

# VIRGINIA'S SECOND AMENDMENT SANCTUARIES: DO THEY HAVE LEGAL EFFECT?

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“That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed . . . .”<sup>1</sup>

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>2</sup>

#### INTRODUCTION

In the November 2019 elections in Virginia, both houses of the General Assembly changed hands from Republican to Democrat, giving the governor the votes he needed to enact new crimes, with severe penalties, regarding the possession and transfer of firearms.<sup>3</sup> Numerous bills to do so were introduced for the 2020 session of the General Assembly.<sup>4</sup> In reaction, nearly all Virginia counties and many cities declared themselves “Second Amendment sanctuaries” or otherwise

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<sup>1</sup> VA. CONST. art. I, § 13.

<sup>2</sup> U.S. CONST. amend. II.

<sup>3</sup> *Members of the House of Delegates 2020 Session Seat Number and House District*, VA. GEN. ASSEMBLY, [https://publications.viriniageneralassembly.gov/display\\_publication/139](https://publications.viriniageneralassembly.gov/display_publication/139) (last visited Jan. 17, 2021); *2020 Senate Seat Numbers*, VA. GEN. ASSEMB. <https://apps.senate.virginia.gov/Portal/Resources/MemberSeatNo.pdf> (last visited Jan. 17, 2021); see also Brad Brooks, *Gun Control Legislation Advances in Virginia's Legislature*, REUTERS (Feb. 25, 2020), <https://news.trust.org/item/20200224234315-7s2dm> (noting that Governor Northam supported eight gun control measures that were voted on by the Virginia House of Delegates and were awaiting the Virginia Senate vote).

<sup>4</sup> *E.g.*, H.R. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); H.R. 02, Gen. Assemb., Reg. Sess. (Va. 2020).

passed resolutions opposing infringement on the right to keep and bear arms.<sup>5</sup>

The Attorney General opined that this response has “no legal effect” and that any such laws must be enforced and obeyed unless declared unconstitutional by the judiciary.<sup>6</sup> This Article analyzes the extent to which local governments and local constitutional officers may decline to enforce firearm bans applicable to law-abiding citizens that are deemed violative of the clear text of the arms guarantees of the Virginia and U.S. constitutions and which have not been upheld by the judiciary.

Based on the constitutional text, history, and tradition, this Article argues that laws banning mere possession of the types of firearms and magazines that are commonly possessed infringe on the right to keep and bear arms. That conclusion is buttressed by decisions of the U.S. Supreme Court on the Second Amendment and by the Virginia Supreme Court on Article I, § 13, of the Virginia Constitution. A fractured decision by the federal Fourth Circuit on a Maryland law would not save the legislation at issue.

Even aside from the constitutional issues, local officials have authority to apply scarce resources to combat violent crime and other crimes that have actual victims. They may exercise discretion not to direct resources to ferreting out gun owners who have a banned feature on a rifle or the sale of a shotgun to a friend without a background check.

Moreover, prosecutorial discretion is fundamental to our criminal justice system. Some Commonwealth’s Attorneys may choose not to prosecute defendants for technical gun law violations, just as some prosecutors have a policy of not prosecuting marijuana possession cases. Enforcement of gun laws is also limited by due process rights and the prohibition on unreasonable searches and seizures.

Finally, the proposed new Gun Prohibition will make criminals out of law-abiding citizens without any effect on real crime. Experience has proven that gun confiscation schemes have never worked because gun owners neither surrender nor register their firearms. Prohibitions on magazines are also typically met with massive non-compliance. Criminalizing the peaceable possession of commonly possessed firearms that major segments of the population consider constitutionally protected will create disrespect for the law.

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<sup>5</sup> See, e.g., Res. 19-R-067, Chesapeake City Council Reg. Sess. (Va. 2019) (declaring Chesapeake a “Second Amendment Sanctuary” in response to proposed legislation in the 2020 session of the Virginia General Assembly that threatened law abiding citizens’ right to keep and bear arms).

<sup>6</sup> Commonwealth of Va., Off. of the Att’y Gen., Opinion Letter 19-059 (Dec. 20, 2019) [hereinafter Att’y Gen. Opinion 19-059].

## I. SANCTUARIES FROM CRIMINALIZATION

*A. Draconian Proposals to Criminalize Previously Lawful Conduct*

When the General Assembly convened in 2020, both houses consisted of a majority of Democrats, and the governor was a Democrat with a strong gun control agenda.<sup>7</sup> Numerous bills were introduced to criminalize firearm possession and transfers, both of which have been lawful since the Commonwealth was founded at Jamestown in 1607.<sup>8</sup>

At the top of the list of the proposed legislation were S.B. 16 and H.B. 961, which would have subjected a citizen to five years in the penitentiary for mere possession of (1) a magazine that holds over ten or twelve rounds, which comes standard with half of all pistols and rifles, or (2) a semiautomatic rifle if it has a single feature on a list, such as an telescoping shoulder stock, which allows the user to adjust the stock to her physique; a protruding pistol grip, which provides a comfortable hold; a muzzle brake, which reduces recoil (kick); and other innocuous features.<sup>9</sup> The banned rifles were described by the pejorative term “assault firearm,”

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<sup>7</sup> *Members of the House of Delegates 2020 Session, supra note 3; 2020 Senate Seat Numbers, supra note 3; Brooks, supra note 3.*

<sup>8</sup> *See THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3783, 3786 (Francis Newton Thorpe ed., 1909) (noting that under the First Charter of Virginia subjects were to have “Furniture of Armour, Weapons, Ordinance, Powder, Victual, and all other things, necessary for the said Plantations, and for their Use and Defence there”); Jamestown, a Place of Many Beginnings, NAT’L PARK SERVS., <https://www.nps.gov/jame/index.htm> (last visited Feb. 4, 2021) (noting that Jamestown, Virginia, was formed in 1607).*

<sup>9</sup> H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (Amendment in the Nature of a Substitute proposed by H. Comm. on Pub. Safety) (proposing to make the sale, possession, or transfer of “large capacity” magazines a class six felony, as well as to expand the definition of “assault firearm” to include firearms that use magazines which hold over twelve rounds or meet other criteria, and make the importation, sale, possession, and transfer of large-capacity firearms punishable as a class six felony); S. 16, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (proposing to expand the definition of “assault firearm” to include firearms which hold magazines over ten rounds or meet other criteria, and make the importation, sale, possession, and transfer of assault firearms punishable as a Class 6 felony); *see also* VA. CODE ANN. § 18.2-10 (LEXIS through 2020 Spec. Sess. I) (providing that Class 6 felonies are punishable by up to five years in prison).

a propaganda term without objective meaning.<sup>10</sup> These provisions would have potentially made felons out of millions of Virginians.<sup>11</sup>

These bills describe the features to be banned with technical complexity, the meaning of which bill supporters had difficulty explaining. Delegate Mark Levine, the sponsor of H.B. 961, stated that the difference between a normal rifle and an “assault weapon” “is how you hold the gun. It makes it a semi-automatic. Meaning you can shoot with each finger, not like a bolt-action” rifle used in hunting.<sup>12</sup> However, the trigger is pulled on ordinary firearms with just one index finger. It is unclear whether a firearm has ever been invented with which “you can shoot with each finger.”

To understand the dramatic effect of these bills, for all of Virginia’s history, magazines have never been regulated before, rifles of all kinds have been treated as ordinary firearms, and millions of persons possess these items.<sup>13</sup> The proposed five years of imprisonment for mere possession of these items was the same Class 6 felony sentence authorized if a person should unlawfully “shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill . . . .”<sup>14</sup> The disproportion is stark.

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<sup>10</sup> See Stephen P. Halbrook, *Reality Check: The “Assault Weapon” Fantasy and Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL’Y 47, 49 (2016) (noting that the term “assault weapons” was coined by gun prohibitionists as propaganda to describe semi-automatic rifles that resembled military rifles); see also Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* 8 STAN. L. & POL’Y REV. 41, 43 (1997) (noting that the term “assault weapon” is a “political term, developed by anti-gun publicists to expand the category of ‘assault rifles’”).

<sup>11</sup> See Richard W. Rahn, *Virginia Postpones Restrictive Gun Legislation so the Battle Rages On*, WASH. TIMES (Feb. 17, 2020), <https://www.washingtontimes.com/news/2020/feb/17/virginia-postpones-restrictive-gun-legislation-so/> (hypothesizing that as many as half of the 10 million firearms in Virginia could become illegal due to the General Assembly’s 2020 legislation).

<sup>12</sup> Paul Bedard, *Anti-gun “Expert” Says “How You Hold the Gun Makes It” an Assault Weapon*, WASH. EXAM’R (Jan. 29, 2020, 1:57 PM), <https://www.washingtonexaminer.com/washington-secrets/anti-gun-expert-says-how-you-hold-the-gun-makes-it-an-assault-weapon> (citing Jon Lareau, *20200125 Levine Ebbin Town Hall Explaining AWB*, YOUTUBE (Jan. 25, 2020), [https://www.youtube.com/watch?v=DlimCLcexpQ&feature=emb\\_title](https://www.youtube.com/watch?v=DlimCLcexpQ&feature=emb_title) (explaining how a person holds a rifle determines whether it is a semi-automatic rifle or a hunting rifle)); H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (showing that a co-sponsor of the bill was Delegate Levine).

