

# GUN OWNERS, GUN LEGISLATION, AND COMPROMISE

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## ABSTRACT

*An important human aspect of firearms ownership and regulation includes the reluctance of gun owners to consent to measures that, viewed in historical isolation, appear quite limited. But this opposition is understandable if placed in historical context. During the rise of the modern gun-control movement in the early 1970s, gun-control proponents publicly proclaimed their objective was a complete or nearly complete ban on private handgun ownership. And they made it clear that lesser measures were but a means to that end. While they subsequently focused on those lesser measures, they returned to the objective of a complete handgun ban whenever that target of opportunity presented itself. When, in the 1990s, a focus on handguns became politically inexpedient, they switched the focus to semiautomatic rifles—notwithstanding their earlier avowals that rifles were not their concern.*

*Gun owners thus learned by experience that their opponents were not interested in genuine compromise, where each party gives up something to the other. Their opponents had no stopping point, no exit strategy, no “enough is enough.” Under these conditions, real compromise is impossible. Any concession given would not be a stopping point, but rather a stepping stone to further restrictions.*

*This conclusion has been underscored by the experience of gun owners in states with restrictive gun legislation, where waiting periods for purchase started at one day but were later increased to three, five, and then ten days. And initially limited restrictions have expanded to fill over a thousand pages of annotated text. Many of these measures serve no discernible purpose except to make legal*

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*firearm ownership as difficult, expensive, and legally risky as possible.*

*Intelligent actions are usually founded upon experience. Gun owners' experiences have taught them one lesson: there is no true compromise to be had.*

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#### I. INTRODUCTION

Over the decades, the gun-control debate has narrowed to the point where the dispute is virtually symbolic. In the 1960s and 1970s, the debate was fueled by proposed national registration and permit requirements for firearm ownership. In the 1980s, the issues largely concerned permit systems and banning types of handguns. By the twenty-first century, the focus shifted to measures like requiring background checks for Internet sales and banning "assault rifles." But most online gun purchases were likely already subject to background checks,<sup>1</sup> and firearms manufacturers could simply remove a few minor parts to obviate assault-rifle bans.<sup>2</sup>

1. See 18 U.S.C.A. § 922 (Westlaw 2014) (requiring any interstate firearm sale to go through a licensed dealer who must run a background check).

2. After the 1994 federal assault-rifle ban, makers of AR-15-type rifles had only to omit the bayonet lug and the flash suppressor (a device fitted to the end of

As the debate narrowed and the issues clouded, assertions that gun owners<sup>3</sup> were unreasonably rejecting regulatory measures escalated. If such measures would do little good, they would also do minor harm to gun owners' interests.

This Article will present gun owners' perspectives and provide an explanation for such apparent unreasonableness. Over the last four decades, gun owners have had a set of shared experiences, which revealed that true compromise was never an option and that legislative conflicts were part of a larger culture war.

## II. GUN OWNERS' WARINESS OF COMPROMISE REFLECTS A SET OF SHARED EXPERIENCES

One of the more frequent criticisms of gun owners is that they refuse to accept reasonable, commonsense gun-control measures. But one response is that *commonsense* too often means that there is no data suggesting that a measure will have any effect on crime. For example, gun-control advocates propose closing the so-called gun-show loophole: most states do not require private sellers at gun shows to run a background check before selling a gun, unlike the federal requirement for licensed dealers. But there is proof that less than one percent of guns traced in connection with crime were purchased at gun shows.<sup>4</sup> And calls to ban "assault rifles"<sup>5</sup> continue,

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the barrel, which has no function with modern ammunition) to make compliant rifles; makers of AK-47-type arms had only to remove the bayonet lug to make compliant rifles. *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110102(a)–(b), 108 Stat. 1796, 1996–98 (1994) (repealed 2004) (making semi-automatic assault weapons illegal and defining a semi-automatic assault weapon as having a detachable magazine in addition to two of five characteristics specified by the statute). *But see id.* (defining a semi-automatic assault weapon as any firearm, or copy, known as an Avtomat Kalashnikov or Colt AR-15). In fact, Avtomat Kalashnikov refers to the fully automatic rifle, not the semiautomatic rifle, and Colt had long stopped calling its rifles AR-15s.

