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## Articles

### INCREMENTALISM, COMPREHENSIVE RATIONALITY, AND THE FUTURE OF GUN CONTROL

ALLEN ROSTRON\*

#### I. INTRODUCTION

“What good is half an eye?” That question has become a familiar refrain in the creation/evolution debate.<sup>1</sup> Proponents of “intelligent design” and other creationist theories contend that certain complex structures, such as eyes, could not have emerged gradually through evolution because they contain many parts that must work together to accomplish their function.<sup>2</sup> If not fully assembled, they do not work at all. Half an eye thus provides no survival advantage, and therefore the trait could not have proliferated and improved through natural selection. Eyes must then have been created as complete units, in one fell swoop, rather than through a gradual step-by-step process.

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1. *E.g.*, Chet K. W. Pager, *The Establishment of Evolution: Public Courts and Public Classrooms*, 81 TUL. L. REV. 17, 48–49 (2006) (noting that Charles Darwin raised the question as a possible critique of his theory of evolution).

2. *E.g.*, MICHAEL J. BEHE, *DARWIN'S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION* 15–17 (1996) (contending that gradual development of the eye was impossible because of its sophisticated, interdependent features).

Others hotly dispute those assertions. Evolutionists insist that half an eye could be very valuable.<sup>3</sup> They describe how eyes could have evolved gradually, starting from a crude cluster of a few photosensitive cells capable of distinguishing light from dark, with each small, subsequent change providing a slight improvement in perception and a corresponding selective advantage.<sup>4</sup>

This conflict about what can be accomplished through a series of many small, incremental changes, versus a single comprehensive plan, has close parallels in the realm of policymaking. Decision and organization theorists have described two basic models of the process by which creation of public policy may proceed. Some urge that policy should be the product of comprehensive, rational analysis and design. Policymakers should identify objectives, imagine all possible means of pursuing those goals, consider the effectiveness of each alternative approach, and then adopt the set of policies that will produce the best results. Others contend that policymaking should be a more evolutionary process, with policy emerging gradually in small, incremental steps through a continual cycle of experimentation, reaction, and adjustment.

This Article examines the issue of gun control through the lens of the “comprehensive rationality” and “incrementalism” models of policymaking. Fierce debate surrounds gun control in the United States, making it not only a major dividing issue in legislative arenas and political races but also a key element in a wider cultural divide.<sup>5</sup> The nation has been locked for years in a bitter, dismal stalemate on this issue, with no one seeming to be happy with the status quo, but little significant change being made in any direction.<sup>6</sup>

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3. See John Rennie, *15 Answers to Creationist Nonsense*, SCI. AM., July 2002, at 78 (noting that Darwin believed “even ‘incomplete’ eyes might confer benefits”).

4. See, e.g., Dan-E. Nilsson & Susanne Pelger, *A Pessimistic Estimate of the Time Required for an Eye to Evolve*, 256 PROC.: BIOLOGICAL SCI. 53, 53 (1994) (explaining that eyes could have evolved from preexisting tissues in a few hundred thousand generations). Charles Darwin himself anticipated the “half an eye” debate and concluded that eyes could have evolved through natural selection. CHARLES DARWIN, *THE ORIGIN OF SPECIES* 190 (Charles W. Eliot ed., P.F. Collier & Son 1909) (1859).

5. See, e.g., Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1323 (2003) (discussing the conflicting cultural values at stake in the gun control debate); Matt Bai, *Nascar-Lovin*, N.Y. TIMES, Sept. 15, 2002, § 6 (Magazine), at 94 (noting the political importance of the NRA and gun control policy); William Safire, *Guns, God and Gays*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 20 (describing political candidates’ polarizing, tactical use of the gun control issue).

6. See, e.g., James P. Pinkerton, *America’s Violence Can Hurt Both Parties*, NEWSDAY (New York), Oct. 9, 2002, at A45 (lamenting that gun control is a “problem that no politician, or even pundit, seems able to solve,” and that a stalemate exists between “anti-gun-control

This Article argues that incremental policymaking has been one of the major impediments to progress toward more effective regulation of guns. This country's gun laws are an often incoherent patchwork of provisions. Legislators pile new restrictions atop old ones, often in response to particular tragedies or narrow concerns, instead of crafting bills to achieve an optimal approach to the entire problem. These laws contain unjustifiable gaps because policymakers draw odd lines between different types of guns, between licensed gun dealers and unlicensed individuals, between foreign and domestic sources of guns, and between state and federal government responsibilities. Gun control has been handled in a crudely instrumentalist manner, but it is an issue with a special need for a far more comprehensive approach.

The limited effectiveness of the incrementalist approach to gun control issues can be seen in three of the most controversial episodes relating to gun policymaking in recent years: the uproar over police seizing citizens' guns in the New Orleans area in the aftermath of Hurricane Katrina,<sup>7</sup> litigation about whether several portions of the District of Columbia's strict gun laws violate the U.S. Constitution's Second Amendment,<sup>8</sup> and the mass shooting at the Virginia Tech campus.<sup>9</sup> Each vividly demonstrates the problems created by incrementalist approaches to gun control policy. Each involved legislators banning or heavily restricting guns in a special zone. In a nation awash with millions of guns subject to inadequate controls, the flow of weapons from other areas substantially undermines these efforts, whether the "gun-free zone" is a flood-ravaged region, the nation's capital city, or a college campus. Meanwhile, reasonable precautions such as background-check requirements are undercut because legislators do not apply them broadly and consistently. The ease with which the Virginia Tech shooter obtained a gun, despite the fact that a judge had previously declared him mentally ill and ordered treatment, is a tragic testament to the insufficiency of the scattershot nature of existing law.<sup>10</sup>

Political science and other social science literature has closely examined the "incrementalism" and "comprehensive rationality" models of policymaking over the past several decades,<sup>11</sup> but legal scholars dis-

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Republicans [who] hold sway in their 'red states,' while pro-gun-control Democrats rule in 'blue states'").

7. See *infra* Part II.A.

8. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir.), *cert. granted sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007); see *infra* Part II.B.

9. See *infra* Part II.C.

10. See *infra* text accompanying notes 270–281.

11. See *infra* text accompanying notes 13, 30–34.

cuss the models much less frequently. This Article takes an important step toward drawing policymaking theory developed in other disciplines into legal analysis. In doing so, this Article sheds new light on the gun control issue, one of the nation's most intractable dilemmas, and proposes a significant change in perspective that challenges gun control proponents and opponents alike to reassess their stances on what measures are likely to be productive or ineffective.

Part II of this Article describes in more detail the "incrementalism" and "comprehensive rationality" models of public policymaking, focusing on how political scientists have identified a few exceptional types of policy problems that are particularly unsuited for an incrementalist approach. Part III describes three recent, major controversies in the gun control field—the dispute over guns in the aftermath of Hurricane Katrina, the fight over gun laws in the District of Columbia, and the massacre of over thirty students and teachers at Virginia Tech—and explains how they reflect the deeply incrementalist patterns of gun control policymaking in the United States. Part IV ties together the common strands of these controversies and suggests that incremental policymaking poses a special risk for firearm regulation because of the uniquely prominent role that "slippery slope" fears play in the opposition to any new measures concerning guns. This Article contends that a more comprehensive approach is vital both to achieve more effective policies and to quell gun owners' concerns that moderate gun control measures will eventually lead to gun bans and confiscation. Finally, this Article contends that the top policy priority should be expanding background check regulations to form a more complete and coherent system limiting access to guns.<sup>12</sup>

## II. INCREMENTALISM AND COMPREHENSIVE RATIONALITY

Charles Lindblom, a political scientist at Yale, did the seminal work on incremental modes of policy decisionmaking.<sup>13</sup> Before him,

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12. In the interests of full disclosure, I emphasize that I am not an impartial observer of gun control matters, having worked as a lawyer for an organization that supports gun control. The quality of the debate over guns and policies concerning them can improve only if everyone, including those with the strongest leanings in one direction or the other, sincerely attempts to assess the issues as rigorously and fairly as possible.

13. See Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 80–81 (1959). Lindblom expanded on these ideas in a number of later works. See, e.g., DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* (1963); CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT* (1965); CHARLES E. LINDBLOM & EDWARD J. WOODHOUSE, *THE POLICY-MAKING PROCESS* (3d ed. 1993); Charles E. Lindblom, *Still Muddling. Not Yet Through,* 39 PUB. ADMIN. REV. 517, 517 (1979).

the classic vision of policymaking featured legislators or regulators methodically attempting to come up with the single best, complete approach to a problem. They would begin by identifying all relevant objectives, ranking their importance, and then identifying all conceivable actions that could be taken in pursuit of those objectives. Next, they would systematically compare every one of the policy alternatives, decide which best achieved the objectives, and implement the chosen policy.<sup>14</sup>

Lindblom questioned this classic model of “comprehensive rationality,” or “synoptic” policymaking, because he believed it relied upon unrealistic assumptions about our cognitive and analytical abilities in the face of very complex problems.<sup>15</sup> Although perhaps a logical approach in theory, policymakers would never actually be able to apply the classic model when faced with such problems in the real world.<sup>16</sup> An innumerable array of objectives and values are at stake in any complex social issue.<sup>17</sup> Even if decisionmakers could identify all of them, they would likely disagree about their relative importance and find conflicts and contradictions among them.<sup>18</sup> Moreover, policymakers inevitably have limited resources, and gathering and processing information about the likely effects of all possible policy alternatives would be an enormous and often impossible undertaking.<sup>19</sup> The classic model thus “assumes intellectual capacities and sources of information” that people simply do not possess.<sup>20</sup> Lindblom recognized that the comprehensive or synoptic style is therefore impossible in practice and argued that “every administrator faced with a sufficiently complex problem must find ways drastically to simplify.”<sup>21</sup>

Under Lindblom’s approach, policymakers simplify by “muddling through” as best they can, making policy in an incremental fashion.<sup>22</sup> They focus on one relatively simple goal at a time, and they consider

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14. See Lindblom, *The Science of “Muddling Through,”* *supra* note 13, at 79 (describing the methodology an administrator might use to formulate a policy regarding inflation under the comprehensive model of policymaking).

15. See *id.* at 80.

16. *Id.*; see Lindblom, *Still Muddling, Not Yet Through,* *supra* note 13, at 519 (arguing that complete, synoptic analysis is impossible, and thus our real choice is “between [the] ill-considered, often accidental incompleteness” of pseudo-comprehensive analysis and the “deliberate, designed incompleteness” of incrementalism).

17. Lindblom, *Still Muddling, Not Yet Through,* *supra* note 13, at 518.

18. Lindblom, *The Science of “Muddling Through,”* *supra* note 13, at 81–82.

19. Lindblom, *Still Muddling, Not Yet Through,* *supra* note 13, at 518.

20. Lindblom, *The Science of “Muddling Through,”* *supra* note 13, at 80.

21. *Id.* at 84.

22. See *id.* at 80–83; Lindblom, *Still Muddling, Not Yet Through,* *supra* note 13, at 517.

just a few policy alternatives, all of which are only marginally different from the status quo and from each other.<sup>23</sup> They choose one, implement it, wait to see the consequences, and then consider whether to try making another small adjustment.<sup>24</sup> Policy, therefore, “does not move in leaps and bounds,” “is not made once and for all,” and, instead changes “almost entirely through incremental adjustments,” being “made and re-made endlessly.”<sup>25</sup>

Lindblom discussed incremental policymaking both descriptively and normatively. He asserted that incrementalism is how policymaking actually occurs, and that it is generally the optimal approach.<sup>26</sup> Incrementalism has the virtue of breaking down an enormous problem into manageable parts. It allows for gradual change with less risk because policymakers can correct any missteps through the continual cycle of experimentation, feedback, and adjustment. By virtue of its decentralized structure, incremental change also makes it possible to have more local, popular control over formulation of policy.<sup>27</sup> Incrementalism “will be superior to any other decision-making method available for complex problems in many circumstances,” Lindblom argued, “certainly superior to a futile attempt at superhuman comprehensiveness.”<sup>28</sup>

Lindblom’s dichotomy<sup>29</sup> between comprehensive and incremental approaches to policymaking has been enormously influential in political and other social science fields.<sup>30</sup> Most observers shared Lindblom’s enthusiasm for incremental policymaking, describing how it achieved or could achieve positive results on issues ranging from

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23. Lindblom, *The Science of “Muddling Through,”* *supra* note 13, at 84.

24. *Id.* at 86.

25. *Id.* at 84, 86.

26. *Id.* at 88.

27. *Id.* at 85–86.

28. *Id.* at 85.

29. While drawing a sharp contrast between purely incremental and completely comprehensive approaches is often useful in theoretical discussion, the truth is that policymaking could be done in a manner found anywhere along a spectrum or continuum between the two. Ian Lustick, *Explaining the Variable Utility of Disjointed Incrementalism: Four Propositions*, 74 AM. POL. SCI. REV. 342, 344 (1980).

30. See Edward J. Woodhouse & David Collingridge, *Incrementalism, Intelligent Trial-and-Error, and the Future of Political Decision Theory*, in AN HERETICAL HEIR OF THE ENLIGHTENMENT: POLITICS, POLICY, AND SCIENCE IN THE WORK OF CHARLES E. LINDBLOM 131, 133–34 (Harry Redner ed., 1993) (describing how Lindblom’s work has been reprinted in dozens of anthologies, there have been “several thousand citations to the seminal works,” and “[t]he insights would seem to have been about as well incorporated into the discipline as could be hoped for any set of ideas”).

health care to television violence.<sup>31</sup> In harmony with “public choice” or economic market oriented schools of policy analysis, the incremental model aims to achieve optimal policy through a galaxy of scattered decisions, rather than a larger, centralized planning mechanism.<sup>32</sup> Reflecting America’s political character as well its market orientation, incremental change is a natural product of pluralistic democracy in which diverse interests compete and bargain.<sup>33</sup> Accordingly, scholars regard incrementalism “as the standard—indeed almost ubiquitous—mode of policy enactment in the United States.”<sup>34</sup>

A few political scientists have challenged the incrementalist orthodoxy, however, by describing a small but significant set of policy matters that have been or should be pursued in a nonincremental manner. For instance, Paul Schulman found a quintessential example in our nation’s efforts to achieve President John Kennedy’s goal of sending astronauts to the moon within a decade.<sup>35</sup> Schulman characterized that initiative as fundamentally indivisible because it demanded a massive commitment of resources, centralized organization, and comprehensive planning, coordination, and consolidation.<sup>36</sup> In other words, thousands of individuals tinkering alone in their garages might produce some impressive technological breakthroughs, such as development of better personal computers,<sup>37</sup> but individual efforts could not put a person on the moon. Moreover, the

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31. See, e.g., Samuel Levey & James Hill, *Universal Health Insurance: Incrementalism or Comprehensive Reform?*, 3 STAN. L. & POL’Y REV. 189, 191–93 (1991) (arguing that health care reform in this country will inevitably come about slowly and incrementally); Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL’Y 351, 382–83 (2004) (explaining that incremental policymaking can result in good policy); see also generally Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981) (explaining in detail the “incrementalism” and “comprehensive rationality” models and applying them to administrative law).

32. See Amitai Etzioni, *Mixed-Scanning: A “Third” Approach to Decision-Making*, 27 PUB. ADMIN. REV. 385, 387 (1967) (describing incrementalism as “the typical decision-making process of pluralistic societies, as contrasted with the master planning of totalitarian societies”); Paul R. Schulman, *Nonincremental Policy Making: Notes Toward an Alternative Paradigm*, 69 AM. POL. SCI. REV. 1354, 1354 (1975) (discussing the relation between an incremental model of policymaking and public choice or economic market models of the policy process).

33. Levey & Hill, *supra* note 31, at 192.

34. JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 9 (1984); see also Lustick, *supra* note 29, at 343 (arguing that incrementalism is becoming “a new conventional wisdom”).

35. Schulman, *supra* note 32, at 1355.

36. *Id.* at 1355–62.

37. Darren Vader, *Biography: Steve Jobs, The Apple Museum*, <http://www.theapple-museum.com/index.php?id=49> (last visited Mar. 28, 2008) (describing how Steve Jobs created the Apple, the first personal computer, in his garage).

moon project was an all-or-nothing enterprise. As NASA chief James Webb put it, “[w]e could not stop with doing 80 or 90 or 99 per cent of what we needed to do and come out reasonably well,” because “for a lunar landing a partial success is likely to be a complete failure.”<sup>38</sup>

Jennifer Hochschild presented another example that closely mirrors the gun control issue in some ways.<sup>39</sup> She concluded that incrementalism was an ineffective and counterproductive approach to desegregating public schools in the three decades following *Brown v. Board of Education*.<sup>40</sup> Integrating schools through a series of small, gradual steps was an appealing idea because it seemed like a way to minimize disruptions, maintain flexibility, increase local control over the process, build popular support, and learn from experimentation and experience.<sup>41</sup> In reality, however, Hochschild found that incrementalism did more harm than good because it fostered opposition and resistance to integration.<sup>42</sup> Temporal incrementalism, or gradually and sporadically phasing in changes, created instability and uncertainty, failed to demonstrate a decisive commitment to integration, and thereby invited resistance.<sup>43</sup> Likewise, Hochschild found that local forces could undercut desegregation too easily if it was not implemented on the largest possible geographic or spatial scale.<sup>44</sup> For example, if one school district moved forward with integration efforts, such as busing, while surrounding districts did not, “white flight” from the integrating district would sabotage the effort.<sup>45</sup>

Hochschild concluded that a more comprehensive approach would have achieved much better results. A comprehensive desegregation effort covering an entire metropolitan area would have made white flight more difficult and “is such a massive undertaking that it is bound to seem permanent and may induce parents to dig in and try to make it work for their children.”<sup>46</sup> While a “full-scale, rapid, exten-

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38. Schulman, *supra* note 32, at 1362 (quoting JAMES E. WEBB, SPACE-AGE MANAGEMENT: THE LARGE-SCALE APPROACH 149 (1969) (internal quotation marks omitted)).

39. See HOCHSCHILD, *supra* note 34, at 10–11.

40. 347 U.S. 483 (1954); HOCHSCHILD, *supra* note 34, at 47.

41. HOCHSCHILD, *supra* note 34, at 46–47.

42. *Id.* at 48.

43. See *id.* at 46–54 (finding that school districts that initiated rapid change had more success than those that took small steps over a long period of time).

44. See *id.* at 54–70 (arguing that desegregation involving large geographical areas allows for beneficial mixing of students with different academic achievement and socioeconomic class, while desegregation of only a few contiguous schools forces children together who are economic and social rivals, causing more racial hostility, instability, and white flight, without the beneficial redistribution of educational resources).

45. *Id.* at 64.

46. *Id.* at 65.

sive” overhaul of schools initially would have been very unpopular with the public, Hochschild argued that it ultimately would have minimized resistance and circumvention, achieved more integration, and improved race relations and student achievement.<sup>47</sup>

Hochschild further argued that incremental efforts to desegregate actually produced worse results than doing nothing at all.<sup>48</sup> Incremental changes—“halfhearted, restricted, timid” in nature—did little to help either minority or majority race students and instead caused substantial harm in the form of racial resentment, increased residential segregation, and decreased minority self-esteem and achievement.<sup>49</sup> While the conventional wisdom says that “[h]alf a loaf is better than none,” Hochschild concluded that this principle did not hold true for desegregation,<sup>50</sup> and that “[h]alf a loaf, in this case, may be worse than none at all.”<sup>51</sup>

As these examples suggest, some social problems are less suited to incremental solutions. Theorists have therefore begun to identify general principles for determining whether a particular issue should be handled through a more incremental or comprehensive policymaking strategy.<sup>52</sup> Ian Lustick observed that incrementalism is less useful when a problem is “non-decomposable,” meaning it cannot easily be broken up into parts to be handled separately.<sup>53</sup> Lustick offered the example of two societies seeking to protect their water resources, with one having its water dispersed into many separate watersheds and the other having virtually all of its water concentrated in one body of water such as a large river.<sup>54</sup> Environmental policymakers in the first society might prefer incrementalism because they can encourage each watershed to experiment with different methods of water regulation.<sup>55</sup> Successful methods can be repeated elsewhere, and failures will have limited effects rather than causing adverse consequences throughout the society’s entire water system.<sup>56</sup>

The second society’s authorities, however, face a problem of “relatively non-decomposable complexity,” because the water resources

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47. *Id.* at 91.