<sup>13</sup> See *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) (“Roughly five million Americans own AR-style semiautomatic rifles.”); *Duncan v. Becerra*, 970 F.3d 1133, 1141 n.1, 1142 (9th Cir. 2020) (“One estimate based in part on government data shows that from 1990 to 2015, civilians possessed about 115 million LCMs [large-capacity magazines] out of a total of 230 million magazines in circulation. Put another way, half of all magazines in America hold more than ten rounds.”).

<sup>14</sup> VA. CODE ANN. § 18.2-51 (LEXIS through 2020 Spec. Sess. I); see *id.* § 18.2-10(f) (explaining that a Class 6 felony is punishable with up to five years in prison).

H.B. 961 was amended by the House of Delegates to keep the felony penalties for sale or purchase of an assault firearm, but to drop the ban on mere possession.<sup>15</sup> It was also amended to keep the felony penalties for sale or purchase of a magazine that holds over twelve rounds, but to make mere possession a Class 1 misdemeanor.<sup>16</sup> After passage in the House, four Democrats joined Republicans in the Senate Judiciary Committee by a vote of 10 to 5 to continue the bill to the 2021 session.<sup>17</sup>

Among other bills, H.B. 2 would have imprisoned a person for five years for lending a rifle to a friend for the day for hunting deer without a background check.<sup>18</sup> H.B. 812 proposed to authorize a year in prison for a person who would purchase more than one handgun within any 30-day period.<sup>19</sup> H.B. 674 proposed the confiscation of firearms from a person subject to a “substantial risk order,” enforceable by search warrants not supported by probable cause of a crime, but instead by a determination that the person poses a “substantial risk of personal injury to himself or others . . . by such person’s possession or acquisition of a firearm.”<sup>20</sup> The above three bills and others would pass, albeit some contained amendments, and were signed by the governor.<sup>21</sup>

When the General Assembly was in session debating the above bills, on January 20, 2020, some 22,000 Virginians peaceably assembled at the Capitol in Richmond to petition the government for a redress of grievances, specifically regarding the proposed gun-ban bills.<sup>22</sup> A large proportion lawfully and openly carried firearms, including the AR-15 and

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<sup>15</sup> Compare H.D. 961, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) (Amendment in the Nature of a Substitute as proposed by H. Comm. on Pub. Safety) (proposing to make it a class 6 felony to “import, sell, transfer, manufacture, or purchase” an assault firearm), with H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (proposing to make it a Class 6 felony to “import, sell, manufacture, purchase, possess, or transport” an assault firearm).

<sup>16</sup> H.D. 961, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>17</sup> H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); *Virginia Senate Rejects ‘Assault Weapon’ Ban*, ASSOCIATED PRESS, WHSV NEWSROOM (Feb. 17, 2020), <https://www.wHSV.com/content/news/Virginia-Senate-rejects-assault-weapon-ban-567938451.html>.

<sup>18</sup> See H.D. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (“Any person who willfully and intentionally sells, rents, trades, or transfers a firearm to another person without obtaining verification in accordance with this section is guilty of a Class 6 felony.”).

<sup>19</sup> H.D. 812, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); VA. CODE ANN. § 18.2-11 (LEXIS through 2020 Spec. Sess. I) (explaining that the penalty for a Class 1 misdemeanor is up to twelve months in prison).

<sup>20</sup> H.D. 674, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>21</sup> Press Release, Ralph Northam, Governor of Virginia, Governor Northam Signs Historic Gun Safety Legislation into Law (Apr. 10, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856016-en.html>.

<sup>22</sup> Brad Brooks, *Thousands of Armed U.S. Gun Rights Activists Join Peaceful Virginia Rally*, REUTERS (Jan. 20, 2020), <https://www.reuters.com/article/us-usa-guns-rally-idUSKBN1ZJ15B>.

other types of rifles that the bills proposed to ban.<sup>23</sup> The protest was entirely peaceful—there were no shootings, arson, looting, assaults, or rioting—and the crowd cleaned up trash from the streets at the end of the day.<sup>24</sup> The General Assembly would ignore most of their concerns.

### *B. The Response: Second Amendment Sanctuaries*

The Virginia sanctuary movement was a reaction to the above draconian bills threatening imprisonment for activities that have been lawful in Virginia and that were thought by major portions of the population to be innocuous and constitutionally protected. Almost all Virginia counties and many localities passed resolutions affirming support for Second Amendment rights.<sup>25</sup> That includes ninety-one of the state's ninety-five counties and fifty-six cities and towns.<sup>26</sup> A map of the sanctuaries envelops the land area of almost the entire Commonwealth, mostly excluding northern Virginia.<sup>27</sup>

The Virginia sanctuary movement began in earnest after the November 5, 2019, elections in which Democrats became a majority in both the House of Delegates and the Senate. Governor Ralph Northam and the leadership in both houses set an agenda for far-reaching firearm restrictions. Hundreds and even thousands of gun owners packed meetings of county boards of supervisors and city councils to demand and support protection for Second Amendment rights.<sup>28</sup>

There is a comprehensive website that includes the actual texts of all local sanctuary ordinances and resolutions together with some of the proceedings that adopted them.<sup>29</sup> What passed in each of the jurisdictions

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<sup>23</sup> Alan Suderman & Sarah Rankin, *Pro-Gun Rally by Thousands in Virginia Ends Peacefully*, ASSOCIATED PRESS (Jan. 20, 2020), <https://apnews.com/article/2c997c92fa7acd394f7cbb89882d9b5b>.

<sup>24</sup> Brooks, *supra* note 22.

<sup>25</sup> *Second Amendment Sanctuaries*, VA. CITIZENS DEF. LEAGUE, <https://www.vcdl.org/> (Mar. 20, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See Second Amendment Sanctuary Push Aims to Defy New Gun Laws*, ASSOCIATED PRESS (Dec. 21, 2019), <https://wset.com/news/local/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws-12-21-2019-220326693> (“A standing-room-only crowd of more than 400 packed the meeting room, filled the lobby and spilled into the parking lot recently in rural Buckingham County, Virginia. They had one thing on their minds: guns.”); Victoria Sanchez & Heather Graf, *Stafford County Votes to Become a ‘Second Amendment Sanctuary,’* WJLA (Dec. 17, 2019), <https://wjla.com/news/local/stafford-county-virginia-second-amendment-sanctuary> (noting that thousands of residents of Stafford County showed up to voice their support for a Second Amendment Resolution at a board of supervisors meeting).

<sup>29</sup> Noah Davis, *New Virginia Second Amendment Sanctuary State Map Update 01Mar2021*, SANCTUARY CNTYS (Mar. 19, 2021), <https://sanctuarycounties.com/2021/03/19/new-virginia-second-amendment-sanctuary-state-map-update-01mar2021/> (compiling all Virginia Second Amendment sanctuary ordinances and resolutions).

varies from soft to hard, general to specific, and short to lengthy. They all have in common concern about impending violations of the right to keep and bear arms and resolve to protect the right. The following two examples are representative.

Stafford County is a high income county of over 150,000 residents located about forty miles south of Washington, D.C.<sup>30</sup> Some 2,000 residents appeared for a session lasting over four hours in which the board of supervisors voted 7-0 in favor of a sanctuary resolution.<sup>31</sup> The resolution began by reciting the arms guarantees of the U.S. and Virginia constitutions and expressing concern about legislation introduced to violate those guarantees.<sup>32</sup> It resolved to declare the county “a Second Amendment Sanctuary” in which the right to keep and bear arms would be upheld, opposed laws that would violate that right, implored the General Assembly and the U.S. Congress to reject infringements or place additional burdens on the right, and authorized the resolution to be sent to the members of the General Assembly, the Congress, and the governor.<sup>33</sup>

Tazewell County has a population of about 40,000 and is located in southwest Virginia; it describes itself as “The Scenic Gateway to the Heart of the Appalachians.”<sup>34</sup> There was standing room only at the board of supervisors meeting to consider a sanctuary resolution.<sup>35</sup> When the board asked the crowd for a show of hands in support, there was only one person who was opposed.<sup>36</sup> One supervisor explained that the proposed resolution was designed to make persuasive arguments that would win in court.<sup>37</sup> A sheriff noted that he was sworn to uphold the U.S. Constitution, which

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<sup>30</sup> See Press Release, United States Census Bureau, Northern Virginia Dominates List of Highest-Income Cntys, Census Bureau Reps. (Dec. 12, 2013), <https://www.census.gov/newsroom/press-releases/2013/cb13-214.html> (Stafford County was one of the five counties with the highest median income in 2013); *QuickFacts: Stafford, County, Va.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/staffordcountyvirginia> (Stafford has a population of 152,882) (last visited Feb. 1, 2021); *Distance from Stafford, VA to Washington, DC*, DISTANCE BETWEEN CITIES, <https://distance-cities.com/distance-stafford-va-to-washington-dc> (last visited Jan. 22, 2021) (indicating that Washington D.C. is 44 miles distance from Stafford).

<sup>31</sup> Sanchez & Graf, *supra* note 28.

<sup>32</sup> Res. 19-367, Stafford Cnty. Bd. of Supervisors Reg. Sess., (2019).

<sup>33</sup> *Id.*

<sup>34</sup> *QuickFacts: Tazewell County, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/tazewellcountyvirginia> (last visited Jan. 22, 2021) (stating that Tazewell County has a population of about 40,000 people); *Tazewell County, Virginia*, TAZEWELL CNTY. VA., <http://tazewellcountyva.org/> (last visited Jan. 22, 2021).

