping guns away from criminals, but "to promote confiscation of guns from law-abiding citizens."[412] Whatever Mr. Bloomberg's motives or objectives, examination of the Bloomberg laws supports the statement of the Washington State Law Enforcement Firearms Instructors Association that the laws "make criminals of all recreational shooters and most law enforcement officers." They "criminalize . . . good citizens" by transforming "casual, innocent, ordinary, non-criminal behavior into a misdemeanor or felony."[413]

The Bloomberg laws are not laws that simply require background checks for the private sale of firearms. Instead, the laws' unusual definition of a firearms "transfer" imposes severe restrictions on temporary firearms loans and the return of loaned firearms. These restrictions severely damage safety training, safe storage, law enforcement, museum displays, lawful self-defense, and other responsible firearms activities. Persons who favor background checks on private sales and who believe that there can be a harmonious synthesis of responsible gun rights and reasonable gun control should reject the Bloomberg system, and instead consider less restrictive, more effective alternatives.

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[411] Brief of Major American Cities, et al. as Amici Curiae Supporting Petitioners, at 1, 18 n.3, 19, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157195 at *1 ("Amici cities are: . . . New York City, New York."); *id.* at *18 ("[T]he Second Amendment was not intended to vest armed power in citizens acting outside of any governmental military effort [nor] to protect the right to possess guns for self defense and hunting."); *see also* Brief of the Commonwealth of Massachusetts, et al. as Amici Curiae Supporting Defendant-Appellee District of Columbia and Affirmance of the Decision Below at 2, Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041), 2006 WL 5846068, at *i ("Michael R. Bloomberg, Mayor, City of New York, by its Attorney Michael A. Cardozo, Corporation Counsel."); *id.* at *2 ("Appellants and their amici are simply wrong that the Second Amendment provides an individual right to bear arms.").

[412] John Tkazyik, *Valley View: Mayoral group's gun agenda is wrong*, POUGHKEEPSIE J., (Feb. 5, 2014), http://archive.poughkeepsiejournal.com/article/20140205/OPINION04/302050008/Valley-View-Mayoral-group-s-gun-agenda-wrong [http://perma.cc/WD4W-FE32] (noting that nearly fifty other mayors have left the Bloomberg organization Mayors Against Illegal Guns for similar reasons).

[413] Shave, *supra* note 126.