48. *Id.*

49. *Id.*

50. *Id.* at xi.

51. *Id.* at 91.

52. *See, e.g.,* Lustick, *supra* note 29, at 342 (presenting an analysis designed to help organizational theorists match policymaking strategies to different situations).

53. *Id.* at 346.

54. *Id.* at 347.

55. *Id.*

56. *Id.*

are interconnected.<sup>57</sup> This society needs a comprehensive, centralized regulatory regime, because “local errors in pollution abatement, for example, could lead to contamination of the vast majority of the society’s water resources.”<sup>58</sup> In Lustick’s terms, the water issue in the second society is characterized by “causal chains elongated in space,” so that the policies instituted in any one area will have ramifications elsewhere.<sup>59</sup>

In those exceptional circumstances, incrementalism stumbles over what generally would be one of its major virtues. As Justice Brandeis famously put it, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>60</sup> Generally, local experimentation is useful and poses less risk than national policy change because the local policy affects a limited area, and because the institutions and resources associated with the old policy approach remain in place in other jurisdictions, providing a form of “institutional insurance” available to some extent if things go wrong in the experimenting jurisdiction.<sup>61</sup> However, in the special circumstances described by Hochschild and Lustick, policymakers cannot conduct such geographically limited policy experiments because the policy’s subject matter—whether people or water—flows across jurisdictional borders.

Incrementalism, thus, may be superior to more comprehensive or synoptic policymaking efforts in many situations, but not in all. As Lindblom recognized, a generalized, abstract debate over which policymaking method is superior or inferior is “a spurious one, for questions about the merits of alternative methods arise in various specific contexts; hence it is in these contexts that one needs finally to evaluate them.”<sup>62</sup> This Article now considers these policymaking approaches in the context of one specific issue: gun control.

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57. *Id.*

58. *Id.*

59. *Id.*

60. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

61. See David Braybrooke, *Scale, Combination, Opposition—A Rethinking of Incrementalism*, 95 ETHICS 920, 926 (1985) (reviewing HOCHSCHILD, *supra* note 34) (arguing that an experimenting jurisdiction can obtain outside resources if its experiment goes wrong).

62. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY*, *supra* note 13, at 293; see also Jonathan Bendor, *A Model of Muddling Through*, 89 AM. POL. SCI. REV. 819, 819 (1995) (citing Lustick, *supra* note 29, at 342) (contending that debate over incremental versus comprehensive policymaking strategies “should be couched in terms of their relative effectiveness in different decisional contexts, for it is unlikely that one is better than the other in all circumstances”).

### III. INCREMENTAL POLICYMAKING ON GUNS

Guns remain one of America's most stubbornly contentious issues. Three major, recent controversies—law enforcement confiscation of guns after Hurricane Katrina, the strict gun laws of the District of Columbia, and a mass shooting by a student at Virginia Tech—illustrate well both this country's propensity to take an incrementalist approach to gun control, and the resultant problems stemming from this piecemeal approach.

#### A. *Hurricane Katrina*

In late August of 2005, as Hurricane Katrina intensified over the warm waters of the Gulf of Mexico, Mayor Ray Nagin ordered residents of New Orleans to evacuate.<sup>63</sup> Thousands of people without means to flee the storm headed to the city's "shelter of last resort," the enormous Superdome stadium.<sup>64</sup> A long line of people snaked around the Superdome, waiting to enter, as police and National Guard troops searched people and their belongings and confiscated guns, knives, drugs, alcohol, cigarettes, and other items prohibited inside emergency shelters.<sup>65</sup>

Everyone is familiar with the disaster that followed. The storm devastated the Gulf Coast, claiming more than a thousand lives and inflicting billions of dollars in property damage.<sup>66</sup> The flood protection system in New Orleans failed catastrophically; the storm breached the city's 350-mile levee, flooding the majority of the city.<sup>67</sup> Chaos ensued after the hurricane, with looters raiding stores and snipers firing on police and other emergency personnel.<sup>68</sup> On August 31, several days after the hurricane's peak, Mayor Nagin ordered most of the city's police officers to concentrate on cracking down on looting and

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63. Christopher Lee & Peter Whoriskey, *Hurricane Bears Down on Gulf Coast; Thousands Flee Area as Vulnerable New Orleans Braces for Direct Hit*, WASH. POST, Aug. 29, 2005, at A1.

64. Mike Hasten, *Millions Flee Hurricane Katrina*, TIMES (Shreveport, La.), Aug. 29, 2005, at 1A.

65. *Id.*; Aaron Sharockman, *Eyes on New Orleans: Refugees Line up for Superdome Lock-in*, ST. PETERSBURG TIMES, Aug. 29, 2005, at 1A.

66. *See THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 7-8* (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> (stating that Hurricane Katrina caused approximately \$96 billion in property damages and claimed an estimated 1,330 lives).

67. *See id.* at 1-2.

68. Felicity Barringer & Jere Longman, *Owners Take up Arms as Looters Press Their Advantage*, N.Y. TIMES, Sept. 1, 2005, at A16. *See generally* Robert D. McFadden & Ralph Blumenthal, *Bush Sees Long Recovery for New Orleans; 30,000 Troops in Largest U.S. Relief Effort*, N.Y. TIMES, Sept. 1, 2005, at A1 (describing the chaos and the government's response in New Orleans in the wake of Hurricane Katrina).

other crimes rather than undertaking search and rescue efforts.<sup>69</sup> At the New Orleans convention center, where there had not been time to search entrants for weapons as was done at the Superdome, “[g]unfire became so routine that large SWAT teams had to storm the place nearly every night.”<sup>70</sup> The news media spread rumors that particularly vicious crimes occurred, such as child rape and murder.<sup>71</sup> Most of these horror stories turned out to be false, but they heightened fears in the midst of an already chaotic and treacherous situation.<sup>72</sup>

While many people used guns for nefarious purposes, others used them for security at a time when law enforcement seemed incapable of providing it.<sup>73</sup> Citizens stood guard at their homes and businesses, using highly visible guns to deter trespassers.<sup>74</sup> People wrote hand-painted messages outside buildings, warning that occupants

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69. McFadden & Blumenthal, *supra* note 68. Newspapers reported:

Across New Orleans, the rule of law, like the city’s levees, could not hold out after Hurricane Katrina. The desperate and the opportunistic took advantage of an overwhelmed police force and helped themselves to anything that could be carried, wheeled or floated away, including food, water, shoes, television sets, sporting goods and firearms.

Barringer & Longman, *supra*, note 68; *see also* Al Baker, *Duty Binds Officers Who Have Gone to Help After Storm*, N.Y. TIMES, Sept. 11, 2005, § 1, at 30 (reporting thefts of “entire inventories from gun and ammunition shops”).

70. Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 1.

71. *See* Gary Younge, *Aftermath of Katrina: Murder and Rape—Fact or Fiction?*, GUARDIAN (London), Sept. 6, 2005, at 5 (describing the unsubstantiated reports of rape, murdered children, and erupting riots).

72. *See* Jim Dwyer & Christopher Drew, *Fear Exceeded Crime’s Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1 (reporting that many of the most alarming and false stories created such fear that troop deployments changed, medical evacuations were delayed, and police officers quit); *see also* Peter Applebome, *Amid One City’s Welcome, a Tinge of Backlash*, N.Y. TIMES, Sept. 7, 2005, at A17 (noting that Baton Rouge residents feared that refugees would commit crimes); David Carr, *More Horrible than Truth: News Reports*, N.Y. TIMES, Sept. 19, 2005, at C1 (stating that the media did not substantiate or prove many of the news stories in New Orleans after Hurricane Katrina); Howard Witt, *Spreading the Poison of Bigotry*, CHI. TRIB., Sept. 4, 2005, at C5 (contending that the rumors “played directly into the darkest prejudices long held against the hundreds of thousands of impoverished blacks who live . . . in New Orleans”); Younge, *supra* note 71 (explaining that the rumors hastened the relief effort but demonized the victims).

73. *See* Baker, *supra* note 69 (reporting that a number of police officers in New Orleans simply resigned, abandoned their posts, or committed suicide after Hurricane Katrina). Additionally, law enforcement efforts were troubled by communications equipment breakdowns and difficulty coordinating separate police agencies. *Id.*

74. *See* Barringer & Longman, *supra* note 68 (“Some frightened homeowners took security into their own hands.”); Erich Pratt, *Katrina Educates World on Need for Owning Guns*, Sept. 2005, <http://www.gunowners.org/no02.htm> (reporting stories of armed homeowners standing guard).

were armed and prepared to shoot looters.<sup>75</sup> Some neighbors formed makeshift militias, sharing firearms and taking turns standing guard.<sup>76</sup> Although Wal-Mart suspended sales of guns at forty of its stores in the Gulf Coast region,<sup>77</sup> sales surged at other gun stores in New Orleans and in nearby cities, like Baton Rouge, nervously facing an influx of refugees.<sup>78</sup> Two weeks after the flooding began, the city was still struggling to recover, but the streets were calm and looting had largely ceased.<sup>79</sup> The press reported that New Orleans police officers had begun “confiscating weapons, including legally registered firearms, from civilians in preparation for a mass forced evacuation of the residents still living [t]here.”<sup>80</sup> New Orleans police superintendent Edwin P. Compass III declared that, “after a week of near anarchy in the city,” civilians in New Orleans would no longer be allowed to carry firearms, and instead “[o]nly law enforcement [will be] allowed to have weapons.”<sup>81</sup>

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75. John R. Lott, Jr., *Defenseless Decision: Why Were Guns Taken from Law-abiding Citizens in New Orleans?*, NAT'L REV. ONLINE, Mar. 21, 2006, <http://www.nationalreview.com/comment/lott200603210744.asp>.

76. David B. Kopel, *Defenseless on the Bayou: New Orleans Gun Confiscation Is Foolish and Illegal*, REASON, Sept. 2005, available at <http://www.reason.com/news/printer/36334.html>; Susan Langenhennig, *Makeshift Militia Guards Algiers Point: They're Armed to the Teeth, but Haven't Fired a Shot*, TIMES-PICAYUNE, Sept. 9, 2005, at A1.

77. Sasha Talcott, *Halted Gun Sales Infuriate Customers*, BOSTON GLOBE, Sept. 11, 2005, at A19.

78. See Applebome, *supra* note 72 (reporting that fearful Baton Rouge residents waited in line for hours to stock up on handguns); Timothy Appleby, *Baton Rouge Welcomes Refugees with Open Arms—and Firearms*, GLOBE & MAIL (Toronto), Sept. 5, 2005, at A8 (reporting “a rush of gun-buying” in Baton Rouge spurred by the influx of displaced New Orleans residents); Lorraine Woellert, *Guns and Water: The Rage of the NRA*, BUSINESSWEEK, Sept. 26, 2005, at 53 (reporting that “gun sales are soaring”).

79. Alex Berenson & Timothy Williams, *New Orleans Begins Confiscating Firearms as Water Recedes*, N.Y. TIMES, Sept. 8, 2005, available at [http://www.nytimes.com/2005/09/08/national/nationalspecial/08cnd-storm.html?\\_r=1&oref=slogin](http://www.nytimes.com/2005/09/08/national/nationalspecial/08cnd-storm.html?_r=1&oref=slogin).

80. *Id.*; Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES, Sept. 9, 2005, at A17.

81. Berenson & Broder, *supra* note 80. W.J. Riley, who was then the second highest ranking officer on the New Orleans police force and later succeeded Compass as superintendent, was also quoted as saying, “No one will be able to be armed. We are going to take all the weapons.” Robert Raffaele, *New Orleans Authorities Search for Residents One House at a Time*, VOICE AM. NEWS, Sept. 9, 2005, available at 2005 WLNR 19184402. The *New York Times* went on to note:

But that order apparently does not apply to hundreds of security guards hired by businesses and some wealthy individuals to protect property. The guards, employees of private security companies like Blackwater, openly carry M-16's and other assault rifles. Mr. Compass said that he was aware of the private guards, but that the police had no plans to make them give up their weapons.

Berenson & Williams, *supra* note 79.

Compass explained that although neither the mayor nor the governor had specifically directed him to ban or to confiscate guns, he interpreted a gubernatorial order declaring a state of emergency as authorizing the police to do so.<sup>82</sup> In fact, a Louisiana statute did authorize Compass, as the chief law enforcement officer of the city, during a state of emergency proclaimed by the governor, to promulgate orders “[r]egulating and controlling the possession, storage, display, sale, transport and use of firearms, other dangerous weapons and ammunition.”<sup>83</sup> Other provisions of the same statute authorized law enforcement chiefs to issue orders “[p]rohibiting the sale and distribution of alcoholic beverages,” “[p]rohibiting and controlling the presence of persons on public streets and places,” and prohibiting price gouging,<sup>84</sup> a difference in wording that suggested the section authorizing Compass to “regulate” and “control” guns might not empower him to “prohibit” them.

It is unclear to what extent police officers knew about and acted on Compass’s pronouncements, and it is difficult to reconstruct given the chaos unfolding in New Orleans at that time. Several officers later reportedly said that they were ordered at a roll call to seize any guns possessed by any person who could not prove lawful ownership of them.<sup>85</sup>

In any event, news reports of Compass’s statements sparked an intense outcry from the National Rifle Association (NRA) and other gun rights organizations,<sup>86</sup> and the issue soon became fodder for outraged talk show hosts<sup>87</sup> and a flurry of newspaper editorials and opinion columns.<sup>88</sup> Electronic media gave life to the story as television

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82. Scott Gold et al., *Katrina’s Aftermath; Crews Roust Holdouts, Brace for the Body Count*, L.A. TIMES, Sept. 9, 2005, at A1.

83. LA. REV. STAT. ANN. § 14:329.6(A)(6) (Supp. 2007). Louisiana’s governor had declared a state of emergency on August 26, 2005. See Press Release, Office of the Governor, Kathleen Babineaux Blanco, State of Louisiana, Governor Blanco Declares State of Emergency (Aug. 26, 2005), <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=776&navID=3>.

84. LA. REV. STAT. ANN. §§ 14:329.6(A)(4), (5), (9).

85. Memorandum in Support of Motion to Hold Defendants C. Ray Nagin & Warren Riley in Contempt for Violation of the Consent Order at 7, *NRA v. Nagin*, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. Sept. 23, 2005).

86. Melanie Hunter, *Gun Rights Group Outraged That New Orleans Officials Confiscated Guns*, CYBERCAST NEWS SERVICE, Sept. 9, 2005, <http://www.cnsnews.com/Culture/Archive/200509/CUL20050909b.html>; Rowland Nethaway, Editorial, *Confiscating Guns in the Bayou City*, COX NEWS SERVICE, Sept. 16, 2005.

87. See, e.g., Nancy Grace: *FEMA Director Recalled* (CNN television broadcast Sept. 9, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/09/ng.01.html>.

88. See, e.g., Bob Barr, Op-Ed., *Governments Ready, Willing to Go Too Far*, ATLANTA J.-CONST., Sept. 28, 2005, at 15A; Editorial, *Goon Control*, INVESTOR’S BUS. DAILY, Sept. 15,

news cameras recorded several seizures of guns, and the NRA quickly produced a short video documentary on the issue that was widely viewed through “YouTube” and other websites.<sup>89</sup> In one clip, filmed by a San Francisco news crew, visiting California Highway Patrol officers wrestled an elderly woman to the floor of her kitchen after she showed them a small revolver.<sup>90</sup>

On September 22, the issue landed in court. The NRA, the Second Amendment Foundation (a smaller and more militant gun rights organization), and an individual gun owner filed suit in federal court in Louisiana seeking “to vindicate the constitutional rights of the law-abiding citizens of Louisiana to keep and bear arms to protect themselves from criminal violence, and to enjoin confiscation of lawful firearms.”<sup>91</sup> The individual plaintiff, NRA member Buell Teel, alleged that St. Tammany Parish sheriff’s officers confiscated two of his rifles.<sup>92</sup> The complaint sought a declaratory judgment that the seizures of guns violated the Second, Fourth, and Fourteenth Amendments of the United States Constitution, and an injunction compelling police to return all unlawfully seized firearms.<sup>93</sup>

The next day, Mayor Nagin responded to the lawsuit by declaring that he had never authorized the taking of firearms from citizens and that he did not approve any statements the police superintendent had made about taking weapons.<sup>94</sup> Meanwhile, Superintendent Compass denied that weapons had been seized from any law-abiding citizens.<sup>95</sup> Because all defendants in the suit denied that the city had any policy of seizing guns from law-abiding citizens or that it had in fact seized any guns,<sup>96</sup> a federal judge issued a consent decree enjoining confisca-

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2005, at A13; Paul Gallant, Op-Ed., *The Second Battle of New Orleans*, J. NEWS (Westchester County, N.Y.), Oct. 28, 2005, at 4B; Nethaway, *supra* note 86; Dimitri Vassilaros, Editorial, *Big Easy Hard on Gun Rights*, PITTSBURGH TRIB. REV., Sept. 18, 2005, available at [http://www.pittsburghlive.com/x/pittsburghtrib/s\\_374924.html](http://www.pittsburghlive.com/x/pittsburghtrib/s_374924.html).

89. See Press Release, Second Amendment Found., SAF, NRA Ask Federal Court to Halt New Orleans Gun Seizures (Sept. 22, 2005), <http://www.saf.org/viewpr-new.asp?id=161>. The NRA’s video, “The Untold Story of Gun Confiscation After Katrina,” can be viewed at <http://www.youtube.com/watch?v=taU9d26wT4&mode=related&search=>.

90. See Press Release, Second Amendment Found., *supra* note 89.

91. Complaint ¶ 1, *NRA v. Nagin*, Civil No. 05-4234, 2005 WL 3546132 (E.D. La. Sept. 23, 2005).

92. *Id.* ¶¶ 4, 18.

93. *Id.* ¶ 1.

94. *Nagin Responds to NRA Suit*, TIMES-PICAYUNE, Sept. 23, 2005, available at 2005 WLNR 19477273.

95. *Id.*

96. *NRA v. Nagin*, Civil No. 05-02,000, 2005 WL 2428840, at \*1 (E.D. La. Sept. 23, 2005). The third defendant in the case, the Sheriff of St. Tammany Parish, denied that his office had “illegally” confiscated any firearms. *Id.* It was unclear whether the sheriff was

tion of any lawfully possessed firearms and ordering the return of any that had been seized.<sup>97</sup>

That was hardly the end of the matter. The litigation dragged on throughout 2006 and into 2007, as the NRA and the Second Amendment Foundation complained that New Orleans officials were too slow to ensure that seized guns still in police custody were returned to their owners.<sup>98</sup>

Meanwhile, with “Remember New Orleans” as its rallying cry, the NRA seized on the events to whip up a frenzy of outrage and fear among its supporters.<sup>99</sup> Boasting to the press about how the issue would be used to recruit new members, NRA Chief Executive Wayne LaPierre bragged that “[t]his will probably mint money for us.”<sup>100</sup> He vowed, “[w]e’re gonna make New Orleans the worst nightmare the gun ban crowd has ever seen.”<sup>101</sup> To garner publicity on the eve of its next annual convention after the hurricane, the NRA took out a full-page ad in the *USA Today* newspaper, calling on every police chief and mayor in the country to sign a pledge promising they would “never forcibly disarm . . . law-abiding citizens.”<sup>102</sup>

The NRA also took the issue to legislators, pushing for passage of federal and state legislation to prohibit seizure of guns in emergencies in the future. The federal enactment, signed into law by President Bush in October 2006 as part of a Department of Homeland Security appropriations measure, barred seizing, banning, or requiring registration of guns during provision of relief from a “major disaster or

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denying that any confiscations occurred or merely asserting that whatever confiscations occurred were lawful. *Id.*

97. *Id.* at \*2.