<sup>35</sup> Jade Burks, *Tazewell County Becomes Second Amendment Sanctuary*, WVVA (Dec. 3, 2019, 11:50 PM), <https://wvva.com/2019/12/03/tazewell-county-becomes-second-amendment-sanctuary/>.

<sup>36</sup> *Id.*

<sup>37</sup> Tazewell Cnty. Bd. of Supervisors Dec. 3, 2019 Meeting Minutes, Reg. Meeting, at 1 (Va. 2019).



supersedes the laws being proposed, and that his office “was not coming to take away anyone’s guns.”<sup>38</sup> A Commonwealth’s Attorney stated that the governor proposed “disarming law abiding citizens” and that “we could not stand for that.”<sup>39</sup>

The board proceeded to adopt the Second Amendment Sanctuary Resolution. It mandated that no agent or employee of the County would participate in the enforcement of, or use funds to enforce or investigate, any unlawful act related to firearms.<sup>40</sup> “Unlawful Act” was defined as “any federal or state act, law, order, rule, or regulation which bans or effectively bans, registers or effectively registers, or limits the lawful use of firearms,” other than existing laws.<sup>41</sup> That term included a ban on the possession of firearms based on having certain grips and stocks, muzzle brakes and other attachments, and magazine capacity.<sup>42</sup> It also included any restriction on parental rights to train their children in gun safety or on such trained children to hunt alone “or have access to firearms and ammunition for home defense when [their] parents are away.”<sup>43</sup>

The Resolution exempted from its protections felons, adjudicated incompetents, subjects of protective orders, and others prohibited from firearm possession by state or federal law that pre-dated the resolution.<sup>44</sup>

The above are representative of the sanctuary resolutions adopted by local jurisdictions. As noted, some were short and general, while others were long and specific. All opposed what they saw as infringements on the right to keep and bear arms.

### *C. The Attorney General Opinion that Second Amendment Sanctuaries “Have No Legal Effect”*

A strong political reaction by gun control proponents followed the declarations of Second Amendment Sanctuaries. Governor Ralph Northam insisted that his “common sense” gun proposals are constitutional and if “law enforcement officers are not enforcing those laws, there [were] going to be some consequences.”<sup>45</sup> Representative

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<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* at 2–3.

<sup>40</sup> Res. 19-009, Tazewell Cnty. Bd. of Supervisors Reg. Sess., (2019).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Dana Smith, *Governor Northam Says Second Amendment Sanctuaries Won't Stop Him from Pursuing 'Common Sense' Gun Legislation*, 13NEWS NOW (Dec. 11, 2019, 6:13 PM), <https://www.13newsnow.com/article/news/politics/governor-northam-on-second-amendment-sanctuaries/291-da6727bc-30ff-43c8-8a4b-6005135632a1>. Previously, however, Governor Northam vetoed two bills “that would have banned ‘sanctuary city’ policies and required local

Donald McEachin (D.-Va.) said that “the governor may have to nationalize the National Guard to enforce the law” and also added that funding could be cut from sheriffs and prosecutors who don’t enforce the law.<sup>46</sup>

Virginia Attorney General Mark Herring claimed, “When the General Assembly passes new gun safety laws they will be enforced, and they will be followed. These resolutions have no legal force, and they’re just part of an effort by the gun lobby to stoke fear.”<sup>47</sup> It might also be surmised that legitimate fear was stoked in the minds of countless gun owners by the potential threat of arrest, conviction, and up to five years of incarceration for their continued possession of the firearms and magazines proposed to be banned.

General Herring issued a formal Opinion on the subject dated December 20, 2019.<sup>48</sup> The courts give attorney general opinions due consideration, but such opinions do not bind the courts.<sup>49</sup> Such opinions may reflect political positions about matters that are unsettled in the law, including on the topic at issue. For instance, a controversial 1993 opinion concluded that “the Second Amendment confers only a collective right upon the citizens of the states to form militias,” and thus a ban on the purchase of more than one handgun in thirty days is constitutional.<sup>50</sup> But the supreme courts of the United States and Virginia have explained that the right is an individual right to bear arms, not a “collective” militia right.<sup>51</sup>

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law enforcement agencies to notify federal immigration officials of undocumented immigrants in their custody.” Mel Leonor, *Northam Vetoes ‘Sanctuary Cities’ Bill*, RICHMOND TIMES-DISPATCH (Mar. 19, 2019), [https://www.richmond.com/news/local/government-politics/northam-vetoes-sanctuary-cities-bill/article\\_a0594c7e-b87f-5e4e-9eb8-feb32abdbfc7.html](https://www.richmond.com/news/local/government-politics/northam-vetoes-sanctuary-cities-bill/article_a0594c7e-b87f-5e4e-9eb8-feb32abdbfc7.html).

<sup>46</sup> Jeffery Martin, *Virginia State Representative Suggests National Guard Be Called to Force Enforcement of New Gun Legislation*, NEWSWEEK (Dec. 13, 2019, 6:19 PM), <https://www.newsweek.com/virginia-state-representative-suggests-national-guard-called-force-enforcement-new-gun-1477242>; *About U.S. Congressman A. Donald McEachin*, CONGRESSMAN A. DONALD MCEACHIN, <https://mceachin.house.gov/about> (last visited Feb. 11, 2021) (noting that McEachin is a Congressional House of Representatives member).

<sup>47</sup> Marie Albiges, *2nd Amendment Sanctuary Resolutions Have “No Legal Effect,” Virginia Attorney General Says*, VIRGINIAN-PILOT (Dec. 20, 2019), <https://www.pilotonline.com/government/virginia/vp-nw-attorney-general-opinion-2nd-amendment-sanctuary-2019-1220-tlr25abndbednegmp2da6b6qm4-story.html>.

<sup>48</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 1.

<sup>49</sup> *Twietmeyer v. City of Hampton*, 497 S.E.2d 858, 861 (Va. 1998); *see also Payne v. Fairfax Cnty. Sch. Bd.*, 764 S.E.2d 40, 43 (Va. 2014) (“Virginia courts do not defer to an interpretation of a statute, such as the one in the Attorney General’s opinion, that contradicts the plain language of the statute.”).

<sup>50</sup> OPINIONS OF THE ATTORNEY GENERAL AND REPORT TO THE GOVERNOR OF VIRGINIA, 13, 16–17 (1993), [https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1993\\_Annual\\_Report.pdf](https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1993_Annual_Report.pdf). For an analysis of that opinion, see Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, 49–62 (1993).

<sup>51</sup> *District of Columbia v. Heller*, 554 U.S. 570, 579–82 (2008); *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 369 (Va. 2011).

In response to a request for an opinion about resolutions by localities “to declare themselves exempt from any new gun safety laws that the General Assembly may enact in the future,” Attorney General Herring’s 2019 Opinion concluded that “these resolutions have no legal effect. It is my further opinion that localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact.”<sup>52</sup>

The Opinion notes a “gun violence epidemic” in which “over 10,000 Virginians have been killed by a gun since 2007.”<sup>53</sup> It would be more accurate to say that they were killed by *a person* with a gun. It is also worth noting that the report on which that data was based stated that “[t]he majority (64.6%) of gun related deaths were due to suicide in 2017.”<sup>54</sup>

Given that the most draconian bills in the 2020 session would have banned entire classes of rifles, it is pertinent to consider what types of weapons were used in the 470 homicides committed in Virginia during 2017.<sup>55</sup> Some of the methods of those homicides included handguns (272), stabbing (53), beating (36), shotguns (18), and rifles (18).<sup>56</sup> The Opinion also refers to a mass shooting in Virginia Beach in 2019,<sup>57</sup> but the murderer used two handguns, one of which he legally purchased a year earlier, and the other three years earlier.<sup>58</sup> Neither a rifle ban nor a one-handgun-a-month law would have mattered.

The Opinion went on to note that the Governor would be working with legislators when the General Assembly convened in January 2020 “to enact certain gun safety measures” like universal background checks.<sup>59</sup> However, the Opinion noted that “some localities have adopted resolutions declaring that they intend to opt out of any gun violence prevention measure that may be adopted.”<sup>60</sup>

Sanctuary supporters see this vocabulary as euphemistic. To them, “gun safety” refers to the safe handling and use of guns.<sup>61</sup> They see the

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<sup>52</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 1, 4.

<sup>53</sup> *Id.* at 1 (citing VA. DEP’T OF HEALTH, OFF. OF THE CHIEF MED. EXAM’R ANN. REP. 2017, at 231 (2019) [hereinafter ANN. REP. 2017]).

<sup>54</sup> ANN. REP. 2017, *supra* note 53, at 2.

<sup>55</sup> *Id.* at 78.

<sup>56</sup> *Id.*

<sup>57</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 1.

<sup>58</sup> Whit Johnson & Bill Hutchinson, *Suspected Virginia Beach Shooter Used Legally-Bought Gun Suppressor*, ABC NEWS (June 4, 2019, 9:13 AM), <https://abcnews.go.com/US/suspected-virginia-beach-gunman-resigned-personal-reasons-massacre/story?id=63449625>.

<sup>59</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 2.