3. I use *gun owners* as a more neutral term than *gun activist*, *gun-rights supporter*, or their like.

4. CAROLINE WOLFE HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. NCJ 189369, FIREARM USE BY OFFENDERS 1 (rev. 2002), *available at* [www.bjs.gov/content/pub/pdf/fuo.pdf](http://www.bjs.gov/content/pub/pdf/fuo.pdf) (noting that surveys of over 11,000 prison inmates found that 0.6 to 0.7% of offenders purchased their gun at a gun show). To the extent that background checks are the issue, even this overstates the relevant situation because licensed firearms dealers comprise a large part of gun-show exhibitors and are required to run checks. *Id.* The surveys also found that 9–22% of the inmates were confined for a first offense, so they would have had no

despite several government-sponsored studies finding that the 1994 federal ban, and its 2004 expiration, had no discernible effect on crime.<sup>6</sup>

Still, gun owners and their organizations seem firm in opposing some measures that would do little harm to their interests. Understanding this opposition requires understanding gun owners' shared experiences. True compromise requires that both parties relinquish something. But there is no true compromise if one party's position is, "Give me this now, and I'll come back for more later." That party will simply use whatever is gained through the "compromise" as a foundation to seek more. Essentially, that is how American gun owners have perceived gun-control proponents' positions over the decades.

### III. GUN-CONTROL PROPONENTS PUBLICLY DECLARE THEIR LONG-TERM OBJECTIVES: BANS ON PRIVATE OWNERSHIP

One shared experience derives from the way gun-control proponents describe their agenda. Early on, when gun-control proponents understandably believed they could achieve broad regulatory control, they candidly avowed that the objective was a ban, or even confiscation, of large categories of arms.

By looking at the history of the Brady Campaign, the largest and ostensibly most centrist gun-control-proponent group, it becomes clear why gun owners are hesitant to trust the supposed compromise

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convictions at the time they purchased and thus could have bought from a dealer at a gun show. *Id.*

5. There is no sound distinction between a semi-automatic assault rifle and any other semi-automatic rifle. The 1994 federal ban, for example, applied to the Colt AR-15 but expressly exempted the Ruger Mini-14, although both rifles fired the same cartridge at the same rate and from magazines of identical size. See Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 44 (1997) (noting that "artificial distinctions" were made in 1989 and that drafters of the legislation lacked firearms knowledge).

6. See, e.g., JEFFREY A. ROTH & CHRISTOPHER S. KOPER, NAT'L INST. OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994-96, 10 (1999), available at <https://www.ncjrs.gov/pdffiles1/173405.pdf> ("The public safety benefits of the 1994 ban have not yet been demonstrated."); CHRISTOPHER S. KOPER ET AL., JERRY LEE CTR. FOR CRIMINOLOGY, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003 (2004), available at [http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=b531daeb-a954-41f8-a21c-268ccec4c4](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=b531daeb-a954-41f8-a21c-268ccec4c4).

offered by such “commonsense” groups. As the Brady Campaign changed its position over the years, it similarly changed its name.

At its inception, this gun-control-proponent group was known as the National Council to Control Handguns (NCCH). It was a small, little-known group at first. Former vice president of DuPont, Nelson “Pete” Shields<sup>7</sup> used his organizational and public-relations experience—which the NCCH’s founders lacked—to develop the group into the more prominent, centrist organization that it is known as today.<sup>8</sup> Although the NCCH initially supported federal legislation that would entirely ban handguns, the organization learned that accomplishing its goals required a different long-term strategy.

In 1976, the NCCH continued to advocate a total handgun ban instead of supporting a bill that would have merely imposed licensing requirements, registration, and increased penalties. Shields summarized the House Judiciary Committee’s criticism of his group’s efforts: “In effect they said . . . ‘Now, for the first time in history, we have a chance to pass *some* form of handgun control legislation, and you threaten the whole thing by holding out for a position that is unwinnable because it is politically unrealistic.’”<sup>9</sup>

Shields consoled himself with the hope that lesser measures would be a means to an end—stopping points on the way to a ban. Five months after backing off from the handgun ban, Shields candidly described the NCCH’s long-term game plan. He hoped that a modest approach to gun control in the present would lead to complete control in the future.

Our ultimate goal—total control of handguns in the United States—is going to take time. My estimate is from seven to ten years. The first problem is to slow down the increasing number of handguns sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of *all* handguns and *all* handgun ammunition—except for the military, policemen,

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7. See *Obituary of Nelson Shields*, N.Y. TIMES, Jan. 27, 1993, <http://www.nytimes.com/1993/01/27/obituaries/nelson-shields-3d-69-gun-control-advocate.html>; KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 157–58 (2006).