98. See Press Release, Second Amendment Found., New Orleans Admits to SAF Attorneys They Have Seized Guns (Mar. 15, 2006), <http://www.saf.org/viewpr-new.asp?id=177> (explaining that city officials denied they possessed firearms seized from citizens for five months before admitting otherwise); Press Release, Second Amendment Found., New Orleans Will Begin Returning Seized Firearms Monday, Says SAF (Apr. 14, 2006), <http://www.saf.org/viewpr-new.asp?id=178> (same); Press Release, Second Amendment Found., SAF Victory in New Orleans, Judge Grants Contempt Motion (Feb. 13, 2007), <http://www.saf.org/viewpr-new.asp?id=211> (noting that a judge held Mayor Nagin and Police Superintendent Warren Riley “in contempt for failure to provide initial disclosures and answers to discovery”).

99. Brian Friel, *NRA’s Cry: ‘Remember New Orleans,’* NAT’L J., Nov. 19, 2005.

100. *Id.*

101. Jeff Johnson, *NRA Tells Conservatives to ‘Remember New Orleans,’* CYBERCAST NEWS SERVICE, Feb. 13, 2006, <http://www.cnsnews.com/Nation/Archive/200602/NAT20060213c.html>.

102. See Greg J. Borowski & Darryl Enriquez, *NRA Packs the Heat of 4 Million Members; Gun Rights Group Launches Initiative as National Convention Opens in Milwaukee,* MILWAUKEE J. SENTINEL, May 19, 2006, at A1.

emergency.”<sup>103</sup> The federal law applies not only to officers and employees of the United States government, but also to others operating pursuant to federal law, receiving federal funds, or acting under the control of federal officials.<sup>104</sup> It passed by wide margins of 84 to 16 in the U.S. Senate,<sup>105</sup> and 322 to 99 in the House.<sup>106</sup>

Although each chamber of Congress engaged in some debate over the proposal, no one disagreed about a core proposition: police should not make blanket sweeps during disasters to take guns away from law-abiding homeowners. Even the most ardent supporters of gun control who spoke against the bill, such as Senator Dick Durbin and Representative Carolyn McCarthy, emphasized that they would have no objection to a more limited bill that would merely “allow people to protect their own homes with their own legally owned firearms.”<sup>107</sup> Along with other opponents of the bill, they readily recognized “the need for law-abiding citizens to be able to protect themselves against criminals breaking into their homes, particularly when law enforcement is unable to protect its citizens after a catastrophic disaster.”<sup>108</sup>

Instead, debate focused on whether the legislation had been drafted with sufficient precision to ban overzealous confiscation of guns without interfering with law enforcement agencies’ efforts to deal sensibly with risks posed by guns in emergency situations. For example, Senator Ted Kennedy suggested that if police found a Wal-

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103. Department of Homeland Security Appropriations Act, Pub. L. No. 109-295, § 557, 120 Stat. 1355, 1391-92 (2006) (codified at 42 U.S.C. § 5207 (Supp. 2007)).

104. *Id.*

105. 152 CONG. REC. S7497 (daily ed. July 13, 2006). The Senate vote was actually on a brief provision that merely would have prohibited the Department of Homeland Security from using any of its 2007 funding appropriation to confiscate firearms during an emergency. *Id.* at S7458 (introducing Amendment No. 4615 to H.R. 5441, 109th Cong. (2006)). The House of Representatives soon passed a more detailed provision that would permanently prohibit such confiscations, and it was that broader provision that wound up being enacted, *see supra* notes 103-104 and accompanying text.

106. 152 CONG. REC. H5814 (daily ed. July 25, 2006).

107. *Id.* at S7493 (daily ed. July 13, 2006) (statement of Sen. Durbin); *see also id.* at H5758 (daily ed. July 25, 2006) (statement of Rep. McCarthy) (“We do not believe in going into someone’s home without due cause [for purposes of] getting someone’s gun.”). Likewise, Representative Jim Oberstar related a story about a close friend who could not reach his gun when looters broke into his home during Hurricane Katrina. *Id.* at H5760 (statement of Rep. Oberstar). While “[t]here are many circumstances of this kind, where the person . . . should be able to protect him or herself in their own home,” he opposed the bill because it would allow guns to be brought into shelters like the Superdome or convention center. *Id.*

108. H.R. REP. NO. 109-596, at 7 (2006) (additional views). Representatives in the minority expressed concerns in the additional views section of the report that the language of the bill was broader than its stated intent. *Id.*

Mart store or pawn shop that had been shut down during “a 9/11-type situation,” with its windows broken and a large stock of guns still sitting on its shelves, the new federal law would prohibit police from taking the guns for safekeeping and thereby depriving looters of the opportunity to steal them.<sup>109</sup> Likewise, Senator Frank Lautenberg expressed concern that the law would prevent police from taking guns and ammunition found in an abandoned home in a neighborhood in which looters were known to be prowling.<sup>110</sup> Members of the House of Representatives also questioned why police or military officers in a moment of crisis, such as a terrorist attack, should not be able to order everyone in the area to surrender their firearms if there is not sufficient time to determine who is a terrorist and who is a law-abiding citizen.<sup>111</sup>

Supporters of the proposed measure agreed that there could be circumstances in which guns should be confiscated. For example, Senator Larry Craig, an NRA board member,<sup>112</sup> acknowledged that it was sensible for police to prohibit possession of guns by those seeking shelter in the Superdome during Hurricane Katrina and, in his view, nothing in the new law would prohibit police from turning away anyone who refused to surrender a gun before entering an emergency relief site during a future disaster.<sup>113</sup> Other boosters of the measure pointed out that an exception had been inserted into the law to allow authorities to require evacuees to surrender firearms temporarily while being transported on airplanes or buses.<sup>114</sup>

Many states passed similar statutes prohibiting gun confiscations by state or local officers during emergencies.<sup>115</sup> These measures en-

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109. 152 CONG. REC. S7491 (daily ed. July 13, 2006) (statement of Sen. Kennedy).

110. *Id.* at S7492 (statement of Sen. Lautenberg).

111. H.R. REP. NO. 109-596, at 8 (2006).

112. NRA Leaders, <http://www.nraleaders.com/senator-larry-craig.html> (last visited Mar. 31, 2008).

113. 152 CONG. REC. S7490 (daily ed. July 13, 2006) (statement of Sen. Craig). *But see* H.R. REP. NO. 109-596, at 8 (2006) (explaining that the bill would prevent authorities from banning weapons from shelters like the Superdome); 152 CONG. REC. H5758 (daily ed. July 25, 2006) (statement of bill sponsor Rep. Jindal) (explaining that the bill prevents authorities from banning weapons in a shelter during emergencies unless a preexisting law already prohibited guns in the type of building, such as a school or sports arena, being used as a shelter).

114. 42 U.S.C.A. § 5207(b) (2007); *see, e.g.*, 152 CONG. REC. H5759 (daily ed. July 25, 2006) (statement of Rep. Jindal) (explaining that his bill grants discretion to officials to temporarily seize firearms during evacuations if state law requires such seizures).

115. *See, e.g.*, 2006 Alaska Sess. Laws ch. 32, § 2 (adding ALASKA STAT. § 26.23.205 (2006)); 2007 Ariz. Legis. Serv. ch. 101 (West) (amending ARIZ. REV. STAT. § 26-303(K) (2007)); 2006 Fla. Laws ch. 2006-100 (amending FLA. STAT. ch. 252.36(5) (h) (2006)); 2006 Idaho Sess. Laws ch. 264, § 1 (amending IDAHO CODE § 46-1008(7) (2006)); 2006 Ky. Acts

joyed wide support in state legislatures, with bills passing in Florida, Louisiana, and Virginia without a single dissenting vote in either house of the legislatures.<sup>116</sup> In April 2007, the NRA took a victory lap around Louisiana, holding rallies at gun stores across the state to celebrate enactment of the anti-confiscation legislation and to squeeze further attention out of the issue.<sup>117</sup>

Gun control advocates largely remained quiet while the NRA beat the New Orleans drum. A spokesperson for the Brady Campaign to Prevent Gun Violence called the issue “a non-problem in America.”<sup>118</sup> The Coalition to Stop Gun Violence dubbed it “a lot of hyperbole,” and suggested that gun control groups and the NRA alike should allow law enforcement agencies to handle such matters.<sup>119</sup>

While New Orleans police went too far with their impromptu and ill-advised declarations about blanket confiscations, they could have justified special restrictions and even firearm seizures if the restrictions were more carefully tailored to the emergency circumstances. For example, police took possession of guns stashed in alleyways or left behind in houses by residents who fled the hurricane.<sup>120</sup> Even the most ardent gun rights advocates could not fault the police for “gathering firearms they found in abandoned New Orleans homes, to pre-

ch. 240, § 7 (adding KY. REV. STAT. ANN. § 237.104 (2006)); 2006 La. Acts 275, § 2 (adding LA. REV. STAT. ANN. § 29:738 (2006)); 2006 Mich. Pub. Acts 546 (amending MICH. COMP. LAWS § 10.31 (2006)); 2006 Miss. Laws ch. 450, § 1 (amending MISS. CODE ANN. § 45-9-53(1)(d) (2006)); 2007 Mo. Legis. Serv. S.B. 257 (West) (adding MO. REV. STAT. § 44.101 (2007)); 2007 Mont. Laws ch. 459; 2007 Nev. Stat. ch. 119 (amending NEV. REV. STAT. §§ 414, 414.030, 414.070 (2007)); 2006 N.H. Laws ch. 124 (amending N.H. REV. STAT. ANN. § 446(I-a) (2006)); 2006 Okla. Sess. Law Serv. ch. 70 (West) (amending OKLA. STAT. tit. 21, § 1321.4(a)(5) (2006)); 2006 S.C. Acts 347 (amending S.C. CODE ANN. § 23-31-520 (2006)); 2007 Tenn. Pub. Acts ch. 129 (adding TENN. CODE ANN. § 58-2-107(m) (2007)); 2007 Tex. Sess. Law Serv. ch. 18 (West) (adding TEX. GOV'T CODE ANN. § 433.0045 (2007)); 2006 Va. Acts ch. 458 (amending VA. CODE ANN. § 44-146.15(3) (2006)); 2007 W. Va. Acts ch. 210 (adding W. VA. CODE ANN. § 15-5-19a (2007)).

116. 152 CONG. REC. S7493-94 (daily ed. July 13, 2006) (statement of Sen. Vitter) (inserting into record a list of ten states that passed laws prohibiting gun seizures during emergencies).

117. Bill Campbell, *NRA Officials Praise Vitter, Jindal for Gun Stance*, NEWS-STAR (MONROE, La.), Apr. 5, 2007, at 1A; Alexandyr Kent, *Jindal, Vitter Address Supporters at Gun Rights Rally*, TIMES (SHREVEPORT, La.), Apr. 5, 2007, at 3A; Robert Morgan, *Second Amendment Tour Visits Cenla*, DAILY TOWN TALK (ALEXANDRIA, La.), Apr. 5, 2007, at 6A.

118. John Hartzell, *NRA Asks City Officials to Pledge They Will Never Seize Guns*, HOUS. CHRON., May 19, 2006, at A10 (quoting Peter Hamm, a spokesperson for the Brady Campaign to Prevent Gun Violence).

119. Carrie Sheffield, *Start of Hurricane Season Triggers Gun Debate*, HILL, June 6, 2006, at 8 (quoting Joshua Horowitz, director of the Coalition to Stop Gun Violence).

120. Trymaine Lee, *NOPD, NRA Call Truce over Gun Seizures*, TIMES-PICAYUNE, Apr. 22, 2006, at 1.

vent them from falling into the hands of criminals.”<sup>121</sup> Likewise, police and soldiers handling refugee evacuation sensibly conducted searches of passengers being taken by bus and airplane to shelters in other states.<sup>122</sup>

The NRA and its allies, however, challenged even limited gun restrictions. For example, a month after the hurricane, the NRA and the Second Amendment Foundation attacked local law enforcement officials for persuading the Federal Emergency Management Agency (FEMA) to ban tenants of an evacuee trailer park near Baton Rouge from possessing guns.<sup>123</sup> A sheriff’s deputy who took responsibility for initiating the gun ban explained that he was a devoted member of the NRA, but in this instance he felt gun rights were outweighed by the dangerous possibility that any bullet fired could penetrate through several of the thin-walled trailers sitting just a few feet away from each other in the crowded sites.<sup>124</sup> Nevertheless, gun owner organizations and their attorneys persuaded FEMA to reverse course and permit guns in the trailer parks.<sup>125</sup>

The New Orleans gun confiscation episode turned out to be an unmitigated fiasco for gun control efforts. It not only gave the NRA an issue with which to stir up fear among gun owners, but also overshadowed the negative role that guns played in the aftermath of the storm. Hurricane Katrina could have served as a powerful example of the need for sensible restrictions on access to guns. Indeed, to foreign observers, images of the chaos in New Orleans confirmed perceptions about America’s deadly fascination with guns and perverse unwillingness to put reasonable controls on them. As one BBC reporter said, drawing a contrast between Hurricane Katrina and the

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121. Jeff Johnson, *New Orleans Gun Seizures Allegedly ‘Creating More Victims,’* CYBERCAST NEWS SERVICE, Sept. 14, 2005, <http://www.cnsnews.com/Nation/Archive/200509/NAT20050914a.html>.

122. See, e.g., Lee, *supra* note 120 (describing how guns were seized from people trying to bring them onto evacuation buses); Bryon Okada, *Screeners Kept Flights Moving*, FORT WORTH STAR-TELEGRAM, Sept. 12, 2005, at B1 (describing searches of evacuees flown to Dallas); Tony Perry, *Katrina’s Aftermath: Astrodome Seen as a Comfort Zone*, L.A. TIMES, Sept. 2, 2005, at 17 (describing searches of evacuees bused to Houston); *57 Storm Evacuees at Lowry Have Criminal Records*, DENVER POST, Sept. 11, 2005, at C05 (describing searches of evacuees flown to Denver).

123. *Sheriff’s Office Got Trailer Site Gun Ban*, ADVOCATE (Baton Rouge, La.), Oct. 14, 2005, at 1B; Press Release, Second Amendment Found., SAF Demands Answers for Gun Ban at FEMA Relief Center Outside Baton Rouge (Oct. 7, 2005), <http://www.saf.org/viewpr-new.asp?id=164>.

124. *Sheriff’s Office Got Trailer Site Gun Ban*, *supra* note 123.

125. Friel, *supra* note 99; Press Release, Second Amendment Found., FEMA Reverses No Guns Policy Following SAF Whistleblowing (Oct. 24, 2005), <http://www.saf.org/viewpr-new.asp?id=166>.

tsunami that devastated coastal areas surrounding the Indian Ocean eight months earlier, “there were no scenes of armed gangs of looters in gun battles with the police in Sri Lanka after the tsunami.”<sup>126</sup>

Indeed, perhaps the most appalling aspect of the New Orleans gun seizure saga is that it managed to distract attention from the enormously greater injustices and tragedies that occurred in the wake of the hurricane. Covering a national convention of conservative students for *Harper's Magazine*, Wells Towers perfectly captured how the gun issue provided an easy distraction for those uninterested in seeing far more important truths coming out of the Hurricane Katrina catastrophe.<sup>127</sup> NRA head Wayne LaPierre was the surprise final speaker at the conference and the crowd erupted into a frenzy of adoration as he took the stage and introduced a video about the “poor souls” who stayed in New Orleans during the hurricane.<sup>128</sup> “It quickly becomes apparent,” wrote Towers, “that by New Orleans’s ‘poor souls,’ LaPierre is not talking about the hundreds of thousands of people whose homes were destroyed by Katrina, or the more than 40,000 who graphically languished in the Superdome and the Morial Convention Center while the levees failed.”<sup>129</sup> As the audience of young conservative activists reacted with horror at the thought of police taking away a relatively small number of guns, Towers realized:

LaPierre, in a single master stroke, ha[d] vanquished for the students what is perhaps the darkest question to trouble the national conscience of late; namely, how it happened that this country required five days and hundreds of lives to pass before deploying buses to an area in screaming range of a navigable interstate.<sup>130</sup>

Thanks to LaPierre, the students left the convention reassured, believing that the great injustice of the Hurricane Katrina debacle had been quickly and neatly cured by enactment of the legislation protecting gun rights during emergencies.<sup>131</sup>

At the start of the next hurricane season after Katrina, the new police superintendent of New Orleans, Warren Riley, caused a stir by declaring in a radio interview that his officers would confiscate guns

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126. Richard Bernstein, *The Days After; The View from Abroad*, N.Y. TIMES, Sept. 4, 2005, § 4, at 5.

127. Wells Tower, *The Kids Are Far Right: Hippie Hunting, Bunny Bashing, and the New Conservatism*, HARPER'S, Nov. 1, 2006, at 41, 52.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 52–53.

from people on the streets if another disastrous storm struck.<sup>132</sup> A few days later, after an outcry by gun rights organizations, Riley retracted his statements.<sup>133</sup>

While Riley and gun advocates speculated and bickered about what police would do in the event of another catastrophic hurricane, a grim flood of weapons and violent crime was already overtaking New Orleans. In the years before Hurricane Katrina, New Orleans was the nation's murder capital. Thanks in part to "shamefully easy access to guns," New Orleans's homicide rate in 2004 was ten times the national average and four and a half times the rate for similarly sized cities.<sup>134</sup> With so many people displaced from the city, including violent criminals, the murder rate plunged for a few months after the hurricane.<sup>135</sup> A wave of killings, however, soon restored New Orleans's title as America's deadliest city.<sup>136</sup>

That epidemic of violent crime went hand in hand with soaring levels of gun possession. Even though the city's population in 2006 was only half what it was before the hurricane, gun sales were up and the number of permits issued to carry concealed firearms had doubled.<sup>137</sup> Everyone in New Orleans "from white society folk who hire off-duty cops to patrol their streets to poor black kids who carry guns while walking theirs—knows that the only real security in New Orleans is private, not public."<sup>138</sup>

While many citizens of New Orleans obtain guns simply to protect themselves and others, widespread and easy access to guns also escalates the frequency and lethality of crime in the city. Civilians acting in defense of themselves or others killed only two criminals in New Orleans in 2006, a number overshadowed by the city's 162 murders

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132. Jonathan Betz, *Riley Says He'll Confiscate Weapons if Disaster Strikes*, *Gun Rights Activists Outraged*, WWL-TV NEWS, June 2, 2006, [http://www.wvlv.com/local/stories/wvl060206jb\\_guns.4aac3cf1.htm](http://www.wvlv.com/local/stories/wvl060206jb_guns.4aac3cf1.htm). Riley stated that "during a circumstance like that, we cannot allow people to walk the street carrying guns," and "as law enforcement officers we will confiscate the weapon if a person is walking down the street and they may be arrested." *Id.*

133. Press Release, Second Amendment Found., *Riley Backs Down on New Orleans Gun Grab After SAF Calls for Investigation* (June 6, 2006), <http://www.saf.org/viewpr-new.asp?id=189>.

134. Nicole Gelinas, *Baghdad on the Bayou*, CITY J., Spring 2007, at 42; Amanda Ripley, *What Happened to the Gangs of New Orleans?*, TIME, May 22, 2006, at 54.

135. Ripley, *supra* note 134.

136. Mary Foster, *Fear Triggers Brisk Gun Sales in N.O.*, PRESS-REG. (Mobile, Ala.), Mar. 24, 2007, at A4.

137. *Id.* ("Just how many guns are out there is anybody's guess" because "[g]un buyers in Louisiana are not required to register their weapon or obtain a concealed-carry permit if they keep the gun in their house or car.").