<sup>60</sup> *Id.*

<sup>61</sup> See NRA’s *Statement on Second Amendment Sanctuaries*, NRA-ILA (Dec. 6, 2019) [hereinafter *NRA’s Statement*], <https://www.nraila.org/articles/20191206/nras-statement-on-second-amendment-sanctuaries-1/> (emphasizing the NRA’s support for citizens protecting

purported “gun violence prevention measures” as the unleashing of draconian laws that would entail arrest, prosecution, imprisonment, and ruining of lives of countless citizens who would never commit acts of gun violence.<sup>62</sup>

The Opinion next recites a provision of the Virginia Constitution, but it is not the arms guarantee in Article I, § 13 (which is not mentioned in the entire Opinion). Instead, it is Article VII, § 2, which provides that “[t]he General Assembly shall provide by general law for the . . . powers . . . of counties, cities, towns, and regional governments.”<sup>63</sup> The supremacy of state law over local ordinances is further shown by statutes and the common law, such as the Dillon Rule.<sup>64</sup> No one doubts those rules, but a state law that violates a constitutional right would be void, and the Opinion fails to engage in a dialogue on that issue.<sup>65</sup>

Under the above, the Opinion continues, “these resolutions neither have the force of law nor authorize localities or local constitutional officials to refuse to follow or decline to enforce gun violence prevention measures” that may be enacted.<sup>66</sup> The resolutions “have no legal effect” because they do not take concrete action, and instead express the intent to uphold Second Amendment rights, to prohibit use of public funds to restrict those rights, and to oppose infringement of those rights, including “such legal means [as] may be expedient, including without limitation, court action.”<sup>67</sup>

Actually, based on the above, the resolutions do appear to take concrete action. They exercise the First Amendment right to petition the government for a redress of grievances.<sup>68</sup> They prohibit use of funds to

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their Second Amendment right by exercising their First Amendment right to speak out against tyrannical politicians); see also *NRA Gun Safety Rules*, NRA EXPLORE, <https://gunsafetyrules.nra.org> (last visited Feb. 3, 2021) (explaining that the NRA’s fundamentals to gun safety are promoted with the safe handling, use, and storage of guns).

<sup>62</sup> See e.g., Shannon Keith, *Hundreds of Residents Turn Out To Support ‘Second Amendment Sanctuary’ in Bedford County*, NEWS & ADVANCE (Nov. 25, 2019), [https://news.advance.com/hundreds-of-residents-turn-out-to-support-second-amendment-sanctuary-in-bedfordcounty/article\\_745d1f2a-5698-56e9-869b-5c13df085732.html](https://news.advance.com/hundreds-of-residents-turn-out-to-support-second-amendment-sanctuary-in-bedfordcounty/article_745d1f2a-5698-56e9-869b-5c13df085732.html) (noting that people who attended a Bedford County Board meeting proposal to adopt a Second Amendment Resolution which would name Bedford County as a Second Amendment Sanctuary thought that the gun regulatory laws being passed by the General Assembly were tyrannical and went against the U.S. Constitution); see also Suderman & Rankin, *supra* note 23 (arguing that law-abiding gun owners would feel the brunt of the General Assembly’s proposals and that these bills would strip people of their weapons).

<sup>63</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 2 (quoting VA. CONST. art. VII, § 2).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1–4.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.* at 3.

<sup>68</sup> U.S. CONST. amend. I; see also *NRA’s Statement*, *supra* note 61 (noting the NRA’s support for citizens exercising their First Amendment right to speak out against tyrannical politicians).

enforce unconstitutional laws.<sup>69</sup> And they authorize the filing of lawsuits to enforce constitutional rights.<sup>70</sup>

Local governments and local constitutional officers have neither been delegated any authority “to exempt themselves (or anyone else) from gun violence prevention statutes,” the Opinion continues, nor “to declare state statutes unconstitutional or decline to follow them on that basis.”<sup>71</sup> Thus, they must comply with all laws unless they are repealed or are invalidated by the judiciary.<sup>72</sup> For that proposition, the Opinion quotes a Virginia judicial decision that “[p]olice are charged to enforce laws until and unless they are declared unconstitutional,” but neglects the sentence that follows, noting “the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”<sup>73</sup>

Finally, the Opinion refutes the possible argument that a locality may not refuse to enforce law on the basis that it would “commandeer” local resources.<sup>74</sup> In *Printz v. United States*, the U.S. Supreme Court explained that Congress may not compel the states to implement a federal regulatory program.<sup>75</sup> Unlike Congress, the Opinion notes, “[t]he authority of the General Assembly shall extend to all subjects of legislation’ not specifically ‘forbidden or restricted’ by the State Constitution.”<sup>76</sup>

But there’s the rub here—local governments and local constitutional officials see the proposed bills as forbidden by both the state and the federal constitutions. Is there a basis for them to refrain from enforcing such bills as would be enacted?

#### *D. The Attorney General Arrogated to Himself the Authority to Repudiate a Provision of the Virginia Constitution as Unconstitutional*

Attorney General Herring argues that local officials must enforce any state law without regard to conflicting constitutional rights, which may only be determined by the courts. Yet when first becoming Attorney General, he arrogated to himself the authority to refuse to enforce a

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<sup>69</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 3; Res. 19-009, *supra* note 40.

<sup>70</sup> Att’y Gen. Opinion 19-059 *supra* note 6, at 3.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 4 (citing *Freeman v. Commonwealth*, 778 S.E.2d 519, 526 (Va. App. 2015)).

<sup>73</sup> *Id.* at 4 n.23 (quoting *Freeman v. Commonwealth*, 778 S.E.2d 519, 526 (Va. App. 2015)).

<sup>74</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 4.

<sup>75</sup> *Printz v. United States*, 521 U.S. 898, 925 (1997).

<sup>76</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 4 (quoting VA. CONST. art. IV, § 14).

provision of the Virginia Constitution because, in his personal opinion, it violated the federal Constitution.<sup>77</sup>

Virginia voters approved by a fifty-seven percent vote the following constitutional amendment in 2006: “That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”<sup>78</sup> The prior Virginia Attorney General was defending the constitutionality of the amendment in court when Herring was elected in a close race and took the oath to defend the Constitution and laws of the Commonwealth.<sup>79</sup> Without informing the voters of his intention during the election, he announced upon assuming office that he wanted Virginia to “be on the right side of history,” and that he was switching sides and would attack the amendment as unconstitutional.<sup>80</sup> At that time, there was no binding judicial opinion so holding.

General Herring filed a notice in the litigation that, based on “his independent constitutional judgment,” he “will not defend the constitutionality of those laws,” but “will argue for their being declared unconstitutional” under the Fourteenth Amendment.<sup>81</sup> He argued by analogy that the President may “disregard” legislative encroachments “when they are unconstitutional.”<sup>82</sup> He abandoned representation of his client and switched sides.<sup>83</sup>

But his sanctuary Opinion accords no such discretion to the counties and localities that, in their “independent constitutional judgment,” resolved not to enforce certain laws deemed unconstitutional. No matter how facially contrary to the right to keep and bear arms, the Opinion says, “gun safety” measures must be enforced without question.<sup>84</sup>

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<sup>77</sup> Markus Schmidt, *Refusing to Defend State Law a Rarity, Herring Says*, RICHMOND TIMES-DISPATCH (Mar. 31, 2014), [https://www.richmond.com/news/local/government-politics/refusing-to-defend-state-law-a-rarity-herring-says/article\\_7c9ba1a8-b887-11e3-898c-001a4bcf6878.html](https://www.richmond.com/news/local/government-politics/refusing-to-defend-state-law-a-rarity-herring-says/article_7c9ba1a8-b887-11e3-898c-001a4bcf6878.html).

<sup>78</sup> VA. CONST. art. I, § 15-A (overturned in 2014 by *Bostic v. Rainey*, 970 F.2d 456, 483–84 (4th Cir. 2014)); *Virginia Question 1, Marriage Amendment (2006)*, BALLETOPEDIA, [https://ballotpedia.org/Virginia\\_Question\\_1\\_Marriage\\_Amendment\\_\(2006\)](https://ballotpedia.org/Virginia_Question_1_Marriage_Amendment_(2006)) (last visited Feb. 1, 2021).

<sup>79</sup> See Schmidt, *supra* note 77 (noting that Attorney General Herring justified his position not to hire a legal team to defend the Commonwealth of Virginia’s legal position in the same-sex marriage case partly because his predecessor had already filed a brief in support of the Commonwealth’s legal position).

<sup>80</sup> *Id.*

<sup>81</sup> Notice of Change in Legal Position by Defendant Janet M. Rainey at 1, *Bostic v. Rainey*, 907 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395).

<sup>82</sup> *Id.* at 4 (quoting *Freitag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part)).

<sup>83</sup> See *Bostic v. Schaefer*, 760 F.3d 352, 369, 388 (4th Cir. 2014) (explaining the circumstances that led to the Attorney General’s change in legal position).

<sup>84</sup> See Att’y Gen. Opinion 19-059, *supra* note 6, at 1, 3–4 (explaining the supremacy of the General Assembly’s laws over local ordinances).

In short, the Attorney General arrogated to himself the power to decide that a provision of the Virginia Constitution was invalid without relying on any binding judicial precedent to that effect. The localities and local constitutional officers are members of the executive branch, just as is the Attorney General. Should they vigorously enforce laws that appear to them, in good faith, to violate constitutional rights? The following offers insights into that question.

*E. Absent Judicial Resolution, Local Officials Have an Obligation Not to Enforce Laws of Questionable Constitutionality*

The Opinion asserts that the Second Amendment Sanctuary resolutions “have no legal effect” and that “localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact.”<sup>85</sup> But local officials take an oath to support and defend the Virginia and U.S. constitutions, both of which provide that the right to keep and bear arms “shall not be infringed.”<sup>86</sup> What effect does this have on the issue?