8. PETE SHIELDS WITH JOHN GREENYA, *GUNS DON’T DIE—PEOPLE DO* 22–23 (1981).

9. *Id.* at 103.

licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.<sup>10</sup>

In short, registration was a means to an end—that of being able to enforce a nearly complete ban. The NCCH considered this no secret; it reprinted and distributed Shields' interview in *The New Yorker* with the organization's logo.<sup>11</sup> One of its pamphlets described the battle against handguns, echoing Shields' sentiments about the way to achieve a total handgun ban. It mentioned that federal registration, banning sales of multiple guns to individuals, and careful screening of gun purchasers were only interim steps. "Ultimately, we want strict Federal laws that will effectively restrict the possession of handguns to only the police, the military, licensed security guards, licensed pistol clubs, and registered collectors. (This, we know, will take time. But we hope and believe it will come.)"<sup>12</sup> This extreme example came from the most centrist of the major advocates for gun control at the time; at least fellow gun-control group the National Coalition to Ban Handguns had a more transparent title.

But the goal of a near-total civilian handgun ban in seven to ten years soon appeared too optimistic, so the NCCH, while not entirely forsaking that eventual goal, felt it necessary at least to equivocate on the issue. In late 1978, the organization announced a name change to Handgun Control, Inc. (HCI). "Even more important than eliminating this confusion over name, we feel it is important that our name clearly reflect our goal—the control of the unfettered use of handguns."<sup>13</sup> The announcement also described new legislation, targeting the Saturday Night Special, and other tactics the organization supposed would ensure accountability and responsibility for handgun owners, manufacturers, and sellers.<sup>14</sup> Although the organization still preferred an outright ban as the ultimate control measure, it found this new approach more realistic.<sup>15</sup>

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10. Richard Harris, *A Reporter at Large*, THE NEW YORKER, July 26, 1976, at 53, 57–58.

11. THE NATIONAL COUNCIL TO CONTROL HANDGUNS, A REPORTER AT LARGE: HANDGUNS (July 26, 1976) (flyer distributed to members, on file with author).

12. THE NATIONAL COUNCIL TO CONTROL HANDGUNS, CONTROL HANDGUNS (n.d.) (pamphlet distributed to members, on file with author).

13. Letter from Nelson T. Shields, Chairman, Nat'l Council to Control Handguns, to members (Nov. 15, 1978) (on file with author).

14. *Id.*

15. *Id.*

The short-term agenda varied as targets of opportunity appeared. In January 1982, Shields described “the perfect bill” that would increase punishment for gun crime and “get rid of the Saturday [N]ight [S]pecial. Because of its concealability, its cheapness, it’s the weapon of the street crime. I’d have restrictive licensing rather than permissive licensing. You would have to prove a need. All we have to prove (now) is that we’re not baddies.”<sup>16</sup>

Four months later, Shields took the position that inexpensive Saturday Night Specials were not the problem but rather *all* small handguns must be the target. He reasoned that criminals were using expensive but equally small pistols, so the new emphasis should be size—in his own words, “Concealability is the key.”<sup>17</sup>

When broader targets of opportunity appeared, HCI quickly abandoned its supposed restraint and returned to supporting outright handgun bans. It endorsed and defended a handgun ban in Washington, D.C.,<sup>18</sup> which the Supreme Court struck down decades later.<sup>19</sup> And it supported a similar ban in Chicago,<sup>20</sup> which was likewise later struck down.<sup>21</sup> Further, it lent considerable aid to an unsuccessful 1982 California initiative that would have banned handgun sales.<sup>22</sup>

Observant gun owners learned their lesson: even ostensibly moderate and centrist groups would support handgun bans whenever they became politically feasible and seek whatever measures they could to that end. Gun-control proponents’ only limitation was their focus on handguns rather than on rifles or shotguns.

By the early 1990s, though, gun-control proponents faced the simple and depressing fact that, at the national level, they had little to show for nearly two decades of work. Indeed, they appeared to have

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16. Robert Benjamin, *Handgun Opponent: “Morton Grove Law Could Hurt,”* CHI. TRIB., Jan. 23, 1982, § 1, at 7.

17. *Uphill Effort Reopens to Register Handguns*, KAN. CITY TIMES, May 6, 1982, at A16.

18. Shields, *supra* note 13 (stating that HCI sided with a Washington, D.C. Court of Appeals decision to uphold the handgun ban); *NCCH Deals Blow to NRA in D.C. Effort*, 8 WASH. REP. 3, Jan.-Feb. 1977, at 1 (announcing that the NCCH helped reinstate D.C.’s handgun ban).

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

20. *National Rifle Association Fails to Pass Gun Decontrol Bill*, 7 WASH. REP. 1, Jan.-Feb. 1982, at 5 (discussing the similarity between Chicago and D.C.’s handgun bans).

21. *Chicago v. McDonald*, 561 U.S. 3025 (2010).