138. Gelinas, *supra* note 134.

that year.<sup>139</sup> In the first quarter of 2007, murders were up 182 percent over the already high rate of the previous year, and armed robberies had jumped 135 percent.<sup>140</sup> Police attributed the dismal statistics to proliferation of guns as well as the population flowing back into the city.<sup>141</sup>

The stream of guns in New Orleans pours into criminal hands “at an alarming rate.”<sup>142</sup> The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) tracks the average “time-to-crime,” or interval between a firearm’s retail sale and its recovery by police in connection with a crime, and considers short time-to-crime to be a significant indicator of illegal firearm trafficking activity.<sup>143</sup> The average time-to-crime is five years nationwide but six months in New Orleans.<sup>144</sup>

New Orleans remains caught in a vicious cycle in which guns fuel an escalation of violent crime that continually drives more people, criminal-minded and law-abiding alike, to obtain and carry weapons. “Guns are worse than ever” in New Orleans, reported a police sergeant.<sup>145</sup> “It seems like every single person has a gun.”<sup>146</sup> New Orleans desperately needs a reasonable, comprehensive, long-term set of measures to control access to guns and reduce gun violence. Improvised, overreaching, and largely ineffective fixes like the gun confiscation efforts during Hurricane Katrina are not a sensible approach from any perspective.

### B. *The District of Columbia*

While New Orleans has recently held the dubious distinction of being the nation’s “murder capital,” the District of Columbia held that title for many years.<sup>147</sup> The District has long been plagued by high rates of gun violence, and it has the most restrictive gun laws in

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139. Foster, *supra* note 136.

140. Kevin Johnson, *Easy Access to Guns Is Tough to Battle*, USA TODAY, June 14, 2007, at 4A.

141. *Id.*

142. Foster, *supra* note 136.

143. EVALUATION AND INSPECTIONS DIVISION, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, INSPECTION OF FIREARMS DEALERS BY THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES 8 (2004), available at <http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf>.

144. Foster, *supra* note 136 (citing ATF spokesperson Austin Banks).

145. Johnson, *supra* note 140.

146. *Id.*

147. See 151 CONG. REC. H5502 (daily ed. June 30, 2005) (statement of Rep. Souder) (asserting that the District of Columbia was the “murder capital of the United States” for fifteen of the last sixteen years).

the country.<sup>148</sup> How those laws affect levels of violent crime in the District has been a prominent question in the gun control debate for decades.<sup>149</sup>

The issue recently took center stage when a court decision invalidated several elements of the District's gun laws and the case headed to the U.S. Supreme Court for a historic showdown on the meaning of the Second Amendment. In *Parker v. District of Columbia*, a divided panel of the United States Court of Appeals for the D.C. Circuit ruled that four provisions of the District's laws violate the Second Amendment of the United States Constitution.<sup>150</sup> Although the judges' task was merely to assess the constitutionality of the laws and not their wisdom or value as a policy matter, the effectiveness of the District's tough restrictions on firearms was inevitably an underlying issue in the case. The Supreme Court agreed to review the case, redubbed *District of Columbia v. Heller*, and heard oral argument on March 18, 2008,<sup>151</sup> just as this Article went to press. Observers predicted that it might turn out to be "one of the most important cases in American history, with profound political and policy implications."<sup>152</sup>

The District's gun laws are the product of several major pieces of legislation.<sup>153</sup> The United States Congress enacted the first one in 1932, adopting a set of measures that have been amended to some extent over the years but remain part of D.C. law today.<sup>154</sup> The 1932 legislation drew distinctions among several categories of guns.<sup>155</sup> Only one significant element of the 1932 law applied across the board

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148. Henri E. Cauvin, *D.C. Asks Full Court to Study Gun Law; Appeals Panel Had Ruled Against Ban, Angering Officials*, WASH. POST, Apr. 10, 2007, at B1.

149. See, e.g., David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 315-18 (1993) (discussing the effectiveness of D.C.'s handgun ban on crime rates in the District).

150. *Parker v. District of Columbia*, 478 F.3d 370, 399-01 (D.C. Cir.), cert. granted sub nom. *District of Columbia v. Heller*, 128 S. Ct. 645 (2007).

151. Warren Richey, *Historic Case May Decide Gun Rights*, CHRISTIAN SCI. MONITOR, Mar. 18, 2008, at 1.

152. Kenneth Blackwell & Sandra Froman, Op-Ed., *The Roe v. Wade of Gun Rights*, N.Y. SUN, Mar. 14, 2008, at 11.

153. For a thorough history and description of the regulation of guns in the District of Columbia, including measures enacted before the 1932 law, see Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 109-16 (1995).

154. Act of July 8, 1932, Pub. L. No. 72-275, 47 Stat. 650 (codified as amended at D.C. CODE §§ 22-4501 to -4516 (2001 & Supp. 2007)).

155. *Id.* § 1, 47 Stat. at 650 (codified as amended at D.C. CODE § 22-4501(a), (b), (c) (Supp. 2007)) (defining "pistol," "sawed-off shotgun," and "machine gun").

to all types of firearms. In that provision, Congress provided for enhanced prison sentences for violent crimes involving firearms.<sup>156</sup>

The legislation banned possession of “sawed-off shotgun[s]” and “machine gun[s].”<sup>157</sup> During the Prohibition Era, these were among the weapons most closely associated with the gangster violence that gripped the public’s attention.<sup>158</sup> While the term “machine gun” ordinarily refers to a gun that fires automatically, meaning it fires more than one round per trigger pull,<sup>159</sup> the 1932 law rather bizarrely defined a “machine gun” by ammunition capacity, deeming the term to cover any firearm “which shoots automatically or semiautomatically more than twelve shots without reloading.”<sup>160</sup>

A number of other measures in the 1932 law applied only to handguns, and not to long guns such as rifles and shotguns.<sup>161</sup> First, Congress prohibited possession of a handgun in the District by any person who had been convicted of a crime of violence.<sup>162</sup> The 1932 law further prohibited the sale of a handgun to any person the seller had reasonable cause to believe had been convicted of a violent crime or was under eighteen years old, a drug addict, or “not of sound mind.”<sup>163</sup> Congress also imposed a forty-eight-hour waiting period on handgun sales.<sup>164</sup>

For those not thereby disqualified from possessing handguns in the District, the 1932 law imposed restrictions on carrying them con-

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156. *Id.* § 2, 47 Stat. at 650–51 (codified as amended at D.C. CODE § 22-4502(a) (Supp. 2007)).

157. *Id.* § 14, 47 Stat. at 654 (codified as amended at D.C. CODE § 22-4514(a) (2001)). Again, this provision contained exceptions such as for law enforcement and military personnel. *Id.*

158. See Allen Rostron, *High-Powered Controversy: Gun Control, Terrorism, and the Fight over .50 Caliber Rifles*, 73 U. CIN. L. REV. 1415, 1428 (2005) (explaining how fears of organized crime led to federal regulations of “gangster” weapons).

159. *Id.* at 1420.

160. Act of July 8, 1932, Pub. L. No. 72-275, § 1, 47 Stat. 650, 650 (codified as amended at D.C. CODE § 22-4501(c) (Supp. 2007)). The 1932 law also contained several provisions that applied to handguns, sawed-off shotguns, and machine guns, such as a requirement that retail sellers of these weapons be licensed by the District’s government. *Id.* §§ 9-10, 47 Stat. at 652–53 (codified as amended at D.C. CODE §§ 22-4509 to -4510 (2001)).

161. The statute used the term “pistol” rather than handgun, but it defined “[p]istol” to include “any firearm with a barrel less than twelve inches in length” so that the term encompassed revolvers as well as pistols. *Id.* § 1, 47 Stat. at 650 (codified as amended at D.C. CODE § 22-4501(a) (Supp. 2007)).

162. *Id.* § 3, 47 Stat. at 651 (codified as amended at D.C. CODE § 22-4503 (Supp. 2007)).

163. *Id.* § 7, 47 Stat. at 652 (codified as amended at D.C. CODE § 22-4507 (2001)).

164. *Id.* § 8, 47 Stat. at 652 (codified as amended at D.C. CODE § 22-4508 (2001)).

cealed.<sup>165</sup> The law permitted carrying a concealed handgun in a person's "dwelling house or place of business or on other land possessed by him."<sup>166</sup> It banned carrying a concealed handgun outside those locations unless the person obtained a license from the District's superintendent of police, which was to be issued "if it appears that the applicant has good reason to fear injury to his person or property or has any other proper reason for carrying a pistol and that he is a suitable person to be so licensed."<sup>167</sup> While the 1932 law thus theoretically left open the possibility of obtaining a license to carry a concealed gun, such licenses were granted so rarely as to be "virtually unobtainable."<sup>168</sup>

Under the 1932 law, no license was needed to carry a handgun openly, such as in a hip or side holster, rather than concealed. Congress changed this in 1943, amending the District's gun law to prohibit open carrying of handguns unless the person had a license or stayed within the bounds of his own residential or business property.<sup>169</sup>

Since then, every major round of legislation on firearms in the District of Columbia has been the work of local government rather than the United States Congress. By the point when concern about firearms reached a peak in 1968 after the assassinations of Reverend Martin Luther King, Jr., and Senator Robert Kennedy,<sup>170</sup> limited local government authority in the District had been put into the hands of a mayor-commissioner and city council appointed by the President of

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165. Carrying concealed weapons generally had been prohibited in the District since 1892, and the 1932 law merely continued and revised that prohibition. See Halbrook, *supra* note 153, at 109–12 (discussing the history of gun control legislation in the District).

166. Act of July 8, 1932, Pub. L. No. 72-275, § 4, 47 Stat. 650, 651 (codified as amended at D.C. CODE § 22-4504 (2001)).

167. *Id.* § 6, 47 Stat. at 651 (codified as amended at D.C. CODE § 22-4506 (2001)). The law made exceptions for certain categories of people who could carry concealed handguns without a license, such as law enforcement officers, military personnel on duty, and those engaged in the business of manufacturing, repairing, or selling firearms. *Id.* § 14, 47 Stat. at 654 (codified as amended at D.C. CODE § 22-4514(a) (2001)). It also allowed a person to transport a handgun "unloaded and in a secure wrapper from the place of purchase to his home or place of business," or from an old home or office to a new one. *Id.* § 5, 47 Stat. at 651 (codified as amended at D.C. CODE § 22-4505(a) (2001)).

168. See *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994) (explaining that licenses had not been issued for many years).

169. Act of Nov. 4, 1943, Pub. L. No. 78-182, 57 Stat. 586 (codified as amended at D.C. CODE § 22-4504(a) (2001)).

170. See Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 147–48 (1975).

the United States.<sup>171</sup> In July 1968, the council promulgated regulations tightening the existing controls on guns.<sup>172</sup> The new regulations subjected rifles and shotguns to the licensing requirements already applied to handguns, and the council created a new registration system under which the District government would maintain records identifying the current owner of every firearm legally possessed within the District.<sup>173</sup>

Greater home rule authority in the District soon led to adoption of even stricter gun control measures. Congress passed a law giving District residents the right to elect their own local government officials, including a new Council of the District of Columbia to serve as the District's primary legislative body.<sup>174</sup> Congress retained the power to review the Council's enactments and to pass resolutions overruling them.<sup>175</sup>

Within a few months after taking office at the beginning of 1975,<sup>176</sup> members of the newly elected D.C. Council began proposing a complete ban on handguns within the District.<sup>177</sup> Although a majority of the Council apparently favored such a ban, the Council ultimately settled on a somewhat less restrictive proposal based on "considerations of constitutional law, budget impact, and political feasibility."<sup>178</sup>

The Firearms Control Regulations Act, adopted by the Council in the summer of 1976, essentially instituted a freeze on handgun ownership and possession in the District of Columbia.<sup>179</sup> Those who owned and had validly registered handguns in the District before the 1976

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171. Council of the District of Columbia, History of Self-Government in the District of Columbia, <http://www.dccouncil.washington.dc.us/history.html> (last visited Mar. 31, 2008).

172. *See* Md. & D.C. Rifle & Pistol Ass'n v. Washington, 442 F.2d 123, 125 & n.1, 129 (D.C. Cir. 1971) (describing then-current D.C. police regulations).

173. *Id.* at 125, 129.

174. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 401-404, 87 Stat. 774, 785-88; Council of the District of Columbia, *supra* note 171.

175. District of Columbia Self-Government and Governmental Reorganization Act, § 602(c), 87 Stat. at 814.

176. *See id.* § 771(c), 87 Stat. at 836 (explaining that the portions of the Act pertaining to the Council took effect in 1975).

177. Edward D. Jones, III, *The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 141-42 & n.13 (1981).

178. *Id.* at 142.

179. *See* D.C. Law 1-85, 23 D.C. Reg. 2464 (1976); McIntosh v. Washington, 395 A.2d 744, 753-54 (D.C. 1978) (explaining that the purpose of the Act was to "freeze" the handgun population).

law took effect could keep those weapons if they re-registered them within sixty days.<sup>180</sup> Aside from a few minor exceptions such as for law enforcement and military personnel, no one else in the District could legally acquire or possess a handgun.<sup>181</sup> The Council anticipated that the number of legal handguns in the District would gradually decline over time as the pool of residents with registered handguns died, moved away, or opted to turn in their weapons to the police.<sup>182</sup>

The new law was a bit less restrictive with respect to long guns. Rifles and shotguns validly registered before the 1976 law took effect could be re-registered and retained under the “grandfather” provision, just like handguns, but the new law also permitted possession of other rifles and shotguns if registered immediately after being brought into the District.<sup>183</sup> To the extent a D.C. resident wanted to purchase a rifle or shotgun from a gun dealer, the purchase would have to be made from one operating in the District.<sup>184</sup> The number of dealers in the District dwindled, however, because of stricter dealer licensing requirements, higher license fees, and the ban on sales of new handguns under the 1976 law.<sup>185</sup> Within five years after adoption of the new law, only five gun dealers remained in business in the District.<sup>186</sup>

On top of those significant limits, the 1976 law prescribed detailed requirements for the registration process.<sup>187</sup> For example, it required applicants to submit photographs and fingerprints<sup>188</sup> and to take a vision test<sup>189</sup> and a written test demonstrating knowledge of D.C. gun laws and safe and responsible use of firearms.<sup>190</sup> The Dis-

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180. D.C. CODE §§ 7-2502.01, 7-2502.02, 7-2502.06 (2001).

181. *Id.* § 7-2502.01(b) (Supp. 2007) (providing exceptions for law enforcement and military personnel while on duty, licensed gun dealers, and non-District residents on their way to or from lawful recreational firearm-related activity in the District).

182. Jones, *supra* note 177, at 143.

183. See D.C. CODE § 7-2502.02(a) (2001) (prohibiting registration of four categories of firearms—“[s]awed-off shotgun[s],” “[m]achine gun[s],” “[s]hort-barreled rifle[s],” and “[p]istol[s]” not registered before September 24, 1976—but permitting registration of other firearms including other rifles and shotguns); *id.* § 7-2502.06(a) (requiring that “an application for registration shall be filed immediately after a firearm is brought into the District”); Jones, *supra* note 177, at 139. As of 2004, D.C. residents had registered over 100,000 guns, mostly rifles and shotguns, with D.C. police. 150 CONG. REC. H7749 (daily ed. Sept. 29, 2004) (statement of Rep. Jackson-Lee).

184. Jones, *supra* note 177, at 139 n.3.

185. *Id.*

186. *Id.*

187. See D.C. CODE § 7-2502.03 (2001).

188. *Id.* § 7-2502.04.

189. *Id.* § 7-2502.03(a)(11).

190. *Id.* § 7-2502.03(a)(10).

trict's 1976 statute also went beyond federal law in some respects in its list of characteristics disqualifying people from acquiring guns. For example, it prohibited access to guns for those committed to mental hospitals within the past five years, even if the commitment was voluntary,<sup>191</sup> and it prohibited gun possession by anyone who had been found to have been negligent in a past firearm accident causing death or serious injury to someone.<sup>192</sup>

Finally, even those who could have guns under the new D.C. law were subject to significant new responsibilities. Except for guns belonging to law enforcement officers, guns being stored at a place of business, and guns being used for lawful recreational purposes, the D.C. law required each firearm to be stored "unloaded and disassembled or bound by a trigger lock or similar device."<sup>193</sup> In other words, to the extent that D.C. residents could possess guns under the 1976 law, the law required them to keep those guns unloaded and disassembled or locked at all times when stored within their homes. The D.C. Council adopted the storage restrictions after extensive discussion of their potential for preventing accidental shootings, such as by children finding and playing with guns in their homes, and shootings by otherwise law-abiding citizens in moments of sudden impulse or passion.<sup>194</sup>

Attempts to block the new law failed in the courts<sup>195</sup> and Congress.<sup>196</sup> To some, the District's gun laws seemed "draconian" and "ty-

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191. *Id.* § 7-2502.03(a)(6). Federal law disqualifies only those involuntarily committed or adjudicated mentally incompetent. See *infra* notes 272–273 and accompanying text.

192. D.C. CODE § 7-2502.03(a)(8).

193. *Id.* § 7-2507.02. In addition, the law required a gun owner to report immediately to the police any loss, theft, or destruction of the firearm. *Id.* § 7-2502.08(1)(A).

194. Brief of Appellee at 3–4, 17, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041).

195. See *McIntosh v. Washington*, 395 A.2d 744, 758 (D.C. 1978) (holding that the District's Firearms Control Regulations Act was within the authority of D.C. Council, was not preempted by federal statutes, and did not violate the U.S. Constitution). Although the new gun law initially took effect on September 24, 1976, a judge enjoined enforcement of the new gun law in December 1976, and that injunction remained in place until an appellate court lifted it in February 1977. *Id.* at 747; Jones, *supra* note 177, at 141.

196. Although some in Congress were uneasy about the new gun law approved by the D.C. Council, congressional leaders were not eager to bring attention to a controversial issue like gun control during an election year. See Jones, *supra* note 177, at 140–41 (explaining that "because of election year unease, subsequent attempts . . . to disapprove the Firearms Control Regulations Act were not permitted by the leadership to come to a vote"). Resolutions to nullify the D.C. Council's enactment were introduced in the U.S. House of Representatives but did not pass. See 122 CONG. REC. 19, 24471 (1976) ("A resolution to disapprove the Firearms Control Regulations Act of 1975"); 122 CONG. REC. 20, 24816 (1976). Shortly before the District's new law was set to take effect, Congress amended its grant of home rule authority to the District in an apparent attempt to deprive

rannical,”<sup>197</sup> while to others they were “sensible” and “reasonable.”<sup>198</sup> However characterized, the D.C. gun control regime was unusually restrictive compared to laws in place throughout the rest of the country and therefore sparked an intense debate among criminologists seeking to assess its effects.

The staff of the United States Conference of Mayors conducted the first evaluation of the new D.C. gun law based on crime statistics.<sup>199</sup> Looking at data on murders, robberies, and aggravated assaults over the period from 1974 to 1979 (three years before and after the new law took effect) and comparing the District’s numbers to those for control groups including several cities of similar size, the Conference of Mayors concluded that the D.C. law resulted in a significant drop in firearm crime in general, and handgun crime in particular.<sup>200</sup>

Likewise, a study by University of Maryland criminologists evaluated data on firearm deaths from 1968 to 1987 and found that in the District “there was an abrupt decline in both suicides and homicides by firearms that coincided with the implementation” of the 1976 law, while no similar reductions had occurred in adjacent metropolitan areas in Maryland and Virginia.<sup>201</sup> They estimated that the 1976 law prevented an average of forty-seven deaths each year.<sup>202</sup>

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the D.C. Council of power to revise the District’s gun laws, *see* Act of Sept. 7, 1976, Pub. L. No. 94-402, 90 Stat. 1220 (1976) (increasing the length of time that the D.C. Council had to wait before revising its criminal laws), but that effort did not have the desired effect, *see McIntosh*, 395 A.2d at 750 n.12 (rejecting the argument that a subsequent Congress’s revision of the District’s home rule authority indicated that a predecessor Congress meant to foreclose enactment of the Firearms Control Regulations Act); Jones, *supra* note 177, at 140 (noting that the revision of the District’s home rule authority “did not include a retroactivity provision” and therefore did not nullify the Firearms Control Regulations Act).

197. *See, e.g.*, 150 CONG. REC. H7765 (daily ed. Sept. 29, 2004) (statement of Rep. Brown-Waite) (urging her colleagues to “end[ ] the tyrannical reign of D.C.’s repressive gun-control laws”); *id.* at H7772 (statement of Rep. Paul); Halbrook, *supra* note 153, at 115 (referring to the D.C. Council’s firearms prohibitions as “draconian”).