Constitutional rights override state laws that violate such guarantees.<sup>87</sup> Every officer of the Commonwealth takes an oath solemnly swearing or affirming that he or she will “support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia.”<sup>88</sup>

The federal Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”<sup>89</sup> Moreover, “the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”<sup>90</sup> Virginia’s sheriffs and Commonwealth’s Attorneys take that oath.<sup>91</sup>

As noted, the Opinion quotes a Virginia court decision that “[p]olice [officers] are charged to enforce laws until and unless they are declared unconstitutional,” but neglects the sentence that follows, noting “the

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<sup>85</sup> *Id.* at 3–4.

<sup>86</sup> U.S. CONST. amend. II; VA. CONST. art. I, § 13; *see also* Joyce L. Malcom, *The Case for Second Amendment Sanctuaries: The Duty to Defend the Constitution*, Geo. Mason U. L. Stud. Rsch. Paper Series, LS 20-16 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3677320](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677320) (analyzing the sanctuary movement by focusing on the oath taken to support the Constitution).

<sup>87</sup> *See id.* at 28–29, 32 (explaining that laws that violate the Constitution are facially void and do not have to be obeyed).

<sup>88</sup> VA. CODE ANN. § 49-1 (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2).

<sup>89</sup> U.S. CONST. art. VI, cl. 2.

<sup>90</sup> *Id.* art. VI, cl. 3.

<sup>91</sup> *See id.* (requiring all state judicial and executive officers to take this oath).

possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”<sup>92</sup> Where does that leave a law that bans commonly-possessed firearms in view of the constitutional directives that the right to keep and bear arms “shall not be infringed”?

By analogy, the Fourth Amendment provides that a search warrant must “particularly describe[] the . . . things to be seized.”<sup>93</sup> In *Groh v. Ramirez*, the U.S. Supreme Court held that executing a search warrant that listed nothing to be seized violated a clearly-established right, and thus the law enforcement agent who executed the warrant was not entitled to qualified immunity: “Given that the particularity requirement is *set forth in the text of the Constitution*, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.”<sup>94</sup> That the right to keep and bear arms “shall not be infringed” is also set forth in the text of the Constitution.<sup>95</sup>

The U.S. Supreme Court held in *Harlow v. Fitzgerald* that law enforcement officials are not “shielded from liability for civil damages” if they “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>96</sup> Further, “[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.”<sup>97</sup> Where the constitutional text is plain, violation thereof is not excusable just because a judicial precedent exactly on point may not exist.<sup>98</sup>

As the U.S. Supreme Court explained in *United States v. Lanier*, “general statements of the law are not inherently incapable of giving fair and clear warning.”<sup>99</sup> No one could argue with the following obvious example: “The easiest cases don’t even arise. There has never been . . . a Section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be

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<sup>92</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 4 n.23 (alterations in original); *Freeman v. Commonwealth*, 778 S.E.2d 519, 526 (Va. Ct. App. 2015) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979)).

<sup>93</sup> U.S. CONST. amend. IV.

<sup>94</sup> 540 U.S. 551, 554–57, 563–66 (2004) (emphasis added).

<sup>95</sup> U.S. CONST. amend. II.

<sup>96</sup> 457 U.S. 800, 818 (1982).

<sup>97</sup> *Id.* at 819.

<sup>98</sup> *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (acknowledging an official’s capacity to believe his or her conduct violates established law, even in the absence of a clear constitutional rule).

<sup>99</sup> 520 U.S. 259, 271 (1997).



immune from damages [or criminal] liability.”<sup>100</sup> *Lanier* further explained, “When broad constitutional requirements have been ‘made specific’ by the text or settled interpretations, willful violators ‘certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. . . . [T]hey are not punished for violating an unknowable something.”<sup>101</sup>

Law enforcement officers may be sued under the federal Civil Rights Act, 42 U.S.C. § 1983, and are not entitled to qualified immunity when “the constitutional rights at issue are clearly established.”<sup>102</sup> A Virginia sheriff “in his individual capacity may be held strictly and vicariously liable” for a deputy’s action where the deputy “was acting *colore officii* when he allegedly violated Plaintiff’s rights.”<sup>103</sup>

Moreover, prevailing parties in § 1983 suits are entitled to attorney’s fees under § 1988.<sup>104</sup> For its success in *McDonald* in invalidating the handgun bans of Chicago and Oak Park, Ill., the National Rifle Association was awarded attorney’s fees of over \$1.4 million.<sup>105</sup> In a case that invalidated certain District of Columbia gun laws, it cost the District over one million dollars in fees.<sup>106</sup> Virginia localities and local constitutional officers would be prudent to avoid enforcement of laws that are of questionable constitutionality, which could result in similar liabilities for fees.

The proposed and passed firearm prohibitions relevant here have not been upheld in the Virginia courts or the pertinent federal courts. There is considerable flux and uncertainty about the validity of similar measures, some of which have been declared unconstitutional by other courts. For example, the Ninth Circuit Court of Appeals declared that California’s ban on magazines holding over ten rounds violated the Second

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<sup>100</sup> *Id.* (alterations in original) (citation omitted). “The absence of ‘a prior case directly on all fours’ here speaks not to the unsettledness of the law, but to the brashness of the conduct.” *Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011) (citation omitted) (explaining that the invalidity of a no-knock search based on mere gun ownership was clearly established under the Fourth Amendment).

<sup>101</sup> 520 U.S. at 267 (alteration in original) (emphasis added) (quoting *Screws v. United States*, 325 U.S. 91, 104–05 (1945)).

<sup>102</sup> *See, e.g., White v. Chapman*, 119 F. Supp. 3d 420, 427–29 (E.D. Va. 2015) (denying motions for summary judgment and holding that a civil suit against a sheriff was appropriate because he was not entitled to qualified immunity).

<sup>103</sup> *Id.* at 431.

<sup>104</sup> 42 U.S.C. § 1988(b).

<sup>105</sup> *See Nat’l Rifle Ass’n v. Vill. of Oak Park*, 871 F. Supp. 2d 781, 783, 788–89, 791–92 (N.D. Ill. 2012) (calculating the final figure pursuant to the court’s ordered fees).

<sup>106</sup> *Heller v. District of Columbia*, 801 F.3d 264, 277–81 (D.C. Cir. 2015); *see Nicholas Toscano, D.C. to Pay Over \$1 Million for Attorneys’ Fees Incurred in Second Amendment Case*, STERLING ANALYTICS (Jan. 3, 2012), <https://www.sterlinganalytics.com/d-c-to-pay-over-1-million-for-attorneys-fees-incurred-in-second-amendment-case/> (comparing the requested attorneys’ fees of \$3.1 million to the awarded fees of \$1.1 million).

Amendment.<sup>107</sup> And the D.C. Circuit Court of Appeals declared that the District of Columbia's one-handgun-a-month law violated the Second Amendment.<sup>108</sup>

In the 2020 session, the Virginia General Assembly passed a measure authorizing a locality to prohibit the possession of a firearm in a public park owned or operated by the locality.<sup>109</sup> Fairfax County, which has parks on more than 23,000 acres of land,<sup>110</sup> passed such an ordinance.<sup>111</sup> Coincidentally, Delaware had a ban on firearm possession in the 23,000 acres of its parkland, which that state's supreme court declared violative of the state guarantee of the right to bear arms.<sup>112</sup>

Red Flag or "substantial risk orders" are of recent vintage and are largely untested in the courts.<sup>113</sup> Virginia's law is susceptible to challenge in part because it authorizes gun confiscations without an opportunity to be heard and the issuance of search warrants without probable cause.<sup>114</sup> Because the order seizes guns but does nothing to help an allegedly dangerous person, authorities may prefer to seek an emergency custody order if there is a substantial likelihood that a person, because of mental illness, will cause serious physical harm to himself or others.<sup>115</sup>

Professor Shawn E. Fields has posited a theory of "first impression departmentalism" regarding Second Amendment Sanctuaries which takes into account the scenario where a legislature presumes its laws to be constitutional, but sheriffs and other constitutional officers do not.<sup>116</sup> He explains:

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<sup>107</sup> See *Duncan v. Becerra*, 970 F.3d 1133, 1145–47, 1169 (9th Cir. 2020) (holding that the ban on LCMs restricts a person's right to self-defense guaranteed under the Second Amendment).

<sup>108</sup> *Heller*, 801 F.3d at 279–80.

<sup>109</sup> VA. CODE ANN. § 15.2-915(E) (LEXIS through 2020 Spec. Sess. I).

<sup>110</sup> *Park Authority History*, FAIRFAX CNTY. VA., <https://www.fairfaxcounty.gov/park-s/about-us> (last visited Mar. 10, 2021).

<sup>111</sup> FAIRFAX, VA., CNTY. CODE, art. 2, § 6-2-1 (2020).

<sup>112</sup> *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 637, 662 (Del. 2017).

<sup>113</sup> See Mark Bowes, *36 Virginians Barred from Possessing Guns Since Va.'s New 'Red Flag' Law Began July 1*, RICHMOND TIMES-DISPATCH (Sept. 18, 2020), [https://richmond.com/news/state-and-regional/crime-and-courts/36-virginians-barred-from-possessing-guns-since-va-s-new-red-flag-law-began-july/article\\_1ee0ac33-75d0-58f2-8186-81e674e114de.html](https://richmond.com/news/state-and-regional/crime-and-courts/36-virginians-barred-from-possessing-guns-since-va-s-new-red-flag-law-began-july/article_1ee0ac33-75d0-58f2-8186-81e674e114de.html) (noting the impact on Virginia gun holders since the passage of the state's new gun control law).