22. *Showdown in California*, 8 WASH. REP. 3, Sept.-Oct. 1982, at 2.

lost ground. Their sole victory of the 1980s involved requiring Glock, a gun manufacturer that makes handguns with polymer frames, to add barium to its polymer to make its firearms stand out on x-ray security scanners.<sup>23</sup> And they lost further ground when pro-gun forces influenced major revisions of the Gun Control Act of 1968 by inserting numerous protections for firearms owners.<sup>24</sup> These revisions effectively overruled no fewer than six Supreme Court cases and about one-third of the case law construing the Gun Control Act.<sup>25</sup>

Back in 1976, Shields predicted a national handgun ban in 7–10 years; but by 1990, 14 years later, there was not even national handgun registration. Handgun restriction became an organizational dead end.

Another gun-control-proponent group, the Violence Policy Center (VPC), suggested a new direction. Financed almost entirely by the nonprofit Joyce Foundation,<sup>26</sup> the VPC was free to stake out more extreme positions than other gun-control-proponent organizations. Its research papers included calls for reducing the number of licensed firearms dealers; restricting gun shows; banning sales of “sniper rifles,” which in most cases were actually civilian target and hunting rifles with telescope sights; and portraying shooting ranges as toxic waste producers due to lead bullets.<sup>27</sup>

In the late 1980s and early 1990s, the VPC urged gun-control proponents to shift their emphasis from handguns to “assault rifles.” It recognized that the public was no longer very concerned with handguns. Although the VPC noted that “handguns claim more than 20,000 lives a year,” there was a need to move on to a newer, more

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23. Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (1988).

24. *See* Firearms Owners Protection Act, Pub. L. No. 90-351, 82 Stat. 225 (1986) (changing many offenses from strict liability to a willful state of mind, restricting forfeitures and dealer license revocations, allowing recovery of attorneys’ fees in some cases, and protecting interstate travel with a firearm through jurisdictions with restrictive firearms laws).

25. *See* David T. Hardy, *The Firearm Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986).

26. *See* 2011 Grants, JOYCE FOUND. 2011 ANNUAL REPORT, <http://ar2011.joycefdn.org/grants/> (last visited July 28, 2014).

27. *See, e.g.*, VIOLENCE POL’Y CENTER, POISONOUS PASTIME: THE HEALTH RISKS OF SHOOTING RANGES AND LEAD TO CHILDREN, FAMILIES AND THE ENVIRONMENT (2001), available at <http://www.vpc.org/graphics/poison.pdf>.



engaging focus.<sup>28</sup> Assault weapons were the perfect target. “The weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.”<sup>29</sup> Further, by focusing on assault-rifle restrictions, the VPC could garner police organizations’ support. “If police continue to call for assault-weapons restrictions, and the NRA continues to fight such measures, the result can only be a further tarnishing of the NRA’s image in the eyes of the public, the police, and NRA members.”<sup>30</sup>

It was a rather cynical approach but had strategic merit. The fact that rifles *of all types* were involved in about 300 homicides a year—half the number of homicides committed with bare hands and feet—was beside the point.<sup>31</sup> The VPC wanted a target of opportunity, not necessarily a focus that would measurably impact crime.

The major gun-control organizations bought the idea, to the point of yet again changing their names—this time to replace *handgun* with *gun*. Thus *Handgun* Control, Inc. became the Brady Center to Prevent *Gun* Violence. The National Coalition to Ban *Handguns* became the Coalition To Stop *Gun* Violence. And new organizations followed suit as they emerged, such as Mayors Against Illegal *Guns* and Americans for *Gun* Safety.

The Brady Campaign’s “scorecard” for evaluating state firearms laws is another example that shows how gun-control-proponent groups began shifting their focus from handguns to firearms generally.<sup>32</sup> A state gets a higher score for stronger gun-control laws, and that score is most often reduced when state laws are limited to handguns. For example, a law requiring background checks on

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28. VIOLENCE POL’Y CENTER, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988), available at <http://www.vpc.org/studies/awaconc.htm>.

29. *Id.*

30. *Id.*

31. *Crime in the United States 2012, Expanded Homicide Data Table 8*, FBI, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2008-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls) (last visited July 28, 2014) (stating that there were 322 homicides by rifle and 678 homicides by personal weapon, including hands and feet).