198. *See, e.g.*, Erwin Chemerinsky, Op-Ed., *A Well-Regulated Right to Bear Arms*, WASH. POST, Mar. 14, 2007, at A15 (claiming that the gun ban is “a reasonable way of achieving the government’s legitimate goal of decreasing gun violence”); Editorial, *Targeting D.C. Gun Laws*, WASH. POST, Nov. 8, 2005, at A18 (calling the D.C. Council’s gun safety law “sensible and broadly supported”).

199. U.S. CONFERENCE OF MAYORS, THE ANALYSIS OF THE FIREARMS CONTROL ACT OF 1975: HANDGUN CONTROL IN THE DISTRICT OF COLUMBIA (1980).

200. *Id.* at 17.

201. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615, 1618 (1991).

202. *Id.* at 1620.

Others remained skeptical and questioned the validity of these statistical analyses.<sup>203</sup> They claimed that the studies had selected inappropriate cities or regions as controls with which to compare the District,<sup>204</sup> did not account for more aggressive law enforcement tactics in the District that may have reduced crime rates,<sup>205</sup> did not consider the effect of advances in emergency and surgical care for gunshot victims,<sup>206</sup> and ignored beneficial uses of firearms such as deterring or defending against criminal attacks.<sup>207</sup> They asserted that crime was declining in the District even before the 1976 gun control law took effect, and that this downward trend merely continued and gave the false appearance that the new law lowered crime rates.<sup>208</sup> They queried how the D.C. gun law could have produced an abrupt decrease in crime, rather than a gradual decline, given that the law froze the existing stock of handguns in the city, rather than banning handguns completely.<sup>209</sup> Some went even further, accusing the Maryland re-

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203. See Paul H. Blackman, Letter to the Editor, 326 NEW ENG. J. MED. 1157, 1157 (1992) (arguing that the Loftin et al. study “misleadingly suggests a post-law decline in homicide”); Chester L. Britt et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 LAW & SOC’Y REV. 361, 376 (1996) (finding that the D.C. gun law had little to no effect on monthly homicides in D.C.); Eric S.H. Ching, Letter to the Editor, 326 NEW ENG. J. MED. 1158, 1159 (1992) (arguing that the effect of the gun law was “nonexistent”); Robert Eilers, Letter to the Editor, 326 NEW ENG. J. MED. 1158 (1992) (calling into question Loftin et al.’s findings on reduced suicide rates); Jones, *supra* note 177, at 144–49 (calling into question the U.S. Conference of Mayors’ findings); Gary Kleck et al., *The Emperor Has No Clothes: Using Interrupted Time Series Designs to Evaluate Social Policy Impact*, 12 J. FIREARMS & PUB. POL’Y 197, 233 (2000) (describing the Loftin et al. study’s approach as “‘subscientific’”); Srinivas M. Sastry et al., Letter to the Editor, 326 NEW ENG. J. MED. 1159 (1992) (calling into question the adequacy and appropriateness of the Loftin et al. study); Timothy Wells, Letter to the Editor, 326 NEW ENG. J. MED. 1158 (1992) (same). The authors of the District of Columbia study responded to some of these critiques. See Colin Loftin et al., Letter to the Editor, 326 NEW ENG. J. MED. 1160 (1992); David McDowall et al., *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.’s Reassessment of the D.C. Gun Law*, 30 LAW & SOC’Y REV. 381, 390 (1996).

204. Blackman, *supra* note 203, at 1157; Britt et al., *supra* note 203, at 365–66; Jones, *supra* note 177, at 146–47; Kleck et al., *supra* note 203, at 203, 225–26.

205. Jones, *supra* note 177, at 144–45; Kleck et al., *supra* note 203, at 211.

206. Sastry et al., *supra* note 203, at 1159.

207. *E.g.*, Ching, *supra* note 203, at 1158.

208. Blackman, *supra* note 203, at 1157; see also Chester L. Britt et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 LAW & SOC’Y REV. 393, 395 (1996) (“Clearly, monthly homicides dropped in D.C. in the mid-1970s, but these results suggest to us that something other than the gun law was responsible for the observed decline.”).

209. Blackman, *supra* note 203, at 1157; Kleck et al., *supra* note 203, at 209; Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY, 207, 212 (1995); see Britt et al., *supra* note 203, at 368–70 (noting that the D.C. gun ban was designed to have a gradual effect, and criticizing Loftin et al.’s study for assuming, without adequate support, that the gun ban was responsible for the decrease in homicides).

searchers of dishonestly slanting their studies to support anti-gun biases.<sup>210</sup>

Critics of the D.C. gun law also argued that it was simply implausible that the District's restrictions on access to guns could significantly reduce crime because the law was too easy to circumvent. Demand for guns for criminal purposes remained high despite the D.C. law, and a vast quantity of illegal guns flowed into the District from neighboring states.<sup>211</sup> Geography exacerbated the problem, since the District of Columbia covers only about sixty-one square miles of land and "no point is more than five miles from the nearest border with Virginia or Maryland."<sup>212</sup> Indeed, ATF data indicated that even before the 1976 law, over eighty percent of the firearms recovered by law enforcement in the District and traced in connection with criminal investigations originated outside the District.<sup>213</sup> The NRA thus insisted that the new law could not possibly reduce crime in the District because "criminals would ignore the requirements of the Act and acquire handguns if they so chose."<sup>214</sup>

Even supporters of the D.C. law agreed that its effectiveness inevitably would be undercut significantly by the fact that surrounding jurisdictions have much weaker gun control laws. Indeed, when D.C. Council members debated in 1976 whether to adopt the new, stricter gun laws, they "were mindful of the fact that the proposed possession requirements generally would have more of an impact on law-abiding firearm owners than criminal users."<sup>215</sup> They nevertheless favored tough restrictions because they could potentially prevent incidents of law-abiding citizens using easily accessible handguns spontaneously in arguments or accidentally.<sup>216</sup> In other words, D.C. Council members realized the new laws were not going to disarm completely the city's

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210. See Blackman, *supra* note 203, at 1158 (arguing that "the District of Columbia gun law can look effective only to gun control's true believers"); Britt et al., *supra* note 203, at 378 (expressing hope that researchers will resist temptations to skirt issues casting doubt on efficacy of politically controversial policies such as gun control); Kleck et al., *supra* note 203, at 231–32 (suggesting that the statistical analyses used to examine the effects of D.C. gun laws are "so flexible, so manipulable, that one can obtain almost any results one likes").

211. See *infra* notes 218–220 and accompanying text.

212. Kleck et al., *supra* note 203, at 224.

213. Jones, *supra* note 177, at 145 (citing BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF TREASURY, CONCENTRATED URBAN ENFORCEMENT: AN ANALYSIS OF THE INITIAL YEAR OF OPERATION CUE IN THE CITIES OF WASHINGTON, D.C.; BOSTON, MASSACHUSETTS; AND CHICAGO, ILLINOIS 107 (1978)).

214. *Id.* at 143–44.

215. *Id.* at 142.

216. *Id.*

hardcore criminal population, but nevertheless hoped the laws would have beneficial effects.

After the law took effect, its enforcers and supporters continued to acknowledge that it was bound to be undermined to some degree by an influx of guns from other jurisdictions. For example, when the Conference of Mayors issued its report in 1980 claiming that the D.C. law had reduced gun violence in the city, the District's own police questioned the findings.<sup>217</sup> A police department spokesperson noted that handguns could be obtained easily in neighboring states and said that "less than 1 percent of all firearms confiscated each year by police are registered here or elsewhere, 'so somehow or other, the illegal guns are still getting in here.'"<sup>218</sup> Likewise, an official from the National Council to Control Handguns (now the Brady Campaign to Prevent Gun Violence)<sup>219</sup> explained that the District's gun laws were tough, but that "the laws are less restrictive in Virginia and Maryland," and "[t]hat results in 'leakage' into Washington of guns purchased in those states, illustrating the need for uniform, national gun control legislation."<sup>220</sup>

The debate took a sad turn as firearm homicide rates increased dramatically in the District at the end of the 1980s and into the 1990s.<sup>221</sup> Supporters of the D.C. gun laws attributed the soaring death toll to an epidemic of deadly violence associated with crack cocaine that would have been even worse but for the District's tough gun

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217. *Id.* at 143–44.

218. Paul W. Valentine, *Study Cites Decline over Last 3 Years in Handgun Crime; Three-Year Drop Cited in D.C. Handgun Crime*, WASH. POST, June 29, 1980, at B1. In 2005, the Mayor of the District of Columbia testified that the District's gun laws are important, but "[b]ecause of the porous nature of our borders, we can never rely on laws alone to keep guns out of our city." *Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 45 (2005) (statement of Anthony Williams, Mayor of the District of Columbia).

219. Brady Campaign to Prevent Gun Violence, About the Brady Campaign, <http://www.bradiycampaign.org/about/history.php> (last visited Mar. 31, 2008).

220. Laura A. Kiernan, *D.C. Appeals Court Upholds City's Tough Gun Control Law; Court Upholds City's Gun Control Law*, WASH. POST, Oct. 25, 1978, at A1 (quoting Charles Orasin, Executive Vice President of the National Council to Control Handguns); see also Eilers, *supra* note 203, at 1158 (arguing that "even a tough gun law like the one in Washington[,] D.C." is inadequate in preventing the illegal flow of guns from neighboring states and that "only a strong federal law restricting or banning handguns can make a noteworthy and lasting impact on the epidemic of violence in our urban areas").

221. Eilers, *supra* note 203, at 1158; Sastry et al., *supra* note 203, at 1159.

laws.<sup>222</sup> Opponents of gun control saw the increase in homicides as confirmation of the D.C. gun laws' ineffectiveness.<sup>223</sup>

As the homicide rate surged upward, Virginia was the largest source of guns illegally flowing into the District of Columbia.<sup>224</sup> Embarrassed by its reputation as a favored shopping place for gun traffickers, Virginia enacted a law in 1993 allowing a person, who is not a licensed dealer, to purchase no more than one handgun in any thirty-day period.<sup>225</sup> Much of the gun trafficking activity previously originating in Virginia simply shifted over to Maryland,<sup>226</sup> and when Maryland passed a similar law prohibiting the purchase of more than one handgun per month,<sup>227</sup> "the gun runners simply moved a few states south, to Georgia, where no such rationing is practiced."<sup>228</sup> With the strength of state laws varying widely, the D.C. gun laws thus remain vulnerable to being undercut by trafficking of guns from other jurisdictions.<sup>229</sup>

In recent years, gun rights advocates stepped up their opposition to the D.C. laws.<sup>230</sup> Strict gun laws remain popular with most D.C. residents and city leaders and thus it is not likely that the D.C. Council

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222. Loftin et al., *supra* note 201, at 1620; *see also* McDowall et al., *supra* note 203, at 390 ("Firearm homicides in the District were visibly lower for more than 10 years after the licensing law began. The later rise in killings shows that this drop was not unalterable.").

223. *See* Blackman, *supra* note 203, at 1157 (noting "the District of Columbia's recent record-setting years for homicide"); *see also* Britt et al., *supra* note 203, at 370–71 (highlighting the fact that, although any decrease in homicide rates attributable to the D.C. gun ban should have been apparent many years after the enactment of the ban, this is precisely when homicide rates in the D.C. area began to increase); Wells, *supra* note 203, at 1158 (proposing that recent increases in homicides suggest that any effect of the gun ban was only temporary, that criminals have found ways around the ban, and that the ban increases law-abiding citizens' vulnerability to violent crimes by disarming them).

224. *See* Cathy Lanier & Vincent Schiraldi, Op-Ed., *Give Us Back Our Gun Law*, WASH. POST, Mar. 15, 2007, at A19 (noting that in spite of D.C.'s tough gun laws, guns flowing in from neighboring states fueled illegal sales in D.C. and that Virginia "was the No. 1 supplier of guns seized in crimes in the District").

225. VA. CODE ANN. § 18.2-308.2:2(P) (Supp. 2007); B. Drummond Ayres, Jr., *Virginia Aims to Shed Image as a 'Handgun Supermarket'*, N.Y. TIMES, Dec. 23, 1992, at A16.

226. *See* OPEN SOCIETY INSTITUTE, GUN CONTROL IN THE UNITED STATES: A COMPARATIVE SURVEY OF STATE FIREARM LAWS 5 (2000) (noting that after Virginia passed its one-gun-a-month law, Maryland "became the main source of crime guns in Washington, D.C."), *available at* [http://www.soros.org/initiatives/justice/articles\\_publications/publications/gun\\_report\\_20000401/GunReport.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/gun_report_20000401/GunReport.pdf).

227. MD. CODE ANN., PUB. SAFETY § 5-128 (LexisNexis 2003).

228. Polsby, *supra* note 209, at 219–20.

229. *See* OPEN SOCIETY INSTITUTE, *supra* note 226, at 5 ("Very strict gun laws in one state can be undermined by permissive laws in neighboring states.").

230. Editorial, *Targeting D.C. Gun Laws*, *supra* note 198 (discussing the recent legislative push to repeal D.C. gun restrictions).

will drastically cut restrictions on guns.<sup>231</sup> As a result, critics of the D.C. gun laws have aimed their pleas at the United States Congress.<sup>232</sup> The House of Representatives voted several times to repeal the District's gun control laws, but the Senate never followed suit.<sup>233</sup>

In the midst of the continuing struggle over the issue in Congress, the D.C. Circuit rendered its decision striking down several elements of the District's gun laws as violations of the Second Amendment.<sup>234</sup> The plaintiffs in the case were D.C. residents who asserted that they wanted to keep guns in their homes for protection against criminal attacks, but that they could not do so because of the D.C. laws preventing them from having handguns and requiring rifles and shotguns to be stored unloaded and locked away.<sup>235</sup>

A federal district court judge dismissed the case, observing that an overwhelming body of precedent rejects the notion that there is an individual right to keep and bear arms apart from service in a well-regulated militia.<sup>236</sup> On appeal, the D.C. Circuit panel reversed, embracing the minority view on the Second Amendment's meaning and

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231. See, e.g., Jesse Jackson, Op-Ed., *Activist Judge Takes Aim at Gun Law*, CHI. SUN-TIMES, Mar. 13, 2007, at 23 (contending that the recent D.C. Circuit decision striking down the D.C. gun laws undermines the wishes of D.C. legislators and the citizens themselves); Editorial, *Targeting D.C. Gun Laws*, *supra* note 198 (noting that every D.C. mayor and D.C. Council member has supported D.C. gun restrictions).

232. Editorial, *Targeting D.C. Gun Laws*, *supra* note 198 (describing how the NRA is joining forces with members of Congress to pass a bill that would allow D.C. residents to store assembled guns in their homes, in spite of opposition from local authorities).

233. See 151 CONG. REC. H5501-04, H5512 (daily ed. June 30, 2005) (voting 259 to 161 to prohibit any funds appropriated to the District of Columbia from being used to enforce the law requiring guns in homes to be kept unloaded and locked); 150 CONG. REC. H7776-77 (daily ed. Sept. 29, 2004) (voting 250 to 171 in favor of a statute repealing significant portions of the D.C. gun laws). In March 2007, when leaders of the new Democratic majority in the U.S. House of Representatives pushed a bill that would grant congressional voting rights to D.C. residents, opponents attached an amendment that would repeal the District's gun laws, prompting the Democratic leaders to drop their pursuit of the bill. See 153 CONG. REC. H2860-63 (daily ed. Mar. 22, 2007); H.R. REP. NO. 110-63, at 4 (2007); see also Tory Newmyer, *NRA Offers Whiff of Gunpowder*, ROLL CALL, Mar. 26, 2007 (describing how House Republicans derailed a D.C. voting rights bill by adding provision that would eviscerate D.C. gun laws), available at 2007 WLNR 5658227.

234. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir.), cert. granted sub nom. *District of Columbia v. Heller*, 128 S. Ct. 645 (2007).

235. *Parker*, 478 F.3d at 373-74; see Paul Duggan, *Lawyer Who Wiped Out D.C. Ban Says It's About Liberties, Not Guns*, WASH. POST, MAR. 18, 2007, at A1 (noting that the driving force behind the lawsuit was Robert Levy, a wealthy entrepreneur who had no interest in having a gun but felt that the D.C. gun laws unduly infringed personal freedoms).

236. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004), rev'd, 478 F.3d 370.

concluding that it provides, at a minimum, a right to keep guns at home for protection.<sup>237</sup>

While having an undeniably significant impact on the debate over the Second Amendment, the actual effect of the D.C. Circuit decision was carefully limited. The decision was not a wholesale invalidation of the District's gun laws.<sup>238</sup> Instead, the court essentially ruled that the D.C. laws went too far in two respects. First, the court concluded that the District violated the Second Amendment to the extent that it effectively banned possession of handguns for everyone who did not have a handgun already registered before the 1976 law took effect.<sup>239</sup> Second, the court struck down the District's requirement that guns in homes be stored unloaded and disassembled or locked up.<sup>240</sup> In other words, the court ruled that the District must allow its residents to have handguns, as well as rifles and shotguns, in their homes, with the option to keep them loaded, unlocked, and ready to be fired.

The District of Columbia persuaded the United States Supreme Court to review the case, a move welcomed by gun rights advocates hoping for a landmark ruling affirming their view of the Second Amendment's scope and effect.<sup>241</sup> Even if the Supreme Court does not reverse the decision below, the D.C. Circuit's ruling leaves the District with gun laws that are still among the nation's strongest.<sup>242</sup> While

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237. *Parker*, 478 F.3d at 395, 400–01. The decision marked only the second time that a federal appellate court has interpreted the Second Amendment broadly to protect possession and use of guns having no relation to organized, public, military activity. *See id.* at 380 (noting that, up to that point, “[o]nly the Fifth Circuit ha[d] interpreted the Second Amendment to protect an individual right”). The first was in *United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001). In its opinion in *Parker*, the D.C. Circuit acknowledged that it was taking the minority view on the issue, rejecting the approach taken by the majority of federal and state appellate courts. 478 F.3d at 380 & nn.4–6.

238. Plaintiffs emphasized that they were not challenging “the totality of the city’s gun control laws” and that the relief sought was “exceedingly narrow.” Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment at 1, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 03-CV-0213-EGS).

239. *Parker*, 478 F.3d at 399–400 (invalidating D.C. CODE § 7-2502.02(a)(4) (2001)). The court also struck down two provisions of the gun law enacted by Congress in 1932 to the extent that they could be construed as prohibiting the movement of a legally registered handgun from room to room within one’s own house. *Id.* at 400 (invalidating D.C. CODE §§ 22-4504, 22-4506 (2001)).

240. *Id.* at 400–01 (invalidating D.C. CODE § 7-2507.02 (2001)).

241. David Nakamura, *D.C. Wants High Court to Hear Gun Case; City Defending Restrictive Law*, WASH. POST, July 17, 2007, at A1.

242. Indeed, the plaintiffs in *Parker* argued that should they prevail in their lawsuit, “the District of Columbia would still be left with what is arguably the Nation’s strictest gun control regime.” Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 238, at 1; *see also* 150 CONG. REC. H7767 (daily ed. Sept. 29, 2004) (statement of Rep. Souder) (asserting that D.C. gun laws “would still be far more

District residents would be able to legally possess handguns or long guns for defense in their homes, those firearms would remain subject to the District's gun registration system, one of the strictest in the country.<sup>243</sup> D.C. law continues to prohibit carrying of guns, whether concealed or not, in public or in automobiles.<sup>244</sup> Automatic weapons, heavily regulated by federal law but still otherwise generally legally available to civilians throughout the United States,<sup>245</sup> remain banned in the District of Columbia.<sup>246</sup> While large-capacity ammunition magazines are legal again in the rest of the country after the expiration of a federal statute that banned them from 1994 to 2004,<sup>247</sup> D.C. law retains its ban on all semi-automatic firearms capable of firing more than twelve shots without reloading.<sup>248</sup> Another D.C. statute, the only one of its kind in the country,<sup>249</sup> makes manufacturers, importers, and dealers of military-style assault weapons, automatic weapons, and firearms with high-capacity ammunition magazines strictly liable for any bodily injuries or deaths resulting from use of such weapons in the District.<sup>250</sup> Stringent gun dealer licensing require-

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restrictive than the laws of most states" even if Congress passed proposed repeal of some portions of those laws).