<sup>114</sup> See VA. CODE ANN. § 19.2-152.14(A) (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2.) (describing the process of obtaining an ex parte emergency substantial risk order); *id.* § 19.2-152.14(B) (noting that "has reason to believe" is the requisite standard for a search warrant in the context of emergency substantial risk orders).

<sup>115</sup> See VA. CODE ANN. § 37.2-808(A) (authorizing emergency custody orders when there is probable cause that the person has a mental illness and there is a substantial likelihood that the person will cause serious harm to himself or others, is in need of hospitalization or treatment, and is unwilling to volunteer for hospitalization or treatment).

<sup>116</sup> Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 496 (2020).

Neither constitutional interpretation can trump the other as a matter of constitutional law, at least until the issue is clearly resolved by the judiciary. Until then, the coequal political branches share the power and duty to define the contours of constitutional doctrine. The question then returns to whether one branch or level of government can trump the other as a matter of legislative or enforcement power . . . .<sup>117</sup>

What the above means is that, because the state and federal constitutions trump contrary state laws, neither the legislature nor the executive branch at the state level are in a position to tell local officials and local constitutional officers that they must enforce laws they perceive to be unconstitutional absent a judicial resolution of the issue.

#### *F. A Case in Point: Printz v. United States*

The U.S. Supreme Court, in *Printz v. United States*, declared as unconstitutional a federal law requiring the law enforcement officers of the states to administer a federal regulatory program—conducting background checks on handgun buyers.<sup>118</sup> That the law was what some today may call a “gun safety” measure did not save it.

The Attorney General Opinion finds no applicability of *Printz* here because, unlike Congress, the General Assembly has power to issue duties to local law enforcement.<sup>119</sup> But *Printz* has a parallel here. This author represented Sheriff Jay Printz and other sheriffs in several cases challenging the federal law in the district courts, courts of appeal, and Supreme Court.<sup>120</sup> When the federal law became effective, Sheriff Printz refused to administer it, even before any court ruling, on the basis that it was unconstitutional and that his scarce resources would be applied to matters more urgent than the federal “gun safety” law, including an unsolved murder and emergencies such as assaults and burglaries in progress.<sup>121</sup>

Sheriff Printz was “required to perform those duties prescribed by state law and takes an oath to this effect,” the district court found, but “enforcement of the [federal] Act forces him to reallocate already limited resources such that he is unable to carry out certain duties prescribed by

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<sup>117</sup> *Id.*

<sup>118</sup> 521 U.S. 898, 902–03, 924–25, 935 (1997).

<sup>119</sup> Att’y Gen. Opinion 19-059, *supra* note 6, at 4.

<sup>120</sup> *Printz*, 521 U.S. 898 (1997); *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996).

<sup>121</sup> Brief for Petitioner at 3–5, *Printz v. United States*, 521 U.S. 898 (1997) (No. 95-1478), 1996 WL 464182, at \*3.

state law.”<sup>122</sup> Thus he was “forced to choose between violating his oath or violating the [federal] Act.”<sup>123</sup> Here, Virginia sheriffs take an oath to support the constitutions of Virginia and the United States,<sup>124</sup> but the purported “gun safety” measures would cause them to violate that oath, not to mention to reallocate their serious duties of combating violent crime.

Thus, while the constitutional issue in *Printz* was the nature of federalism, a very practical aspect involved law enforcement discretion to put resources in the most urgent places. Even if the law was upheld, the United States later agreed that the sheriffs could forgo administering it if more urgent duties took priority.<sup>125</sup>

If the General Assembly enacts victimless crimes, such as possession of a rifle with a pistol grip, will it be conceded that local law enforcement may prioritize violent crime? Or must “gun safety” measures take priority over murder, rape, and robbery?

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Imagine that bills are introduced to confiscate books that some folks do not like and to search houses without warrants to seize them. The Quran or the Bible, *Mein Kampf* or the *Communist Manifesto* might be the targets. If counties declared themselves First and Fourth Amendment Sanctuaries, would that even be controversial? Would we expect an Attorney General opinion claiming that the proposed “press and speech safety” laws must be enforced and obeyed without question? That law enforcement is required to break into houses without warrants as the law directs? And would it be realistic to anticipate unhesitating citizen compliance to turn in the offensive books for a Josef Goebbels-style book burning?

The proliferation of Second Amendment Sanctuaries in Virginia should come as no surprise, given that the proposed bills would impose drastic penalties of imprisonment for victimless conduct seen as a constitutional right. The issue will not go away by brushing off these concerns as having no legal effect and failing to engage in a constitutional dialogue on the merits.

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<sup>122</sup> *Printz v. United States*, 854 F. Supp. 1503, 1507 (D. Mont. 1994).

<sup>123</sup> *Id.* at 1508.

<sup>124</sup> VA. CODE ANN. § 49-1 (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2).

<sup>125</sup> See *Mack v. United States*, 856 F. Supp. 1372, 1376 (D. Ariz. 1994) (“[I]t will be left to the discretion of the CLEO [chief law enforcement officer] to establish enforcement standards based upon the jurisdiction’s resources which, depending on the area, could entirely negate the research obligation.”).

## II. DO GUN BANS VIOLATE THE RIGHT TO KEEP AND BEAR ARMS?

### A. *The Virginia and U.S. Constitutions Forbid Infringement of the Inherent Right to Bear Arms*

The Virginia Declaration of Rights is “the basis and foundation of government.”<sup>126</sup> It declares that all persons “have certain inherent rights,” including “the enjoyment of *life* and liberty, with *the means* of . . . pursuing and obtaining happiness and *safety*.”<sup>127</sup> The right to self-defense and of the means of defending life is inherent in that provision.<sup>128</sup>

Further, “all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them.”<sup>129</sup> Along with that is recognition of “the right of the people peaceably to assemble, and to petition the government for the redress of grievances.”<sup>130</sup> The Second Amendment Sanctuary resolutions at issue here are classic examples of the exercise of the right to petition.

To ensure protection of the above rights, Section 13 of the Declaration of Rights declares: “That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed.”<sup>131</sup> The Opinion does not recite that explicit language.

Nor does the Opinion acknowledge any meaning of the Second Amendment to the U.S. Constitution, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>132</sup> It’s as if the Amendment is of no consequence, except in the misguided imagination of the localities that passed resolutions. The constitutional right endeared to Virginians since it was ratified by the states in 1791, which is at the center of the storm, is absent from the discussion.<sup>133</sup>

The proposed bills would imprison peaceable citizens for exercise of constitutional rights. Many of the new crimes will be Class 6 felonies,

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<sup>126</sup> VA. CONST. art. I, pmbl.

<sup>127</sup> *Id.* art. I, § 1 (emphasis added).

<sup>128</sup> Stephen R. McCullough, *Article I Section 13 of the Virginia Constitution: Of Militias and an Individual Right to Bear Arms*, 48 U. RICH. L. REV. 215, 227 (2013) (explaining that the purpose of this section of the Virginia Declaration of Rights is to protect the right to self-defense).

<sup>129</sup> VA. CONST. art. I, § 2.

<sup>130</sup> *Id.* art. I, § 12.

<sup>131</sup> *Id.* art. I, § 13. For a history of the adoption of the right to bear arms clause, see McCullough, *supra* note 128, and Stephen P. Halbrook, *The Right to Bear Arms in the Virginia Constitution and the Second Amendment: Historical Development and Precedent in Virginia and the Fourth Circuit*, 8 LIBERTY U. L. REV. 619 (2014).

<sup>132</sup> U.S. CONST. amend. II.

<sup>133</sup> *Id.*

which are punishable by “a term of imprisonment of not less than one year nor more than five years.”<sup>134</sup> As proposed, H.B. 961 would impose five years of incarceration for keeping a common firearm with some inconsequential feature, such as a muzzle brake, to reduce recoil. That’s exactly the same penalty if a person would unlawfully “shoot . . . any person . . . with the intent to . . . kill.”<sup>135</sup> The sense of disproportion is incredibly stark. Moreover, a felony conviction deprives one of his or her civil rights to vote, serve on a jury, run for office, and possess a firearm.<sup>136</sup>

Ironically, supporters of severe criminal penalties for victimless gun crimes advocate lessening criminal penalties for some crimes that do have victims. One press release reads, “Governor Northam Signs Historic Gun Safety Legislation into Law,”<sup>137</sup> in contrast with another that states “Governor Northam Signs Bold New Laws to Reform Criminal Justice.”<sup>138</sup> None of the former included the actual misuse of a firearm against a victim, while the latter included increasing the amount of the felony larceny threshold, permitting community service to reduce imposed fines and court costs, reopening sentences of persons convicted when juries were not informed about parole status, and other changes applicable to crimes that have victims.<sup>139</sup>

In addition to the right to bear arms, the right to just compensation is implicated by the proposed gun confiscation laws which offer no compensation.<sup>140</sup> Inherent rights under the Virginia Constitution include

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<sup>134</sup> VA. CODE ANN. § 18.2-10(f) (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2); *see also, e.g.*, H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (punishing the following offenses as Class 6 felonies: any dealer who willfully and intentionally sells or transfers a firearm in violation of this section, any person who attempts to encourage or entice a dealer to transfer a firearm other than to the actual buyer, and any person who imports, sells, transfers, purchases, possesses, or transports an assault firearm, large capacity magazine, silencer, or trigger activator).

<sup>135</sup> VA. CODE ANN. § 18.2-51.