32. *2013 State Scorecard: Why Gun Laws Matter*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE 1, 3 (2013), available at <http://bradycampaign.org/sites/default/files/2013-scorecard.pdf>.

private firearm sales would win 11 points—reduced to 6 if it covers only select firearms.<sup>33</sup> Requiring a centralized database on gun sales earns 6 points—cut to 2 if it only applies to handguns.<sup>34</sup> And scores for firearm registration, prohibiting open carry, and imposing waiting periods are halved if the requirements are applied to only handguns.<sup>35</sup>

This change underscored a lesson gun owners learned years before. Their opponents would go for any target of opportunity (e.g., if handgun restrictions fail, try to restrict rifles) and use that as a foundation to take more in the future. Any “reasonable compromise” would simply be a first step in a long campaign to make firearm ownership as difficult, expensive, and legally risky as possible.

#### IV. GUN OWNERS’ EXPERIENCE WITH EVER-EXPANDING LEGAL RESTRICTIONS

Gun owners also have a shared experience dealing with legal restrictions that start out modest but rapidly expand to impose considerable, and often utterly irrational, burdens. This experience can be exemplified in three states’ legislation: California, New Jersey, and New York.

##### A. California

California began with limited legislation. A 1917 statute required licenses for concealed carry of arms and required handgun dealers to report sales to the police.<sup>36</sup> First offenses were misdemeanors.<sup>37</sup> A 1923 statute expressly recognized that carrying in a belt holster was not restricted, arranged for licensing of handgun dealers, and imposed a one-day waiting period for handgun sales.<sup>38</sup> Possession, sale, and carrying of long arms were unrestricted. A one-day waiting period was meant to impede impulsive crimes of passion, but in 1955 the legislature increased it to three days, in 1965 to five days, and in 1975 to ten days.<sup>39</sup>

Open carry of a firearm was initially unrestricted, following the predominant Western view that a person carrying openly, where all

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33. *Id.* at 9.

34. *Id.*

35. *Id.* at 10.

36. 1915 Cal. Stat. 651, 652 (Supp. 1917).

37. *Id.*

38. 1923 Cal. Stat. 664, 666, 668.

39. CAL. PENAL CODE § 27540(a) (Westlaw 2014).

including police could see it, was unlikely to be planning a crime. Then in 1967, the Black Panthers demonstrated with rifles outside the State Capitol.<sup>40</sup> The legislature responded by making open carrying of loaded guns a felony.<sup>41</sup> And in 2011, open carrying of *unloaded* handguns was forbidden in incorporated areas.<sup>42</sup> The mere sight of an empty handgun is apparently too much for some Californians to tolerate.

In 2001, dealers were forbidden to sell handguns that were not approved by the government. This approval depended on rigorous laboratory testing paid for by the gun manufacturer.<sup>43</sup> The requirement supposedly ensured that the firearms were safe. But it had nothing to do with safety; the statute exempted guns being purchased by law-enforcement officers and state prosecutors.<sup>44</sup> So it was simply one more burden and expense for private gun owners. And in 2014, a requirement that handguns microstamp fired cartridge cases became effective, causing two of the three largest handgun manufacturers to leave the California market.<sup>45</sup>

Along the way, the state banned “assault weapons,” magazines holding more than ten rounds, and private gun sales that didn’t go through dealers.<sup>46</sup> In 1999, the legislature enacted “one gun a month”<sup>47</sup> for no discernible reason. “One gun a month” bills were meant to hinder interstate gun-running—but why would a gun runner pick the most tightly regulated state in the West as his source?

Today, the weapons regulation portion of the California Penal Code spans over 1,050 pages with annotations—a California attorney has published a 273-page book for the guidance of California gun

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40. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 244–45 (2011).

41. CAL. PENAL CODE § 25850(a)–(c) (Westlaw 2014).

42. CAL. PENAL CODE § 26350(a) (Westlaw 2014). Most populous California counties are incorporated. See CAL. STATE DATA CTR. DEMOGRAPHIC RESEARCH UNIT, *HISTORICAL CENSUS POPULATIONS OF COUNTIES AND INCORPORATED CITIES IN CALIFORNIA, 1850–2010* (2013), available at [http://www.dof.ca.gov/research/demographic/state\\_census\\_data\\_center/historical\\_census\\_1850-2010/view.php](http://www.dof.ca.gov/research/demographic/state_census_data_center/historical_census_1850-2010/view.php).

43. CAL. PENAL CODE § 32000 (Westlaw 2014).

44. CAL. PENAL CODE § 32000(b)(4) (Westlaw 2014).

45. See Dave Workman, *Gun Control Initiative Qualifies; “Revolt” Against Cal Microstamping*, EXAMINER (Jan. 23, 2014) <http://www.examiner.com/article/gun-control-initiative-qualifies-revolt-against-cal-microstamping>.

46. CAL. PENAL CODE § 27545 (Westlaw 2014).

47. CAL. PENAL CODE § 27540(f) (Westlaw 2014).

owners.<sup>48</sup> Yet more and more gun control measures are still pending in the legislature.