243. See D.C. CODE §§ 7-2502.01 to -2502.10 (2001); *Parker*, 478 F.3d at 374 (noting that plaintiffs did not challenge the District's authority to require registration of firearms).

244. D.C. CODE §§ 22-4504, 22-4506 (2001); *Parker*, 478 F.3d at 374 (noting that plaintiffs did not assert any legal right to carry guns outside their homes); *id.* at 400 ("[W]e need not consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles.").

245. See Rostron, *supra* note 158, at 1428-34 (describing the regulation of such weapons under the National Firearms Act).

246. See D.C. CODE §§ 7-2501.01(10)(A), 7-2502.02(a)(2) (2001).

247. 18 U.S.C. §§ 921(a)(31)(A), 922(w) (repealed 2004). These provisions were enacted in 1994 with a ten-year "sunset" term that expired in 2004. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110105, 108 Stat. 1996, 2000 (1994).

248. D.C. CODE §§ 7-2501.01(10)(B), 7-2502.02(a)(2). The D.C. statute bans any firearm "which shoots, is designed to shoot, or can be readily converted or restored to shoot" more than twelve rounds without manually reloading. *Id.* The statute could quite plausibly be read as prohibiting virtually all semi-automatic firearms, because a magazine holding more than a dozen rounds could be inserted into any firearm that can accept a detachable magazine. See Eugene Volokh, *Why Congress Should Pre-empt Most Lawsuits Against Gun Manufacturers*, VOLOKH CONSPIRACY, Apr. 21, 2005, [http://volokh.com/archives/archive\\_2005\\_04\\_17-2005\\_04\\_23.shtml](http://volokh.com/archives/archive_2005_04_17-2005_04_23.shtml) ("[T]he only 'conversion' required is simply slapping in the bigger magazine.").

249. See Rae Theodore, *Gun Makers Say D.C. Liability Ruling Could Affect All Products Cases*, FINDLAW, Aug. 9, 2005, <http://news.lp.findlaw.com/andrews/pl/gun/20050809/20050809beretta.html>.

250. D.C. CODE §§ 7-2551.01 to -2551.03; see *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 655-59 (D.C. 2005) (rejecting constitutional challenges to the District's Assault Weapon Manufacturing Strict Liability Act of 1990).

ments<sup>251</sup> and restrictions on ammunition sales<sup>252</sup> also remain in place, along with a forty-eight hour waiting period for obtaining a handgun.<sup>253</sup>

The constitutional litigation thus threatens to take away significant pieces of the District of Columbia's uniquely strict system of gun control regulations, but it does not fundamentally alter the bigger, overall picture. As before, the District will continue to have some of the strongest restrictions on access to guns of any place in the nation. But as before, those restrictions will be undercut by the substantially weaker laws of surrounding states and the lack of a strong, comprehensive national regulatory scheme.<sup>254</sup> As the District's police chief put it, "we are continuing to face a serious problem with firearms being brought illegally into the District from other jurisdictions. Unfortunately, that problem is not likely to go away anytime soon."<sup>255</sup>

### C. *Virginia Tech*

Gun control again became a headline story in April of 2007 when a student at Virginia Tech used two pistols to murder thirty-two people and wound seventeen others before killing himself.<sup>256</sup> The deadliest shooting spree in American history,<sup>257</sup> it prompted outrage and calls for reform from both opponents and proponents of gun control.

Gun rights advocates immediately blamed the tragedy on the fact that Virginia Tech prohibited firearms on its campus.<sup>258</sup> Within hours of the shootings, they claimed that the university had "blood on its

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251. D.C. CODE §§ 7-2504.01 to -2504.08 (2001 & Supp. 2007).

252. *Id.* § 7-2505.02(d) (2001) (requiring an ammunition purchaser to have a valid registration certificate for a firearm of the same caliber or gauge as the ammunition purchased).

253. *Id.* § 22-4508.

254. The District of Columbia emphasized this point in a tort action that it filed against gun manufacturers several years ago. Complaint at 15, *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (Nos. 03-CV-24, 03-CV-38) ("[A]lmost all firearms that are possessed and used unlawfully in the District were originally sold outside the District in a manner that has undermined the District's stringent gun control laws.").

255. *Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?: Hearing Before the H. Comm. on Government Reform, supra* note 218, at 48 (statement of Charles H. Ramsey, Chief of Police, Metropolitan Police Department).

256. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 1, 71 (2007), available at <http://www.vtreviewpanel.org/report/index.html>.

257. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1.

258. See Paul Joseph Watson & Alex Jones, *Campus Gun Ban Disarmed Virginia Victims: VA Tech Has "Blood on Its Hands" as Gun Control Advocates Milk Tragic Event*, PRISON PLANET, Apr. 16, 2007, <http://www.prisonplanet.com/articles/april2007/160407gunban.htm> ("A gun ban recently enforced by Virginia Tech campus prevented over thirty victims of today's mass shooting from defending themselves against the killer . . .").

hands” for prohibiting possession of guns by students and teachers “who could potentially have stopped the killer in his tracks.”<sup>259</sup>

Like most states, Virginia generally allows people to obtain permits to carry concealed guns.<sup>260</sup> While placing special restrictions on guns at certain locations, such as places of worship and elementary and secondary schools,<sup>261</sup> the Virginia statutes are silent on the issue of guns at institutions of higher education.<sup>262</sup> In the absence of any specific statutory treatment of the subject, most colleges and universities in Virginia adopted rules prohibiting guns on their campuses.<sup>263</sup>

Even before the shootings at Virginia Tech, those bans had been targets of criticism and controversy for several years. Gun owners challenged the validity of the restrictions at several schools,<sup>264</sup> but Virginia’s attorney general issued an opinion in 2006 upholding colleges’ and universities’ authority to restrict the possession of guns on campus.<sup>265</sup> Legislators in Virginia’s General Assembly introduced bills that would have nullified the “no guns on campus” rules, but those

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259. *Id.* (quoting Aaron Zelman of Jews for the Preservation of Firearms Ownership); *see also* Press Release, Gun Owners of America, Virginia Tech Shooting—Gun Bans Are the Problem, Not the Solution (Apr. 16, 2007), <http://www.gunowners.org/pr0704.htm>; Press Release, Virginia Citizens Defense League, Inc., Gun-Control Claims Lives at Virginia Tech (Apr. 16, 2007), <http://www2.vcdl.org/cgi-bin/wspd.cgi.sh/vcdl/vadetail.html?RECID=1702146&FILTER=:Press>.

260. VA. CODE ANN. § 18.2-308(D) (Supp. 2007).

261. VA. CODE ANN. §§ 18.2-283 (2004), 18.2-308.1 (Supp. 2007).

262. State legislators introduced bills in 2005 that would have spelled out the authority of Virginia public universities to prohibit guns, but those bills did not pass. *See* S.B. 1343, 2005 Sess. (Va. 2005); H.B. 2897, 2005 Sess. (Va. 2005).

263. Greg Esposito, *Gun Bill Gets Shot Down by Panel*, ROANOKE TIMES, Jan. 31, 2006, at A1; Kevin Miller, *VA. Tech’s Ban on Guns May Draw Legal Fire*, ROANOKE TIMES, Apr. 13, 2005, at A1.

264. *See* Esposito, *supra* note 263 (noting that some questioned Virginia Tech’s decision to discipline a student for bringing his gun to class despite having a concealed handgun permit); Steven M. Janosik, *Anticipating Legal Issues in Higher Education*, 42 NASPA J. 401, 409–10 (2005), *available at* <http://www.elps.vt.edu/janosik/anticipating.pdf> (discussing a Blue Ridge Community College student’s dispute of the college’s ban on weapons); Miller, *supra* note 263 (discussing both the Virginia Tech and Blue Ridge Community College incidents and noting challenges to James Madison University’s ban on concealed weapons).

265. Op. Va. Att’y Gen. No. 05-078 (2006), *available at* <http://www.oag.state.va.us/OPINIONS/2006opns/05-078.pdf>. While the attorney general determined that Virginia colleges and universities could not impose blanket or universal bans on carrying concealed guns on their campuses, he took the position that schools had the authority to ban their students and employees from possessing guns and could impose “regulation of, or under limited circumstances, prohibition of, firearms by any persons attending events on campus, visiting dormitories or classroom buildings, attending specific events as invitees, or under any circumstance permitted by law.” *Id.*

bills did not make it out of committee.<sup>266</sup> In the midst of the debate over campus rules on firearms, Virginia Tech's governing board reaffirmed its policy of prohibiting guns, and a school spokesperson declared that continuation of the gun ban "will help parents, students, faculty and visitors feel safe on our campus."<sup>267</sup>

The shootings at Virginia Tech intensified the fight over guns on college and university campuses. On one side, gun rights advocates insisted that criminals would never obey rules prohibiting guns, and therefore students and teachers should be allowed to arm themselves to deter and defend against attacks.<sup>268</sup> On the other side, gun control proponents maintained that pouring more guns onto campuses would be a foolish response to the problem of gun violence.<sup>269</sup>

Meanwhile, another aspect of the Virginia Tech incident soon took center stage in the gun debate. Initial reports indicated that the shooter's acquisition of his guns, a Walther .22-caliber pistol and a Glock 9mm pistol, did not violate any state or federal laws.<sup>270</sup> A few days after the massacre, however, authorities conceded that a tragic

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266. See H.B. 2300, 2007 Sess. (Va. 2007) (H.B. 2300 was left in the Committee on Militia, Police and Public Safety on Feb. 6, 2007); H.B. 1572, 2006 Sess. (Va. 2006) (H.B. 1572 was left in the Committee on Militia, Police and Public Safety on Feb. 15, 2006).

267. Esposito, *supra* note 263 (quoting Virginia Tech spokesman Larry Hincker) (internal quotation marks omitted).

268. See, e.g., Robert J. Caldwell, Editorial, *The Lessons from Virginia Tech; Bloodbath in a 'Gun-Free Zone'*, SAN DIEGO UNION-TRIB., Apr. 22, 2007, at G1; David B. Kopel, Op-Ed., 'Gun-Free Zones,' WALL ST. J., Apr. 18, 2007, at A17; Tracy W. Price, Op-Ed., *Anti-Gun Nonsense*, WASH. TIMES, Apr. 30, 2007, at A17; Press Release, Gun Owners of America, *Aftermath of Tragedy: GOA Defending Freedom* (Apr. 17, 2007), <http://www.gunowners.org/a041707.htm>; Press Release, Second Amendment Found., *SAF Says Virginia Tech Case Underlines Importance of Second Amendment Right* (Apr. 19, 2007), <http://www.saf.org/view-pr-new.asp?id=220>.

269. See, e.g., LEGAL ACTION PROJECT, BRADY CENTER TO PREVENT GUN VIOLENCE, *NO GUN LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS*, at vi (2007), available at <http://www.bradycampaign.org/xshare/pdf/reports/no-gun-left-behind.pdf> ("[T]he effect of any policy to arm students and teachers will be to undermine school safety and academic freedom and supplant it with a culture of gun carrying that is completely foreign to those institutions."); Richard Cohen, Editorial, *Thompson on Horseback*, WASH. POST, July 31, 2007, at A19 (implying that college kids would likely "party with guns" if they were allowed on campus); Editorial, *More Guns Won't Solve Problem*, DAILY REVEILLE (Baton Rouge, La.), May 2, 2007, available at [http://www.lsureveille.com/home/index.cfm?event=displayArticle&uStory\\_id=0bdade59-d4ce-43d6-914a-eeefa6e9c0a46](http://www.lsureveille.com/home/index.cfm?event=displayArticle&uStory_id=0bdade59-d4ce-43d6-914a-eeefa6e9c0a46) ("[I]t does not make sense to have guns within easy access of . . . students."); Op-Ed., *No Guns on Campus*, HERALD (Rock Hill, S.C.), May 9, 2007, at 7A (opining that allowing guns on school campuses "would severely increase the danger for students").

270. See, e.g., Mary Sanchez, Editorial, *No Real Lessons Here on Gun Violence*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Apr. 21, 2007, at 21A ("Within a few days of the incident, it was learned that the student had obtained his guns legally. No laws were broken that need mending, no loophole needed to be closed."); Brigid Schulte & Sari Horwitz, *Weapons Purchases Aroused No Suspicion, Pawnshop, Dealer Supplied Handguns*, WASH. POST, Apr. 18,

mistake occurred and that the killer was able to buy guns even though it was illegal for him to do so.<sup>271</sup>

Federal law prohibits possession of a gun by a person “who has been adjudicated as a mental defective or who has been committed to a mental institution.”<sup>272</sup> Federal regulations specify that this includes any “determination by a court, board, commission, or other lawful authority” that a person suffers from a mental illness rendering him a “danger to himself or to others” or without “mental capacity to contract or manage his own affairs.”<sup>273</sup>

Sixteen months before his murderous rampage, the Virginia Tech shooter, Seung-Hui Cho, had been “adjudicated as a mental defective” within the meaning of federal law. In December 2005, Virginia Tech police took Cho into emergency custody after receiving reports that he had made suicidal statements and his behavior had become bizarre and threatening to other students.<sup>274</sup> After one night of detention in a hospital, Cho had a commitment hearing before a special justice who found that Cho “present[ed] an imminent danger to himself as a result of mental illness” and directed Cho to receive outpatient treatment.<sup>275</sup> An hour after being discharged from the hospital, Cho arrived at the university’s counseling center for an appointment, but the counselor cannot recall Cho’s visit, the counselor’s report on the visit is missing, and Cho did not make a follow-up appointment and never returned to the counseling center.<sup>276</sup>

The special justice’s finding meant that federal law barred Cho from purchasing or owning a gun. Cho nevertheless passed back-

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2007, at A13 (describing how Cho Seung Hui purchased the two guns he used in the Virginia Tech shootings and stating that “[b]oth transactions were legal”).

271. See Michael Luo, *U.S. Rules Made Killer Ineligible to Purchase Gun*, N.Y. TIMES, Apr. 21, 2007, at A1 (stating that Cho should have been prohibited from purchasing a gun under federal law because in 2005 a Virginia court had “declared him to be mentally ill and an imminent danger to himself”).

272. 18 U.S.C. § 922(g)(4), (s)(3)(B)(iv) (2000); see also Bureau of Alcohol, Tobacco and Firearms, Dept. of the Treasury, ATF Form 4473, available at <http://www.atf.gov/forms/4473/index.htm> (questioning whether an applicant has “been adjudicated mentally defective” or “committed to a mental institution”). The federal prohibition technically applies only to guns shipped in interstate or foreign commerce or possessed “in or affecting” interstate or foreign commerce, 18 U.S.C. § 922(g), but that covers virtually all firearms.

273. 27 C.F.R. § 478.11(a) (2007).

274. OFFICE OF THE INSPECTOR GENERAL FOR MENTAL HEALTH, MENTAL RETARDATION & SUBSTANCE ABUSE SERVICES, INVESTIGATION OF APRIL 16, 2007 CRITICAL INCIDENT AT VIRGINIA TECH 5–7 (2007), available at <http://www.oig.virginia.gov/documents/VATechRpt-140.pdf>.

275. *Id.* at 11.

276. VIRGINIA TECH REVIEW PANEL, *supra* note 256, at 49.

ground checks when he sought to obtain firearms early in 2007 because no record of the special justice's ruling existed in the databases of the National Instant Criminal Background Check System (NICS) maintained by the FBI.<sup>277</sup> Although Virginia provides to NICS the names of people disqualified by mental illness from having guns, Virginia authorities did not submit Cho's name, apparently because of confusion created by small differences in the wording of state and federal law.<sup>278</sup> While the federal regulations disqualify those found to pose a danger to themselves or others because of mental illness,<sup>279</sup> Virginia has its own statute on guns and mental illness, which disqualifies only those adjudicated "legally incompetent" or "mentally incapacitated."<sup>280</sup> While Virginia law did not disqualify Cho from having a gun because he was never declared incompetent or incapacitated, federal law disqualified him, and Virginia therefore should have submitted his name for inclusion in the NICS databases.<sup>281</sup>

Revelation of how the Virginia Tech shooter slipped through a small crack in the firearm laws suddenly created intense new interest in improving the records used for background checks. Representative Carolyn McCarthy, elected to Congress after a gunman killed her husband and wounded her son during a mass shooting on a Long Island Rail Road commuter train, had been trying for years to push through legislation to fund improvements to the NICS system.<sup>282</sup> In particular, McCarthy emphasized the fact that the NICS databases included only a small portion of those disqualified from having guns on mental illness grounds.<sup>283</sup> Less than half the states have ever provided to NICS any information about mental health adjudications and commit-

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277. See Luo, *supra* note 271.

278. 153 CONG. REC. H6344-45 (daily ed. June 13, 2007) (statement of Rep. Boucher); VIRGINIA TECH REVIEW PANEL, *supra* note 256, at 71-73.

279. See *supra* notes 272-273 and accompanying text.

280. VA. CODE ANN. § 18.2-308.1:2 (2004).

281. Two weeks after the shootings, Virginia's governor issued an executive order expanding the state's reporting of mental health information to include those, like Cho, adjudicated mentally ill and dangerous but directed to receive only outpatient treatment. See Va. Exec. Order 50 (2007), available at [http://www.governor.virginia.gov/Initiatives/ExecutiveOrders/2007/EO\\_50.cfm](http://www.governor.virginia.gov/Initiatives/ExecutiveOrders/2007/EO_50.cfm).

282. See H.R. 297, 110th Cong. (2007); H.R. 1415, 109th Cong. (2005); H.R. 3237, 108th Cong. (2003).

283. See *Mental-Health Data Not in Gun Files*, RICH. TIMES-DISPATCH, Nov. 27, 2005, at A18 (noting that Rep. McCarthy introduced the legislation to "close the gaps in the background-check system"); *Rep. Dingell: National Instant Criminal Background System Improvements Will Benefit Both Lawful Gun Owners, Law Enforcement*, U.S. FED. NEWS, Dec. 19, 2007, available at 2007 WLNR 25188024 (discussing how the shortcomings of the NICS System in preventing guns from being sold to the mentally ill motivated Rep. McCarthy to introduce such legislation).

ments, and only four states regularly report that information.<sup>284</sup> The rest, blocked by state-law privacy restrictions or simply not having mechanisms in place to process and provide the information, submit no mental health records at all.<sup>285</sup> One study estimated that more than ninety percent of disqualifying mental health records are not included in the background check system.<sup>286</sup> Millions of other records that would disqualify gun purchasers, including information about criminal charges and restraining orders, have also never been put into NICS databases.<sup>287</sup> During the last two sessions of Congress, McCarthy's bills seeking to improve records gathering for NICS passed the House, but then died in the Senate.<sup>288</sup>

Before the Virginia Tech shootings, the NRA expressed support for the concept of improving the NICS database, but was not interested in backing anything proposed by an outspoken gun control advocate like McCarthy and did not take a position on her bills.<sup>289</sup> A few days after the tragic events at Virginia Tech, the NRA began negotiating with Democratic congressional leaders.<sup>290</sup> Representative John Dingell, the senior Democrat in the United States House of Representatives and a former NRA board member, led the push to reach a compromise on a modified version of McCarthy's bill.<sup>291</sup>

In less than two months, legislators and interest groups from both sides of the gun control debate hammered out a satisfactory compromise.<sup>292</sup> The measure, dubbed the NICS Improvement Amendments Act, sailed through the House of Representatives, passing on a voice

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284. DEP'T OF HEALTH & HUMAN SERVS., DEP'T OF EDUC. & DEP'T OF JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 10 (2007), available at <http://www.hhs.gov/vtreport.html> [hereinafter REPORT TO THE PRESIDENT]; Open Letter from Michael J. Sullivan, Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Justice, to the States' Attorneys General (May 9, 2007), available at <http://www.atf.gov/press/2007press/050907open-letter-to-states-attorneys-general.htm>.