<sup>136</sup> *E.g.*, 18 U.S.C. § 922(g)(1) (explaining how it is unlawful for felons to possess or transport a firearm); VA. CONST. art. II, § 1 (preventing convicted felons from voting unless their rights have been restored by the governor); VA. CONST. art. II § 5 (requiring any person who runs for office to be qualified to vote for that office); VA. CODE ANN. § 8.01-352 (LEXIS through 2021 Reg. Sess. and Acts 2021 Spec. Sess. I, cc. 5, 34, 55, 56, 78, 82, 85, 110, 117 and 118) (providing for objection to jurors who have legal disabilities such as being a convicted felon); VA. CODE ANN. § 18.2-308 (making it unlawful for a convicted felon to possess or transport firearms).

<sup>137</sup> Press Release, Ralph Northam, *supra* note 21.

<sup>138</sup> Press Release, Ralph Northam, Governor of Virginia, Governor Northam Signs Bold New Laws to Reform Criminal Justice (Apr. 12, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856054-en.html>.

<sup>139</sup> *Compare* Press Release, Ralph Northam, *supra* note 21, *with* Press Release, Ralph Northam, Governor of Virginia, *supra* note 138.

<sup>140</sup> U.S. CONST. amend. V (explaining how just compensation is required when the government takes private property for public use); Denise Cartolano, *Check “Mate”:* *Australia’s Gun Law Reform Presents the United States with the Challenge to Safeguard*

“the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”<sup>141</sup> “To deprive a citizen of any property already legally acquired, without a fair compensation, deprives him, *quoad hoc*, of the means of *possessing property*, and of the only means, so far as the Government is concerned, besides the security of his person, of *obtaining happiness*.”<sup>142</sup>

The Virginia Constitution further provides: “That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof.”<sup>143</sup> And the federal Fifth Amendment mandates, “nor shall private property be taken for public use, without just compensation.”<sup>144</sup>

In sum, both the Virginia and the U.S. Constitutions provide that “the right of the people to keep and bear arms, shall not be infringed.”<sup>145</sup> To say the least, whether imprisoning citizens for keeping and bearing arms and for other exercises of that right constitutes infringement is worthy of discussion.

### *B. The Founders Sought to Prevent Gun Confiscation*

The seal of the Commonwealth of Virginia depicts Virtus, with sword and spear, standing over the slain Tyranny, and includes the caption, *Sic semper tyrannis* (“Thus always to tyrants”).<sup>146</sup> Its symbolism of virtuous, armed citizens protecting freedom is unmistakable.

After the Redcoats tried to disarm the colonists at Lexington and Concord in 1775, the Virginia House of Burgesses complained to Lord Dunmore, Virginia’s last royal governor, decrying “the many attempts in the northern colonies to disarm the people, and thereby deprive them of

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*Their Citizens from Mass Shootings*, 41 NOVA L. REV. 139, 173–74 (2017) (recognizing that the United States would be required to pay just compensation for any guns the government requires citizens to surrender).

<sup>141</sup> VA. CONST. art. I, § 1.

<sup>142</sup> *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276 (1828) (Green, J., concurring) (emphasis added).

<sup>143</sup> VA. CONST. art. I, § 11.

<sup>144</sup> U.S. CONST. amend. V.

<sup>145</sup> *Id.* amend. II.; accord VA. CONST. art. I, § 13.

<sup>146</sup> VA. CODE ANN. § 1-500 (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2); 2012–2013 REPORT OF THE SECRETARY OF THE COMMONWEALTH TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA (Patrick Mayfield ed., 2013), [https://www.bluebook.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/bluebooks/2013\\_RD39-Report\\_of\\_the\\_Secretary\\_of\\_the\\_Commonwealth\\_2012\\_-\\_2013.pdf](https://www.bluebook.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/bluebooks/2013_RD39-Report_of_the_Secretary_of_the_Commonwealth_2012_-_2013.pdf).

the only means of defending their lives and property.”<sup>147</sup> In reaction to Dunmore’s “gun safety” measures to do the same, Patrick Henry organized an independent militia company.<sup>148</sup> That could be considered Virginia’s first “Second Amendment Sanctuary.”

Meanwhile, George Washington organized the Fairfax Independent Militia Company, about which George Mason wrote: “[T]hreat’ned with the Destruction of our Civil-rights, & Liberty,” its members pledged that “we will, each of us, constantly keep by us” a firelock, six pounds of gun powder, and twenty pounds of lead.<sup>149</sup> Those were the 18th century equivalents of the guns and magazines that H.B. 961 would ban.

In his Proclamation of November 7, 1775, Dunmore condemned the patriots as “a Body of armed Men unlawfully assembled,” declared martial law, and required “every Person capable of bearing Arms” to join his forces “or be looked upon as Traitors to his majesty’s Crown,” subject to the death penalty.<sup>150</sup>

In 1776, Thomas Jefferson proposed: “No freeman shall be debarred the use of arms . . . .”<sup>151</sup> Jefferson endorsed the penal reformer Cesare Beccaria, who wrote that arms control laws “disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.”<sup>152</sup>

When independence was won and the federal Constitution was proposed, James Madison heralded that Americans possess an “advantage of being armed . . . over the people of almost every other nation,”<sup>153</sup> adding: “Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.”<sup>154</sup>

In the Virginia ratification convention, George Mason recalled British plans “to disarm the people; that it was the best and most effectual

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<sup>147</sup> VIRGINIA GAZETTE, Aug. 5, 1775, at 1; Ted Brackemyre, *Lord Dunmore: America’s First Villain?*, U.S. HIST. SCENE, <https://ushistoryscene.com/article/lord-dunmore/> (showing that Lord Dunmore was the last Royal Governor of Virginia) (last visited Feb. 12, 2021).

<sup>148</sup> See David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 302–03 (2012) (explaining the events that led to Patrick Henry’s call to arms in response to Lord Dunmore’s actions).

<sup>149</sup> 1 THE PAPERS OF GEORGE MASON 1725–1792, at 209–11 (Robert A. Rutland ed., 1970).

<sup>150</sup> *Lord Dunmore’s Proclamation (1775)*, ENCYC. VA., <https://encyclopediavirginia.org/entries/lord-dunmores-proclamation-1775/> (last visited Apr. 7, 2021).

<sup>151</sup> *Draft Constitution for Virginia (June 1776)*, in 1 THE PAPERS OF THOMAS JEFFERSON 329, 344–45 (Elizabeth J. Sherwood & Ida T. Hopper eds., 1954).

<sup>152</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., The Bobbs-Merrill Co. 1963) (1764).

<sup>153</sup> The Federalist No. 46 (James Madison).

<sup>154</sup> *Id.*



way to enslave them.”<sup>155</sup> Patrick Henry averred: “The great object is, that every man be armed. . . . Everyone who is able may have a gun.”<sup>156</sup> Virginia ratified the federal Constitution subject to a declaration that “[t]hat the people have a right” to peaceably assemble, to freedom of speech, and to keep and bear arms.<sup>157</sup>

Virginia jurist and commentator St. George Tucker wrote in 1803 that “[w]herever . . . the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”<sup>158</sup>

Could it seriously be contended that the right to arms in the minds of the Founders, including those from Virginia, would *not* be violated by laws imprisoning peaceable gun owners and confiscating their firearms? That a firearm may be banned because of this or that attachment or how it is held? For instance, H.B. 961 proposed to ban certain ordinary rifles if they have a listed feature, including “a bayonet mount.”<sup>159</sup> Yet the federal Militia Act of 1792, adopted a year after the Second Amendment, required each able-bodied male citizen to enroll in the militia and to “provide himself with a good musket or firelock, [and] a sufficient bayonet.”<sup>160</sup>

The only firearm bans in the early Republic applied to African Americans. Virginia law provided that “[n]o negro or mulatto slave whatsoever shall keep or carry any gun.” Further, “[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead,” without a license.<sup>161</sup> Such limits “upon their right to bear arms” were among the “numerous restrictions imposed on [free blacks] in [Virginia’s] Statute Book, many of which [were] inconsistent with the letter and spirit of the Constitution, both of this State and of the United States.”<sup>162</sup>

When slavery ended, Frederick Douglass famously said that the freedmen “must have the cartridge box, the jury box, and the ballot box, to protect them.”<sup>163</sup> But the Black Codes replaced the Slave Codes, and jurisdictions in the South, such as Alexandria, Virginia, continued “to

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<sup>155</sup> 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327, 380 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1836).

<sup>156</sup> *Id.* at 386.

<sup>157</sup> *Id.* at 657–59.

<sup>158</sup> GEORGE TUCKER, NOTES OF REFERENCE APPENDED TO BLACKSTONE’S COMMENTARIES (1803), at 181 (2013) (ebook).

<sup>159</sup> H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (emphasis removed).

<sup>160</sup> 2d Cong., 1 Stat. 271 (1792).

<sup>161</sup> Va. 1819, c. 111, §§ 7–8, <https://babel.hathitrust.org/cgi/pt?id=uva.x004234001&view=1up&seq=501>.

<sup>162</sup> See *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (considering the restriction of free blacks’ right to bear arms).