### B. *New Jersey*

New Jersey requires a license to own guns plus a separate permit for each handgun.<sup>49</sup> Carrying is generally forbidden,<sup>50</sup> and magazines are limited to 15 rounds.<sup>51</sup>

Although most gun owners would not consider this a modest starting point, the legislature apparently thought these were deficient restrictions. In 2013, the legislature passed 22 more gun restrictions. Some examples include reducing magazine size to ten rounds, increasing the punishment for failing to report a stolen firearm, and requiring background checks for private firearm sales (even though the state already had a requirement that gun owners must secure a permit to own, which was issued after a background check).<sup>52</sup>

And although it was ultimately vetoed, the legislature passed a bill that would have confiscated .50-caliber rifles, none of which have been used or are likely to be used in a crime.<sup>53</sup> Gun owners could hardly be surprised to hear three legislators with an embarrassing hot-mic problem after a gun-bill hearing, in which someone proclaimed, “We needed a bill that was going to confiscate, confiscate, confiscate.”<sup>54</sup>

### C. *New York*

For decades, New York has been considered to have the strictest gun laws in the country, including requiring pistol-possession

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48. See C.D. MICHEL, CALIFORNIA GUN LAWS STATE AND FEDERAL FIREARM REGULATIONS (1st ed. 2012).

49. N.J. STAT. ANN. § 2C:58-3 (Westlaw 2014).

50. See N.J. ADMIN. CODE § 13:54-2.4 (2014) (placing an extremely heavy burden on applicants that wish to obtain a permit to carry a handgun).

51. N.J. STAT. ANN. §§ 2C:39-1, 3 (Westlaw 2014).

52. Robert Farago, *BREAKING: New Jersey House Passes 22 Gun Control Bills*, TRUTHABOUTGUNS.COM (Feb. 22, 2013), <http://www.thetruthaboutguns.com/2013/02/robert-farago/breaking-new-jersey-house-passes-22-gun-control-bills/>.

53. David Jones, *New Jersey Governor Vetoes Proposed Ban on .50 Caliber Rifles*, REUTERS (Aug. 17, 2013, 12:17 AM), <http://www.reuters.com/article/2013/08/17/us-usa-guns-newjersey-idUSBRE97G01M20130817>.

54. Darryl R. Isherwood, *Senators Caught on Tape: “Confiscate, Confiscate, Confiscate,”* POLITICKER NJ (May 10, 2013, 4:27 PM), [http://www.politickernj.com/back\\_room/confiscate-confiscate-confiscate](http://www.politickernj.com/back_room/confiscate-confiscate-confiscate).

permits, issued in the sole discretion of police, with application fees as high as \$340;<sup>55</sup> carry permits, limited in some jurisdictions to government officials and celebrities; and a ten-round-magazine limit.<sup>56</sup> In 2013, the New York Legislature reduced the allowed magazine capacity to seven rounds (existing ten-round magazines could be kept, but only if loaded with no more than seven rounds),<sup>57</sup> required background checks to buy ammunition (at a charge of ten dollars per purchase), and greatly broadened its “assault-rifle” ban.<sup>58</sup> Its Attorney General described this as a “modest first step.”<sup>59</sup> More stringent still, New York City recently mailed about 500 notices to registered owners of such firearms, instructing, “Immediately surrender your [r]ifle and/or [s]hotgun to your local police precinct . . . .”<sup>60</sup>

#### V. “REASONABLE” RESTRICTIONS BECOME EVER-GROWING RESTRICTIONS

Gun owners have, in short, learned to distrust calls for compromise or “reasonable” restrictions. Part of this distrust stems directly from the gun-control proponents’ avowed purposes and part from gun owners’ shared experience, in which their opponents use every successful restriction as a building block for the next restriction. For gun-control proponents, there is simply never enough. Again, the Brady Campaign’s scorecard for gun restrictions is demonstrative. On a scale of 1–100, California (the highest-scoring state) got only 75, New Jersey only 68, and New York only 65.<sup>61</sup> The organization obviously considers the most restrictive states in the nation to fall far short of its goals. To approach the Brady Campaign’s goals, a state must, for example, prohibit open carry of all firearms, bar guns from state parks, require a permit to purchase ammunition,

55. N.Y. PENAL LAW § 400.00 (McKinney 2013).

56. N.Y. PENAL LAW §§ 265.02(8), 265.36 (McKinney 2013).

57. N.Y. PENAL LAW § 265.02(8) (McKinney 2013).

58. See NYSAFE, <http://www.governor.ny.gov/nysafeact/gun-reform> (last visited July 28, 2014).

59. *NY AG Calls Gun Efforts a Good First Step*, NEWSLOOK (Apr. 11, 2013), <http://www.newslook.com/videos/561311-ny-ag-calls-gun-efforts-a-good-first-step>.