285. REPORT TO THE PRESIDENT, *supra* note 284, at 10.

286. JIM KESSLER, THIRD WAY CULTURE PROJECT, MISSING RECORDS: HOLES IN BACKGROUND CHECK SYSTEM ALLOW ILLEGAL BUYERS TO GET GUNS 3, 7 (2007), available at [http://www.third-way.com/data/product/file/86/Third\\_Way\\_Missing\\_Records\\_Report.pdf](http://www.third-way.com/data/product/file/86/Third_Way_Missing_Records_Report.pdf).

287. Pub. L. No. 110-180, § 2(4)-(5), 122 Stat. 2559, 2560 (2008).

288. Jonathan Weisman, *Dingell, NRA Working on Bill to Strengthen Background Checks*, WASH. POST, Apr. 20, 2007, at A10.

289. See *Mental-Health Data Not in Gun Files*, *supra* note 283, (noting that while the NRA supports improving the background-check system, "it has not taken a position on McCarthy's legislation"); Weisman, *supra* note 288 (describing how the gun lobby stayed relatively neutral during efforts to pass the legislation).

290. Weisman, *supra* note 288.

291. *Id.*

292. Jonathan Weisman, *Democrats, NRA Reach Deal on Background-Check Bill*, WASH. POST, June 10, 2007, at A2.

vote just two days after its introduction,<sup>293</sup> with only maverick, staunchly libertarian congressman and presidential candidate Ron Paul speaking against it.<sup>294</sup>

The measure took longer to make its way through the Senate, but again faced opposition only from one legislator.<sup>295</sup> Senator Tom Coburn of Oklahoma placed a hold on the bill, preventing it from being brought to the Senate floor for a vote.<sup>296</sup> Coburn objected to the bill on the ground that it increased government spending too much and did not adequately protect the rights of people, particularly military veterans, unfairly tagged as having a mental problem, or who seek to have their gun rights restored after recovering from a mental illness.<sup>297</sup> Proponents of the legislation eventually reached a compromise with Coburn on amendments to the bill.<sup>298</sup> The Senate and House quickly passed the revised bill,<sup>299</sup> and President Bush signed it into law in January 2008.<sup>300</sup>

The Act requires states to provide information for NICS about people prohibited from having guns, including people disqualified as a result of having been adjudicated mentally defective or committed to a mental institution.<sup>301</sup> To encourage states to comply with those obligations, the Act also contains a set of financial carrots and sticks. It makes a total of \$1.3125 billion in federal grants available over five years to states for purposes of improving their maintenance and provision of records for NICS purposes.<sup>302</sup> After a three-year grace period, a state not providing NICS a sufficient portion of its relevant records

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293. See 153 CONG. REC. H6347 (daily ed. June 13, 2007).

294. Paul denounced the bill as a “flagrantly unconstitutional” violation of Second Amendment and privacy rights. See 153 CONG. REC. H6345 (daily ed. June 13, 2007) (statement of Rep. Paul). Other critics of the compromise legislation include the American Psychiatric Association, which denounced the proposal for stigmatizing mentally ill people. See Michael Isikoff, *Taking Aim at Mental Health Records*, NEWSWEEK/MSNBC.COM, Apr. 24, 2007.

295. Editorial, *As the Shock of Virginia Tech Fades*, N.Y. TIMES, Oct. 17, 2007, at A26 (describing how a “lone obdurate lawmaker” blocked Senate passage of the bill).

296. Elizabeth Williamson, *Oklahoma Senator Blocks Widely Accepted Gun Bill*, WASH. POST, Oct. 3, 2007, at A5.

297. *Id.*

298. Elizabeth Williamson & Brigid Schulte, *Congress Passes Bill to Stop Mentally Ill from Getting Guns*, WASH. POST, Dec. 20, 2007, at A12.

299. The Senate passed the bill by unanimous consent, 153 CONG. REC. S15971 (daily ed. Dec. 19, 2007), and the House of Representatives accepted the Senate’s amended version of the bill by unanimous consent later the same day, 153 CONG. REC. H16926 (daily ed. Dec. 19, 2007).

300. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008).

301. *Id.* § 102(c), 122 Stat. at 2566–67.

302. *Id.* §§ 103(e), 301(e), 122 Stat. at 2568, 2571.

would become subject to penalties in the form of cuts to federal funding of the state's law enforcement.<sup>303</sup>

The NRA negotiated for addition of several provisions limiting the category of people disqualified from having guns because of mental illness.<sup>304</sup> Under current law, a person adjudicated mentally defective or committed to a mental institution is forever thereafter prohibited from having a gun.<sup>305</sup> The NICS improvement bill, however, provides for "relief from disabilities" programs through which a person can have a disqualification lifted under certain circumstances, such as if a person's adjudication or commitment has been set aside, a person has been found to have recovered from mental illness, or a person has been released from all treatment and supervision.<sup>306</sup> Largely to protect military veterans diagnosed as mentally ill for purposes of Veterans Administration disability benefits, the bill also includes a provision to block federal agencies from including anyone in the database "based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority."<sup>307</sup>

Legislators on both sides of the gun debate hailed the NICS Improvement Amendments Act as the sort of valuable compromise that could be achieved to break the usual political stalemate over gun issues.<sup>308</sup> Reflecting on the legislation's passage, Representative McCarthy said it was "a proud moment for the American people to see how we can work together," and expressed hope that "down the road I can continue to work with the NRA and continue working with the Brady Center [to Prevent Gun Violence] to come up with commonsense solutions on how we can save lives."<sup>309</sup>

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303. *Id.* § 104(b), 122 Stat. at 2568–69.

304. See Press Release, NRA-ILA, Senate Passes NICS Improvement Act, House Concur (Dec. 19, 2007), <http://www.nraaila.org/Legislation/Federal/Read.aspx?id=3321>.

305. 18 U.S.C. § 922(g) (2000).

306. Pub. L. No. 110-180, §§ 101(c), 103(c), 105, 122 Stat. 2559, 2562–64, 2568, 2569–70.

307. *Id.* § 101(c)(1)(C), 122 Stat. at 2562; 153 CONG. REC. H12351-52 (daily ed. Oct. 31, 2007) (statement of Rep. McCarthy).

308. See, e.g., 153 CONG. REC. H6343 (daily ed. June 13, 2007) (statement of Rep. Castle) (calling the legislation a "true compromise"); *id.* at 6343–44 (statement of Rep. Dingell) (expressing excitement that both sides support a worthy goal); *id.* at 6344, 6346 (statements of Rep. Lungren) (acknowledging relief that extraneous arguments did not sidetrack legislators in creating the bill).

309. 153 CONG. REC. H16927 (daily ed. Dec. 19, 2007); Op-Ed., *Gun Control; Gun-Rights and Gun-Control Advocates Can Find Common Ground in Senate*, MORNING CALL (Allentown, Pa.), June 19, 2007, at A8 (quoting Sen. Charles Schumer as saying, "The fact that the NRA and I agree shows that this legislation is needed, not controversial and should pass quickly").

Meanwhile, an even greater problem lurks in the heart of the background check system, untouched by the NICS Improvement Amendments Act. Federal law requires background checks only for sales of guns by licensed dealers engaged in the business of selling firearms, and not for the enormous number of other “private” or “secondary market” transfers that occur every day.<sup>310</sup> Several states, such as California and Pennsylvania, have expanded their background check requirements to cover all transfers of firearms.<sup>311</sup> However, most states, including Virginia, have not, allowing a person who fails a background check at a gun store to obtain a gun simply by purchasing one from a friend, co-worker, neighbor, a stranger on the street, at a gun show, or through a classified ad in the local newspaper.<sup>312</sup> Estimates indicate that as many as half of all gun transactions in America occur in the unregulated, or “secondary,” market.<sup>313</sup>

The NRA and its allies do not regard this as an inadvertent loophole. Instead, this limitation on the background check system is something they favor and fight to preserve.<sup>314</sup> They steadfastly oppose

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310. See 18 U.S.C. § 922(t) (requiring licensed importers, manufacturers, and dealers to perform background checks before completing transfers of firearms).

311. See LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 100 (2006), available at [http://www.lcav.org/library/reports\\_analyses/National\\_Audit\\_Total\\_8.16.06.pdf](http://www.lcav.org/library/reports_analyses/National_Audit_Total_8.16.06.pdf) (identifying California and Pennsylvania among the states that have eliminated the “secondary market” loophole).

312. Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 270, 275 (1999); see also James D. Wright, *Ten Essential Observations on Guns in America*, SOCIETY, Mar. 1995, at 63, 65 (explaining that criminals can obtain guns “by informal swaps, trades, and purchases among family members, friends, acquaintances, and street and black-market sources”).

313. JAMES B. JACOBS, CAN GUN CONTROL WORK? 134 (2002); see also Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. JUST.: RESEARCH IN BRIEF, May 1997, at 6, available at <http://www.ncjrs.gov/pdffiles/165476.pdf> (estimating that forty percent of guns, or about two million guns per year, are acquired in “off-the-books transfers in the secondary market”); Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 69–70 (1995) (finding data supportive of the conclusions that about half of all gun sales involve used guns and that about forty percent occur in secondary rather than regulated markets).

314. See Siebel, *supra* note 312, at 270–71 (stating that the gun industry and the NRA are heavily responsible for constraining the government’s ability to regulate the illegal gun market); *Stop Handgun Violence, The Smoking Gun: The NRA Admits It Does Not Support Criminal Background Checks for All Gun Sales; Association Also Supports Loophole Allowing Suspected Terrorists to Purchase Guns Without Identification or Background Check*, BUS. WIRE, July 24, 2007, available at [http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news\\_view&newsId=20070724006046&newsLang=en](http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070724006046&newsLang=en) (discussing areas that the NRA believes should remain unregulated).

the background check system being implemented in a comprehensive way that would allow it to more fully perform its intended function.<sup>315</sup>

As a result, it is unclear how many people who fail background checks are actually prevented from obtaining guns, and how many ultimately acquire them from unlicensed sources.<sup>316</sup> In other words, nearly half of America's gun sales are not covered by background checks, and it is unclear how effective such a partial policy can be.

Indeed, it is impossible to know what would have happened if Seung-Hui Cho failed background checks when he attempted to purchase guns through licensed dealers. He was apparently a very anti-social loner,<sup>317</sup> and it is not clear that he had access to guns through any friends or family, or had familiarity with any other sources of firearms. On the other hand, he may well have been determined enough to seek out guns from an unlicensed seller at a gun show or elsewhere. We will never know, but it remains possible that Cho would have slipped past the partial roadblock of the existing background check system even if the NICS databases had been kept perfectly up to date with all relevant records. In other words, the enhancements of record gathering promised by the NICS Improvement Amendments Act are a valuable effort and a sensible response to the Virginia Tech shootings, but it is unclear whether they in fact would have prevented that tragedy from occurring.

#### IV. TOWARD MORE COMPREHENSIVE AND EFFECTIVE POLICYMAKING ON GUNS

A common thread runs through all of these recent major controversies in the gun control arena, with each reflecting the problems created by implementing gun policy in an incremental, piecemeal fashion. First and most obviously, each of the controversies involves

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315. That does not necessarily stop them from attacking the current background check system for being ineffective because it does not cover all gun sales. See, e.g., Press Release, Gun Owners of America, Your Gun Rights Could Soon Hang in the Balance—VA Tech Shootings Now Spurring the Most Far-reaching Gun Control in a Decade (Apr. 23, 2007), <http://www.gunowners.org/a042307.htm> (arguing that “[b]ackground checks DO NOT ULTIMATELY STOP criminals and mental wackos from getting guns,” and citing the example of a neo-Nazi who went on a shooting spree with guns he bought through an unlicensed seller’s newspaper advertisements after failing a background check at a licensed gun store).

316. Wright, *supra* note 312, at 66.

317. See Natasha Altamirano & Seth McLaughlin, *Fairfax Man Identified as Tech Shooter; English Major ‘Loner’ Wrote Upsetting Stories*, WASH. TIMES, Apr. 18, 2007, at A1 (describing Cho as a “loner”); Brigid Schulte & Tim Craig, *Unknown to Va. Tech, Cho Had a Disorder; Fairfax Helped Student Cope with Anxiety*, WASH. POST, Aug. 27, 2007, at A1 (noting that Cho was “unable to speak in social settings”).

an attempt to create special “gun-free zones,” whether it is in the New Orleans area in the immediate aftermath of Hurricane Katrina,<sup>318</sup> in the District of Columbia,<sup>319</sup> or on the campuses of universities like Virginia Tech.<sup>320</sup> In each instance, the goal is to carve out a limited area in which guns will be either completely prohibited or heavily restricted, with the hope of creating a haven safer than areas in which no special restrictions on guns are in force.

The objective is commendable. The dilemma, of course, is that the relatively lax controls on guns in other areas undermine the effort. No one can ensure that a college campus, let alone a sprawling urban region like New Orleans or the District of Columbia, will remain truly “gun-free” when guns are so numerous and loosely controlled in surrounding areas.<sup>321</sup>

Little or no controversy surrounds the creation of gun-free zones in circumstances where security personnel are present and entrants are searched or screened for weapons, such as within courthouses or the “sterile” areas of airports.<sup>322</sup> In those contexts, the promise of a gun-free zone can be fully achieved. By contrast, the borders of a city or a university campus are too vulnerable to achieve complete success in eliminating guns. That distinction is overlooked, for example, when members of Congress seeking to repeal the District of Columbia’s gun laws are accused of hypocrisy because they would leave in place the laws prohibiting guns within the United States Capitol building.<sup>323</sup> A gun-free zone with a tightly secured perimeter is quite different from a gun-free zone with no border security of any sort.

Regulating guns thus presents the same sort of special difficulties as policymaking in other contexts where the effectiveness of incremental approaches may be limited. Just as aggressive desegregation

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318. See *supra* Part I.A.

319. See *supra* Part I.B.

320. See *supra* Part I.C.

321. See *supra* notes 217–229 and accompanying text.

322. See, e.g., Daniel C. Vock & Pauline Vu, *Va. Tech Shooting Inspires First Legislation*, STATELINE.ORG, Apr. 18, 2007, <http://www.stateline.org/live/printable/story?contentId=199731> (“If the university is able to protect [students and others on campus], I have no problem with them banning guns. . . . To adequately protect students, universities would have to add more police and screen visitors for weapons as airports and courthouses do . . . .”) (quoting Utah State Republican Sen. Michael G. Waddoups) (internal quotation marks omitted).

323. See, e.g., 150 CONG. REC. H7775 (daily ed. Sept. 29, 2004) (statement of Rep. Slaughter) (labeling as hypocritical a repeal of the ban on guns in the District of Columbia that does not affect the prohibition of guns in certain government buildings); *id.* at 7742 (statement of Rep. McGovern) (noting that the debated bill to repeal D.C.’s gun ban would not repeal the ban on guns in the Capitol, thus “approv[ing] guns in another person’s workplace in the District but not in our offices”).

efforts instituted in one district may be undercut by “white flight” to surrounding areas,<sup>324</sup> attempts to carve out special gun-free zones may be undermined by movement of guns. Just as allowing local experimentation with varying degrees of environmental protection may threaten everyone in a state with all of its water resources in a large lake or river,<sup>325</sup> states with weaker gun laws become the source of weapons that flow into and undermine the laws of states opting for tighter legal controls on access to guns. In the political scientists’ terms, the gun issue is “characterized by causal chains elongated in space,” thus the uniquely tough gun laws in one place can be undercut by the very fact that they are unique and not in force in all areas.<sup>326</sup> Data on traces of guns recovered by law enforcement confirm that the volume of guns imported into a state is “closely linked to the stringency of local firearm controls,” or, in other words, that large numbers of guns sold in states with weak laws wind up in places with stricter controls.<sup>327</sup>

This is not necessarily to say that particularly strict regulations of guns, like the laws on the books in the District of Columbia or the rules against guns on many college campuses, are on balance bad policies. One can reasonably argue that, even if they are not perfect, and the ideal of truly gun-free zones cannot be achieved, these policies still have merit. For example, even though the District of Columbia continues to have significant problems with guns, its laws may reduce to some extent the number of firearms available to be criminally or accidentally misused. As discussed above, criminologists disagree about what the empirical evidence ultimately shows about the net effect of the District’s gun laws on homicide and suicide rates.<sup>328</sup> Likewise, banning guns at colleges and universities surely saves some lives by reducing to some extent the number of firearms in an environment where binge drinking, drug abuse, youthful recklessness, fighting, depression, and suicide are ever-present problems.<sup>329</sup>

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324. See *supra* notes 39–51 and accompanying text.

325. See *supra* notes 54–59 and accompanying text.

326. See *supra* note 59 and accompanying text; see also *supra* notes 215–224 and accompanying text.

327. Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277, 298–99 (2001); cf. JACOBS, *supra* note 313, at 224 (arguing that gun policies should be made at the local level but acknowledging that this “decentralized gun regulation according to local preference allows negative externalities” because one jurisdiction’s restrictions may be undermined by another’s lax controls).

328. See *supra* notes 199–210 and accompanying text.

329. See LEGAL ACTION PROJECT, *supra* note 269, at 6–9 (arguing that allowing gun possession on college campuses would pose multiple risks given college students’ drug and

In assessing their merits, however, the proponents of creating these sorts of gun-free zones should be much more cognizant of the complexities and challenges presented by trying to implement gun regulation in such a spatially incremental manner. Prohibiting guns and thereby reducing but not totally eliminating their presence in an area may have benefits, but it may have costs as well. Guns can be used to do good things as well as bad; they can be used to save lives as well as to take them. Evaluating the overall effects of a policy like a city-wide or campus-wide ban on guns therefore is an enormously complicated enterprise, and gun control advocates must be cautious not to assume too hastily or dogmatically that implementing strict gun laws in limited areas is better than nothing. What would be optimal policy on a worldwide or nationwide scale may be poor policy for one college, city, or state to implement by itself. Again, people can reasonably disagree about the net effect and overall virtues of the District of Columbia laws, college gun bans, and various other similar measures now in place, but there can be no doubt that the geographically incremental nature of this sort of policymaking approach limits its effectiveness to some extent.

Gun control advocates are not the only ones often guilty of paying too little attention to the special perils of making regulatory policy for guns in an incremental manner. The NRA and its allies have continually fought hard to limit the nation's most important gun control measures in ways that significantly reduce their effectiveness.<sup>330</sup> The fact that background checks apply only to sales by licensed dealers is a glaring recent example,<sup>331</sup> but this sort of policymaking, in which a restriction on guns is imposed but undermined by its conspicuous incompleteness, is not a new phenomenon. It has been a pattern repeated many times over the past century. For example, among the earliest federal gun control enactments was the Mailing of Firearms Act of 1927,<sup>332</sup> which prohibited interstate mail-order purchases of handguns but applied only to shipments by the United States Postal Service. The ban could be avoided simply by shipping the handguns through a private package delivery company such as United Parcel Service.<sup>333</sup> Another egregious example was the Gun Control Act of

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alcohol use, mental vulnerabilities, and the likelihood that guns on college campuses could be easily stolen).

330. See *supra* note 314 and accompanying text.

331. See *supra* notes 310–316 and accompanying text.

332. Act of Feb. 8, 1927, Pub. L. No. 69-583, 44 Stat. 1059 (1927) (codified as amended at 18 U.S.C. § 1715 (2000)).

333. Zimring, *supra* note 170, at 136.

1968's ban on imports of small, inexpensive, low-quality handguns.<sup>334</sup> By cutting off imports of these guns from abroad while imposing no restrictions on their domestic manufacture, the legislation gave birth to a set of new U.S. manufacturers soon churning out enormous quantities of small, cheap "Saturday Night Special" pistols.<sup>335</sup>

Politics explains in part this frustrating pattern of repeatedly enacting gun control measures that are too limited to accomplish fully their objectives. Gun control is such a controversial issue that compromises and bargains must be struck to get anything enacted, and sometimes those deals result in misshaped legislation. The aggregation of disparate interests through the political process can produce legislation drawing lines and distinctions otherwise lacking any rational explanation. For example, the ban on foreign imports of cheap handguns became law in 1968 because it had the enthusiastic support of the U.S. gun industry (as a protectionist measure) as well as the support of gun control advocates.<sup>336</sup> A few years later, without the gun makers and their allies in Congress on board, attempts to extend the same restrictions to domestically manufactured handguns failed.<sup>337</sup> Other major pieces of gun control legislation, from the National Firearms Act of 1934<sup>338</sup> to the Brady Handgun Violence Prevention Act of 1993,<sup>339</sup> have undergone significant hacking and twisting to gain majority support as they moved through Congress.<sup>340</sup>

The shortsighted enactment of incomplete measures has also occurred in part because gun control legislation has so often been the

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334. See Gun Control Act of 1968, Pub. L. No. 90-618, § 925(d)(3), 82 Stat. 1213, 1225 (1968) (codified at 18 U.S.C. § 925(d)(3) (2000)) (banning imports of handguns not "generally recognized as particularly suitable for or readily adaptable to sporting purposes"); Zimring, *supra* note 170, at 154-57, 163-65 (describing ATF's implementation of the 1968 import restriction).