60. Edmund DeMarche, *NYPD Cracks Down on Long Guns that Hold More than Five Rounds*, FOX NEWS (Dec. 5, 2013), <http://www.foxnews.com/us/2013/12/05/nypd-targets-owners-multi-clip-shotguns-rifles/>.

61. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *supra* note 32, at 8.

and require technology that allows only the owner or other authorized user to fire the gun—a technology that does not exist.<sup>62</sup> When this is the obvious goal of gun-control proponents’ “compromise,” it is not surprising that gun owners refuse to accept even reasonable restrictions.

## VI. GUN CONTROL AS A CULTURE WAR

Over a century ago, Otto von Bismarck termed his conflict with the Roman Catholic Church a *Kulturkampf*, or Culture War.<sup>63</sup> The term is aptly applied here.<sup>64</sup> Nearly 40 years ago, Barry Bruce-Briggs perceptively wrote:

[U]nderlying the gun control struggle is a fundamental division in our nation. The intensity of passion on this issue suggests to me that we are experiencing a sort of low-grade war going on between two alternative views of what America is and ought to be. On the one side there are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization. On the other side is a group of people who do not tend to be especially articulate or literate, and whose worldview is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are “conservative” in the sense that they cling to American’s unique premodern tradition – a nonfeudal society with a sort of medieval liberty writ large for every man . . .

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62. *Id.* at 11.

63. KIMBERLY COWELL-MEYERS, RELIGION AND POLITICS IN THE NINETEENTH CENTURY: THE PARTY FAITHFUL IN IRELAND AND GERMANY 45–46 (2002) (noting that Bismarck was not particularly religious; he just found the issue politically useful because it divided and distracted Germany’s parliament, leaving it unable to interfere with his ministry).

64. See LEE NISBET, THE GUN CONTROL DEBATE 23 (2d ed. 2001) (showing that scholars already view the gun-control issue as a *Kulturkampf*).

They ask, because they do not understand the other side, “Why do these people want to disarm us?” They consider themselves no threat to anyone; they are not criminals, not revolutionaries. But slowly, as they become politicized, they find an analysis that fits the phenomenon they experience: Someone fears their having guns, someone is afraid of their defending their families, property, and liberty.<sup>65</sup>

The evidence of the culture war is sometimes obvious. For example, one generally hostile appraisal of the gun culture sees it as a “pariah group,” “paternal and anachronistic,” comparable to “cock-fighters and Neoconfederates.”<sup>66</sup> Its members “venerate more or less uncritically elders of the past,” “come from patriarchal families,” and may find guns “a way for an impotent, self-doubting individual to reaffirm his masculinity.”<sup>67</sup> This is how one who sees himself as elite might describe his social and intellectual inferiors: antiquated, incapable of critical thinking, and given to (well-deserved) self-doubt.<sup>68</sup>

Conversely, during the 2004 Presidential campaign, one National Rifle Association (NRA) political ad featured a be-ribboned French poodle, symbolizing John Kerry, captioned, “That Dog Won’t Hunt.”<sup>69</sup> It reflected how a member of the “bedrock” would perceive a member of the elite—effete, useless, and un-American.<sup>70</sup>

The two sides’ internal functions illustrate this conflict. In 2013, the Brady Campaign held a gala at Cipriani, an upscale venue in the heart of Manhattan, and tickets started at \$1,000 for an individual—for \$100,000, a corporation could get a prominent table featuring

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65. Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37 (1976), reprinted in THE GUN CONTROL DEBATE 55, *supra* note 64, at 73–74 (predicting that gun owners would become politicized).

66. FRANCIS FREDERICK HAWLEY, *Gun Culture*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND THE LAW 341, 343 (Gregg Lee Carter ed., 2d ed. 2012).

67. *Id.* at 343–45.

68. *See id.* at 343–46.

69. *NRA Ad Portrays Kerry as Poodle*, BOS. GLOBE, Sept. 30, 2004, [http://www.boston.com/news/politics/president/articles/2004/09/30/nra\\_ad\\_portrays\\_kerry\\_as\\_poodle/](http://www.boston.com/news/politics/president/articles/2004/09/30/nra_ad_portrays_kerry_as_poodle/).

70. *See* HAWLEY, *supra* note 66, at 343–46.

media acknowledgement.<sup>71</sup> Meanwhile, the NRA held its annual meeting in the George R. Brown Convention Center in Houston, which was free to members and servicemen, drawing 86,000 attendees.<sup>72</sup>

Another example stems from the way the two sides finance their operations. The NRA draws 69% of its funding from its members paying their \$35 annual dues.<sup>73</sup> The Brady Campaign, in contrast, draws 97% from grants and contributions.<sup>74</sup> The VPC is 100% financed by grants,<sup>75</sup> the majority coming from the Joyce Foundation, which in 2011 funded it with half a million dollars while giving \$650,000 to Mayors Against Illegal Guns.<sup>76</sup> One side draws its resources from its members, the other from foundations.

Gun-control proponents' tools likewise reflect an elite's disdain for the masses. One of their most important allies is the national mass media, which tends to see itself as a subclass of the elite.

Professor Brian Anse Patrick attempted to quantify media treatment of the NRA and its chief opponent, the Brady Campaign. He began by devising objective standards for measuring bias. For example, are spokespeople for an organization quoted rather than paraphrased, and if quoted, at what length?<sup>77</sup> Is the spokesman

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71. 2013 Gala Invitation, BRADY CENTER TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/sites/default/files/Brady-Evite.pdf> (last visited July 28, 2014).

72. Jason Howerton, *Guess How Many People Attended This Year's Annual NRA Convention (Hint: It's a New Record)*, BLAZE (May 6, 2013, 6:15 PM), <http://www.theblaze.com/stories/2013/05/06/annual-nra-convention-shatters-previous-attendance-record/>.

73. *National Rifle Association Of America in Fairfax, Virginia (VA)*, FAQS.ORG, <http://www.faqs.org/tax-exempt/VA/National-Rifle-Association-Of-America.html#b> (last visited July 28, 2014); *Official NRA Membership Application*, NRAMEMBERSHIP, <https://membership.nrahq.org/forms/signup.asp> (last visited July 28, 2014).

74. *Brady Campaign To Prevent Gun Violence in Washington, District of Columbia (DC)*, FAQS.ORG, <http://www.faqs.org/tax-exempt/DC/Brady-Campaign-To-Prevent-Gun-Violence.html#b> (last visited July 28, 2014).

75. *See Violence Policy Center in Washington, District of Columbia*, NONPROFITFACTS.COM, <http://www.nonprofitfacts.com/DC/Violency-Policy-Center.html> (last visited July 28, 2014).

76. *2011 Grants*, *supra* note 26.

77. BRIAN ANSE PATRICK, *THE NATIONAL RIFLE ASSOCIATION AND THE MEDIA: THE MOTIVATING FORCE OF NEGATIVE COVERAGE* 67–70 (Arktos Media Ltd., 2d ed. 2013).



correctly identified (e.g., chairman vs. chief lobbyist)?<sup>78</sup> Is the headline based on a pun or otherwise derisive?<sup>79</sup> And how often do articles claim that an organization is growing versus dwindling?<sup>80</sup>

He chose five interest groups and analyzed their treatment in five elite newspapers. He found that, on scales where higher numbers meant more favorable coverage, the NRA not only always scored lowest, but that it generally came in at one-third the score of its major opponent.<sup>81</sup>

So on the whole, NRA is systematically marginalized in the elite newspapers that set the national standards. As the comparisons show, it is an object of discourse rather than a participant; it is shown in opposition to important cultural values such as Democracy and Science; it is derogatorily labeled and mocked; its representatives are not accorded the same level of titular dignity as the representatives of other organizations; and when its representatives or positions are quoted, they tend to be qualified as tentative.<sup>82</sup>

Importantly, Professor Patrick also documented the pushback in this culture war: NRA membership rose and fell in direct proportion to negative media coverage.<sup>83</sup> More media attacks led more people to join the organization under attack. So the media became a setting for offensive and counter-offensive moves in the firearms culture war.

## VII. CONCLUSION

Gun owners have been seen as stubborn and unyielding, even when the proposed gun-control measures seem to have little effect on their interests, or are essentially symbolic. But this apparent stubbornness is actually reasonable once their shared experiences are understood. For nearly four decades, anything that gun owners yielded in a supposed compromise was used as a bridgehead to attempt to take more. They have heard opponents describe their purpose to eliminate handgun ownership, with any lesser measures

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78. *Id.* at 78–79.

79. *Id.* at 86–89.

80. *Id.* at 100–03.

81. *Id.* at 68.

82. *Id.* at 103.

83. *Id.* at 149.

simply a means to that end. And they have seen their issue evolve into a culture war between the elite and the non-elite, or the effete and bedrock citizens. Under these conditions, opposition even to modest restrictions is both logical and natural.