335. See Holly Yeager, *Guns in America; Cheap Guns Flow from a Few Factories to Many Crime Scenes*, HOUS. CHRON., Oct. 20, 1997, at A15 (describing how a 1968 gun control law effectively insulated domestic manufacturers of small handguns from "foreign competition").

336. See Dave Kopel & Paul Blackman, Op-Ed., *City Council v. NRA; New York Likes Republican Money, but not Republican Values*, NAT'L REV. ONLINE, Aug. 30, 2004, [http://www.nationalreview.com/comment/kopel\\_blackman200408300841.asp](http://www.nationalreview.com/comment/kopel_blackman200408300841.asp) (noting how gun makers pushed legislation to block imports of inexpensive guns); see also Zimring, *supra* note 170, at 155-56 (analyzing the degree to which legislation impeding importation of cheap guns was a protectionist measure, while at the same time suggesting that Congress's implicit goal in passing the legislation "was to reduce access to guns for high-risk groups").

337. See Zimring, *supra* note 170, at 171-73 (discussing the failure of proposals to extend such regulation to domestic guns).

338. 26 U.S.C. §§ 5801-72 (2000).

339. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.).

340. For an overview of the history of the major federal enactments relating to guns, see generally ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 109-41 (3d ed. 2004).

product of acute surges of concern or prominent tragedies. Congress passed the National Firearms Act of 1934 amid widespread fear of gangsterism, fueled by sensational media reports, and in the wake of an anarchist's failed attempt to assassinate President-elect Franklin Roosevelt.<sup>341</sup> The assassinations of Reverend Martin Luther King, Jr. and Senator Robert Kennedy led to passage of the Gun Control Act of 1968.<sup>342</sup> Rather than seeking to fashion proposals that comprehensively address a problem, legislators often rushed to patch whatever hole in gun laws seemed to be responsible for the most recent tragic incident. Lee Harvey Oswald purchased his rifle through the mail, thus legislators proposed bans on mail-order firearm sales.<sup>343</sup> The two students who carried out the deadly shooting spree at Columbine High School in 1999 obtained one of their weapons through a gun show, thus expanding background check requirements at gun shows became the focus of post-Columbine legislative activity.<sup>344</sup> This pattern of limited and specific responses to particular tragedies continues to this day, with Congress's reaction to the Virginia Tech shootings as the most recent example.<sup>345</sup>

The incrementalist model of policymaking thus provides a way of understanding and assessing many of the difficulties that have plagued development of gun laws in the United States. Congress enacted a series of measures that gradually increased controls on firearms. Those federal provisions lay on top of a wide array of state and local measures, forming a confusing and unfinished mosaic in which many odd lines have been drawn and significant gaps in coverage remain. America's gun laws evolved in small and varying steps over time without coalescing into a sound and coherent whole.

This is particularly troublesome with respect to guns because of the central role that "slippery slope" concerns play in inflaming the debate over firearm regulations.<sup>346</sup> Polls suggest that about half the

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341. See Greg S. Weaver, *Firearm Deaths, Gun Availability, and Legal Regulatory Changes: Suggestions from the Data*, 92 J. CRIM. L. & CRIMINOLOGY 823, 824 (2002).

342. SPITZER, *supra* note 340, at 87, 113.

343. *Id.* at 87.

344. See JACOBS, *supra* note 313, at 129.

345. See *supra* Part II.C.

346. See JACOBS, *supra* note 313, at 221 (describing gun owners' resolve to resist all gun controls to avoid going down "a path to involuntary disarmament"); Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, in THE GREAT AMERICAN GUN DEBATE 93, 99-100 (Don B. Kates, Jr. & Gary Kleck eds., 1997) (arguing that the gun control debate has been dominated by "extreme views" and that gun owners have been mobilized by a fear that every gun control measure is "a further step toward the hatemongers' ultimate goal of banning and confiscating all guns"); Gary Kleck, *Absolutist Politics in a Moderate Package: Prohibitionist Intentions of the Gun Control Movement*, 13 J. FIRE-

country believes even modest gun control measures will lead to progressively stricter laws and eventual confiscation of all guns.<sup>347</sup> The idea that politicians and organizations calling for gun control ultimately want to prohibit all guns is an article of faith among hardcore advocates of gun rights.<sup>348</sup> Incremental implementation of increasingly strict regulatory controls on guns inevitably pours fuel on these fears.<sup>349</sup> That is particularly true when governments adopt gun control measures that are incomplete in their coverage in crucial respects. For example, many gun owners see that the federal background check laws leave gaping holes by affecting only sales by licensed dealers and ignoring black-market and other secondary sales.<sup>350</sup> Rather than seeing such laws as well-intentioned but limited measures, many gun owners conclude that the laws cannot truly be aimed at criminals and instead must be meant to harass law-abiding gun purchasers and lay the groundwork for future bans and confiscations of guns.<sup>351</sup>

For many other policy issues, incrementalism would not pose this problem. If government agencies develop safety standards for automobiles, for example, by tinkering with existing regulations and making an endless series of small, new policy changes until they get just the right results, few Americans would see this as terrifying proof that the government is secretly determined to ban and confiscate all cars. With respect to guns, however, slippery slope concerns are widespread and intense, and it is crucial for policymaking on guns to be handled in ways that do not unnecessarily exacerbate those fears.

The flip side of the “slippery slope” problem is the danger that adoption of an array of incomplete measures saps support for gun control among those otherwise favoring it. Sociologist and philosopher Herbert Marcuse is among those who have described how government programs often go just far enough to suppress support for

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ARMS & PUB. POL'Y 1, 1 (2001) (describing gun control opponents' consistent use of slippery slope arguments in fighting gun control); Rostron, *supra* note 158, at 1459–60 (describing various slippery slope arguments in the gun context and noting that gun control advocates “must be attentive to those slippery slope concerns and cannot cavalierly dismiss them”).

347. See Kleck, *supra* note 346, at 32 (discussing a 1978 national survey finding that fifty-one percent of U.S. adults fear that a national registration program could lead to gun confiscation).

348. Rostron, *supra* note 158, at 1460 (describing the widespread conviction among gun owners and organizations like the NRA “that every gun control proposal is part of a grand scheme to eliminate all civilian access to guns”).

349. See Kleck, *supra* note 346, at 2–4.

350. Wright, *supra* note 312, at 66.

351. See *id.* (noting gun owners' fears that gun registration and permit requirements are “intended primarily to keep tabs on them”).

more comprehensive and effective reforms.<sup>352</sup> For example, he contends that the welfare system “provides the minimal amount of benefits to keep its recipients from revolution, yet never enough to make educational or social advancement possible.”<sup>353</sup> Likewise, the existing gun laws are enough to reassure many people that something is being done, thereby defusing pressure for larger steps to be taken. Indeed, one of the arguments invariably invoked against passage of any new gun control measure is the apocryphal claim that there are already more than 20,000 gun laws on the books in the United States.<sup>354</sup> If all those laws have not made us safe, the argument goes, enacting one more law surely will not make a difference. The end result is that most of the public is skeptical of the effectiveness of gun control laws even while it favors their adoption.<sup>355</sup>

To avoid the problems posed by controls implemented in incomplete, piecemeal ways, it is not necessary to go to the extreme of either completely banning guns or having no regulation of them at all.<sup>356</sup> Instead, policymakers should be striving harder to ensure that

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352. See Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81, 81 (Robert Paul Wolff et al. eds., 1969) (presenting the theory that tolerance effectively serves the cause of oppression); Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 56–58 (1990) (explaining Marcuse’s theory of repressive tolerance and describing one form of such tolerance as when “government programs are made just palatable enough that their oppressive aspects are tolerated”).

353. Levit, *supra* note 352, at 57.

354. Rep. John Dingell apparently invented the “20,000 gun laws” argument during congressional testimony in 1965, and it has since been repeated countless times in arguments against gun control. Jon S. Vernick & Lisa M. Hepburn, *State and Federal Gun Laws: Trends for 1970–99*, in EVALUATING GUN POLICY: EFFECTS ON CRIME & VIOLENCE 345, 361–62 (Jens Ludwig & Philip J. Cook eds., 2003); see, e.g., 146 CONG. REC. 8271 (2000) (statement of Sen. Craig); 145 CONG. REC. 13090 (1999) (statement of Rep. Linder); 140 CONG. REC. 9380 (1994) (statement of Rep. Packard); 137 CONG. REC. 16918 (1991) (statement of Sen. Hatch); 131 CONG. REC. 7582 (1985) (statement of Rep. Cobey). A few months after his attempted assassination in 1981, President Reagan denied the need for additional gun legislation on the ground that “[t]here are today more than 20,000 gun control laws in effect—federal, state, and local—in the United States.” *I Have Recovered, ’President Declares*, N.Y. TIMES, June 17, 1981, at A27. A lively debate exists about whether the 20,000 figure is accurate or meaningful. See, e.g., Vernick & Hepburn, *supra*, at 362–63 (questioning the accuracy of the 20,000 figure and noting its rhetorical importance in the gun control debate); Michael L. Betsch, *Gun Control Group’s Statistical Study Called ‘A Waste of Time,’ CYBERCAST NEWS SERV.*, Jan. 27, 2003, <http://www.cnsnews.com/Culture/Archive/200301/CUL20030127a.html> (discussing gun rights advocates’ reaction to a study by a liberal think tank calling into question the accuracy of the 20,000 figure).

355. See Kates, *supra* note 348, at 93–95.

356. For the contrary view that any gun control measure short of absolute elimination of all guns will be counterproductive, see Daniel D. Polsby, *Equal Protection*, REASON, Oct. 1993, at 34, and Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 57.

whatever restrictions they put on guns are not limited in arbitrary or unreasonable ways that undercut their effectiveness.

Transforming the current background check requirements into a more comprehensive and stronger system should be a high priority. As one member of Congress put it in the debates after the Virginia Tech shootings, “if we are going to have a background check system, we ought to do it right.”<sup>357</sup> Background checks should be required for all acquisitions of firearms, not just purchases from licensed dealers. A system of licensing gun owners and registering firearms would be the ideal means of facilitating and ensuring compliance with the background check requirement. Safety training and a thorough background check could be prerequisites for the licenses. Registration of firearms would permit quick and reliable tracing of guns used in crimes, giving everyone a strong incentive to comply with the background check rules.<sup>358</sup> In other words, if you wanted to sell a gun to a neighbor, you would have every reason to ensure that he was licensed and legally qualified to have the gun so that you could update the registration and later prove easily that you no longer had the gun if it turned up in connection with a shooting or other unsavory incident.

Opinion polls suggest that most Americans, even most gun owners, support the movement to this sort of sensible, more comprehensive system of controls over firearms.<sup>359</sup> Several states already require background checks for all transfers of guns, and some have varying forms of licensing and registration requirements, demonstrating the feasibility of these measures.<sup>360</sup> If implemented on a nationwide basis,

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357. 153 CONG. REC. H6345 (daily ed. June 13, 2007) (statement of Rep. McCaul).

358. See Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589, 604–05 (2004) (discussing how improvements to the gun registration and tracing system could help law enforcement identify and punish individuals who commit gun crimes). Bills providing for establishment of a nationwide licensing and registration system have been introduced occasionally in Congress but have never made any significant progress toward passage. See, e.g., Blair Holt’s Firearm Licensing & Record of Sale Act of 2007, H.R. 2666, 110th Cong. (2007) (last action, referred to the House Subcommittee on Crime, Terrorism and Homeland Security on July 16, 2007).

359. For example, a 2001 survey found high levels of support for requiring background checks, licensing, and registration for all handgun purchases, even among survey respondents who described themselves as NRA supporters. Press Release, Educational Fund to Stop Gun Violence, *New Poll Finds American Voters Overwhelmingly Support Handgun Licensing and Registration, Criminal Background Checks* (June 12, 2001), available at <http://www.commondreams.org/news2001/0612-05.htm>; see also Stephen P. Teret et al., *Support for New Policies to Regulate Firearms: Results of Two National Surveys*, 339 *NEW ENG. J. MED.* 813, 816 (1998) (describing survey results indicating that 77% of Americans favor requiring background checks for private sales of firearms, 82% support mandatory registration of handguns, and 63% want registration of long guns).

360. LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 311, at 71–72, 112–31.

the effectiveness of this sort of scheme would be far greater than what scattered cities, counties, or states acting on their own can achieve. Moreover, these measures would be carefully targeted against potential criminals, seeking to disarm only those already prohibited by law from having guns, and not interfering with gun acquisition or possession by qualified, law-abiding individuals.<sup>361</sup> Even researchers generally pessimistic about the effectiveness of gun control have recognized that

[t]here do appear to be some gun controls which work, all of them relatively moderate, popular, and inexpensive. Thus, there is support for a gun control policy organized around gun owner licensing or purchase permits (or some other form of gun buyer screening), stricter local dealer licensing, bans on possession of guns by criminals and mentally ill people, stronger controls over illegal carrying, and possibly discretionary add-on penalties for committing felonies with a gun.<sup>362</sup>

Fear of the slippery slope is undoubtedly the primary obstacle to adoption of this sort of comprehensive national system.<sup>363</sup> Registration of firearms, in particular, would be regarded by some as merely a prelude to a dreaded ban and confiscation of all firearms. At the moment, NRA opposition and the low ebb of politicians' interest in gun control would render unrealistic a dramatic reform of the background check system into a comprehensive and far more effective control.<sup>364</sup>

That might change if the proposal could be paired with measures giving substantial benefits and reassurance to the gun rights side of the debate. Again, the issue of "gun free zones" looms large in every one of the recent major controversies surrounding guns. Bans or severe restrictions on guns remain in place in a smattering of limited areas such as the District of Columbia and college campuses. Meanwhile, virtually all states have moved toward allowing qualified people to obtain permits to carry concealed guns, but the standards gov-

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361. See Robert Taylor, *A Game Theoretic Model of Gun Control*, 15 INT'L REV. L. & ECON. 269 (1995) (formulating game theory models to suggest that background checks, licensing, and registration requirements would be the most effective gun control strategies because they impose heavy costs on potential criminals and only modest costs on those who obtain guns for legitimate defensive purposes).

362. Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249, 283 (1993).

363. See *supra* notes 346–351 and accompanying text.

364. Current conventional wisdom says that Democrats have been hurt politically for supporting gun control and now shy away from the issue. See, e.g., Alex Koppelman, *Why Democrats Dumped Gun Control*, SALON, Apr. 18, 2007, [http://www.salon.com/news/feature/2007/04/18/dems\\_and\\_guns/index.html](http://www.salon.com/news/feature/2007/04/18/dems_and_guns/index.html).

erning those permits vary tremendously from state to state, as do the rules on recognition of out-of-state permits.<sup>365</sup> Passing a federal law to ensure nationwide reciprocity for the permits, therefore, has become a primary objective for the NRA.<sup>366</sup>

Combining these issues into one major overhaul of the nation's firearm laws might attract support from both sides of the gun debate. It would mean taking several different types of gun control measures that have been implemented in limited form and paring back some while letting others achieve full flower. A comprehensive system of background checks, licensing, and registration would finally be achieved. At the same time, the ability of qualified citizens to carry concealed guns would be expanded and standardized throughout the nation, not only enhancing the odds of guns being used for socially beneficial purposes, but also providing reassurances that the controls imposed on guns are genuinely meant to promote safety and not to pave the way for gun confiscation. The political impasse over gun regulation would be broken, as would America's unfortunate pattern of regulating guns in incremental, piecemeal ways that leave us with a set of partial measures too easily undermined by their limited reach.

## V. CONCLUSION

What good is half an eye? Is half a loaf better than none? These questions must be carefully considered if the United States is to make progress toward more effective policymaking, or even a more reasoned, constructive debate about guns. As illustrated by the recent major controversies concerning guns, from Hurricane Katrina to Virginia Tech, regulation of guns has too often been done in a piecemeal, incomplete way that has undermined its effectiveness and left no one content. While an incremental approach may be an effective or even ideal way to deal with many other problems, it will continue to pose serious problems when applied to the regulation of guns. People on every side of the gun control debate must take into account the possibility that policies partially but not completely addressing a targeted problem may achieve the worst results, whether it is gun con-

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365. See LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 311, at 132–42 (providing a summary of the various state and local carrying concealed weapons laws); Ryan S. Andrus, Note, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 130 (2000) (describing three general categories of concealed carry statutes).

366. See NRA-ILA, *The Stearns/Boucher Right-to-Carry Reciprocity Bill* (Apr. 26, 2007), <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=189> (supporting a bill requiring states to recognize carry permits from other states).

control advocates pushing for creation of “gun free zones” too easily undermined by the ubiquity of firearms throughout the remainder of society, or gun rights advocates purporting to support moderate controls like background checks but insisting on preserving limitations and loopholes destined to doom the enterprise.

Giving up is not the answer. After every high-profile shooting, some critics of gun control efforts insist that nothing could have been done to prevent the attack. For example, while supporting improvements to the background check system after the Virginia Tech shootings, the NRA repeatedly emphasized that in its view “no piece of legislation will stop a madman bent on committing horrific crimes.”<sup>367</sup>

As Tulane law professor Stephen Griffin observed on a blog just a few hours after the shootings at Virginia Tech, the phrase “you can’t prevent something like this” is “surely one of the most demoralizing and misleading memes ever released into the public sphere.”<sup>368</sup> “If it is reasonable to act to prevent terrorism,” Griffin wrote, “it is reasonable to make every effort to make sure that nothing like this ever happens again.”<sup>369</sup> Indeed, Americans surely would have reacted with disgust if Congress had responded to the terrorist attacks on September 11, 2001, by announcing that it would not be doing anything to try to make the nation safer because no piece of legislation will stop madmen bent on committing horrific crimes against us.

Reasonable efforts should be made to reduce gun violence, but those efforts should push toward a comprehensive and cohesive pattern of controls, rather than a crazy quilt of inconsistent and incomplete measures. Suddenly grabbing guns in the midst of a crisis, as New Orleans police announced they would do during Hurricane Katrina, is an overreaching reaction too late and too haphazard to achieve any significant benefits. Trying to carve out a small haven with extremely restrictive gun laws, as in the District of Columbia, will be frustrated to a substantial extent by the easy availability of guns from surrounding areas with weaker laws. Gaps in coverage and implementation will prevent potentially sound policies like background check requirements from fully achieving their objectives, as the Vir-

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367. NRA-ILA, H.R. 2640, the “NICS Improvement Act,” Passes House by Voice Vote, June 15, 2007, <http://www.nraila.org/Legislation/Read.aspx?ID=3112>; see also NRA-ILA, NRA Statement on Legislative Efforts on Capitol Hill (Apr. 27, 2007), <http://www.nraila.org/Legislation/Federal/Read.aspx?id=2921> (“Including necessary records on prohibited persons into the NICS is a position we have long supported. However, history has shown that no law will stop a madman intent on doing evil.”).

368. Posting of Stephen Griffin to Balkinization, <http://balkin.blogspot.com/2007/04/you-cant-prevent-something-like-this.html> (Apr. 16, 2007, 18:52 EST).

369. *Id.*

ginia Tech shootings tragically demonstrated. After years of incremental development of regulations on guns, America needs to make a leap forward toward a comprehensive approach that will do more to keep guns out of the wrong hands.