<sup>163</sup> Frederick Douglass, *Frederick Douglass on the American Crisis*, NEWCASTLE COURANT, May 26, 1865.

enforce the old law against [freedmen] in respect to whipping and carrying fire-arms . . . .”<sup>164</sup>

Congress responded with the Freedmen’s Bureau Act, which protected “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty[] [and] personal security . . . including the constitutional right to bear arms . . . without respect to race or color, or previous condition of slavery.”<sup>165</sup> That was followed by the ratification of the Fourteenth Amendment, one objective of which was to protect the right to keep and bear arms.<sup>166</sup>

In sum, the liberty to keep and bear arms was a fundamental right to the Founders, both of Virginia and the United States alike. The Fourteenth Amendment sought to end the infringement of this right as applied to African Americans. Proposals to criminalize the exercise of this right are inconsistent with this history and tradition.

*C. A Ban on Common Firearms is Precluded by Decisions of the U.S. and Virginia Supreme Courts*

Neither the United States nor Virginia supreme courts have considered, much less upheld, a ban on the commonly-possessed firearms, mostly rifles, proposed to be banned. The proposed gun ban is facially inconsistent with the clear text guaranteeing “the right of the people to keep and bear *arms*” and with the decisions of the United States and Virginia supreme courts.

The U.S. Supreme Court has referred to the AR-15 semiautomatic rifle in the context of a “long tradition of widespread lawful gun ownership” in America.<sup>167</sup> In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects arms that are “in common use” or “typically possessed by law-abiding citizens” for “lawful purposes like self-defense.”<sup>168</sup> The right to bear arms was held to be a fundamental right that applies to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*.<sup>169</sup>

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<sup>164</sup> *Report of the Joint Committee on Reconstruction*, 39th Cong. 21 (1866) (statement of John Hawkshurst).

<sup>165</sup> Freedman’s Bureau Act, ch. cc. §14, 14 Stat. 173, 176–77 (1866) (in force for two years until the passage of the Fourteenth Amendment made it unnecessary).

<sup>166</sup> *See McDonald v. City of Chicago*, 561 U.S. 742, 775–76, 778 (2010) (explaining how one purpose of the Fourteenth Amendment was to guarantee black citizens the right to keep and bear arms).

<sup>167</sup> *See Staples v. United States*, 511 U.S. 600, 602–03, 610 (1994) (evaluating the history and tradition of private gun ownership in the United States and analogizing the civilian AR-15 with the military M-16).

<sup>168</sup> 554 U.S. 570, 576, 624–25, 627, 636 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1938)).

<sup>169</sup> 561 U.S. at 750, 767.

The Supreme Court explained in a stun gun case that protected arms are not limited to the types that existed at the Founding.<sup>170</sup> While some 200,000 Americans own stun guns,<sup>171</sup> nearly twenty million “modern sporting rifles” (also known as “assault weapons”) like the AR-15 are in civilian hands.<sup>172</sup> Yet these are the rifles, America’s most popular,<sup>173</sup> that are to be banned.

Before his elevation to the Supreme Court, then-Judge Brett Kavanaugh wrote: “In my judgment, both D.C.’s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under *Heller*.”<sup>174</sup> Justice Thomas has written: “Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting.”<sup>175</sup> Justice Scalia, the author of *Heller*, joined in that view.<sup>176</sup>

Opponents of the right to keep and bear arms have tried to keep the U.S. Supreme Court from hearing any case on the Second Amendment by mooting the case before the Court, as is witnessed by New York City’s amendment to its ordinance prohibiting one from removing a handgun from one’s premises.<sup>177</sup> Given that *Heller* invalidated D.C.’s handgun ban under the common-use test,<sup>178</sup> the Court could well invalidate rifle bans under the same test.

The Virginia Supreme Court has applied *Heller*’s reasoning to the Virginia arms guarantee as follows: “We hold that the protection of the right to bear arms expressed in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the

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<sup>170</sup> *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016) (per curiam).

<sup>171</sup> David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS UNIV. L. J. 193, 241 (2016).

<sup>172</sup> *NSSF Releases Most Recent Firearm Production Figures*, NAT’L SHOOTING SPORTS FOUND. (Nov. 16, 2020), [https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/?utm\\_source=bulletpoints](https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/?utm_source=bulletpoints); Aaron Smith, *Assault Weapons Like the AR-15 Face Uncertain Future if Trump Loses*, FORBES, (Oct. 22, 2020, 7:32 AM), <https://www.forbes.com/sites/aaronsmith/2020/10/22/assault-weapons-including-the-bushmaster-face-uncertain-future-if-trump-loses/?sh=5856f3413882>; see also Alex Kingsbury, *It’s Too Late to Ban Assault Weapons*, N.Y. TIMES, (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/opinion/ar15-assault-weapon-ban.html> (estimating that there are nearly 15 million military-style rifles in circulation).

<sup>173</sup> *NSSF Releases Most Recent Firearm Production Figures*, *supra* note 172.

<sup>174</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>175</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting) (citation omitted).

<sup>176</sup> *Id.* at 447; *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>177</sup> *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1526 (2020).

<sup>178</sup> *Heller*, 554 U.S. at 624, 627–29.

instant case.”<sup>179</sup> In particular, *Heller* “held that the Second Amendment protects the right to carry and possess handguns in the home for self-defense.”<sup>180</sup>

Yet H.B. 961 would ban not only a variety of handguns, but numerous rifles and some shotguns.<sup>181</sup> It is noteworthy that the 2007 Virginia Tech shooting and the 2019 Virginia Beach shooting<sup>182</sup> involved only handguns, which are also used in most gun-related murders, including mass shootings.<sup>183</sup>

Rifles in particular are rarely used in crime. The FBI Uniform Crime Reports show the following weapons were used in homicides in 2018: handguns (6,603), knives (1,515), personal weapons such as hands (672), and rifles of all kinds (297).<sup>184</sup> If, as *Heller* held, the large number of handgun homicides does not justify a handgun ban,<sup>185</sup> the small number of rifle homicides surely would not justify a ban on an unknown subset of such rifles.

The Virginia Court of Appeals rejected an argument that would be equivalent to “limiting the right to keep and bear arms only to muskets because more modern firearms came to be at a later point in time.”<sup>186</sup> As *Heller* explained:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to

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<sup>179</sup> *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 369 (Va. 2011).

<sup>180</sup> *Id.* at 369 (citing *Heller*, 554 U.S. at 635–36).

<sup>181</sup> H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>182</sup> *Virginia Tech Shootings Fast Facts*, CNN, <https://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/index.html> (showing that a 9mm and .22 caliber pistols were the guns used in the Virginia Tech shooting) (Apr. 9, 2020, 9:47 AM); Sara Dorn & Laura Italiano, *New Details Emerge About Alleged Virginia Beach Shooter DeWayne Craddock*, N.Y. POST, <https://nypost.com/2019/06/01/new-details-emerge-about-alleged-virginia-beach-shooter-dewayne-craddock/> (June 1, 2019, 10:44 AM).

<sup>183</sup> *ALERT Active Shooter Data*, ADVANCED L. ENF’T RAPID RESPONSE TRAINING, <http://activeshooterdata.org/the-event.html> (last visited Jan. 17, 2021); *Weapon Types Used in Mass Shootings in the United States Between 1982 and February 2020, By Number of Weapons and Incidents*, STATISTA, <https://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/> (last visited Apr. 8, 2021); *Most Active Shooters Use Pistols, Not Rifles, According to FBI Data*, TRACE, <https://www.thetrace.org/newsletter/mass-shooting-gun-type-data/> (last visited Feb. 12, 2021).

<sup>184</sup> *Murder Victims by Weapon 2014-2018*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls> (last visited Jan. 17, 2021).

<sup>185</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008).

<sup>186</sup> *Prekker v. Commonwealth*, 782 S.E.2d 604, 612 n.12 (Va. Ct. App. 2016).

modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>187</sup>

Governor Ralph Northam's closure of indoor shooting ranges in response to the COVID-19 pandemic gave rise to a circuit court opinion with an extensive analysis of the right to bear arms.<sup>188</sup> In *Lynchburg Range & Training v. Northam*, Lynchburg Circuit Judge F. Patrick Yeatts enjoined the closure order based on the provision that the chapter in the Virginia Code authorizing emergency powers may not be construed to: "Empower the Governor . . . to in any way limit or prohibit the rights of the people to keep and bear arms as guaranteed by Article I, Section 13 of the Constitution of Virginia or the Second Amendment of the Constitution of the United States, including the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms . . . ."<sup>189</sup>

In an opinion letter to the parties, the court noted about the above provision: "It is regrettable the Governor only one time in a footnote cited the statute on which this case turns."<sup>190</sup> Given that seeming disregard for the right to bear arms, the court posed this paradox: "The Governor appears to argue that, when he declares a state of emergency, he can ignore any law that limits his power, even laws designed to limit his power during a state of emergency."<sup>191</sup>

The court found the language of the Virginia guarantee to be compelling—"a well regulated militia, composed of the body of the people, *trained to arms*, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and *bear arms* shall not be infringed."<sup>192</sup> While the operative clause guarantees the right to bear arms, "the prefatory clause provides that the purpose of the right is to have a population trained with firearms in order to defend the Commonwealth."<sup>193</sup> Besides violating the statute, the order failed constitutional muster under strict scrutiny because it was not narrowly tailored.<sup>194</sup> Under that reasoning, if a ban on practicing at indoor shooting

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<sup>187</sup> Heller, 554 U.S. at 582.

<sup>188</sup> Lynchburg Range & Training v. Northam, 455 F. Supp. 3d 238, 241–48 (W.D. Va. 2020) (mem.).

<sup>189</sup> VA. CODE ANN. § 44-146.15(3) (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2); Order Granting Temporary Injunction, Lynchburg Range & Training, 455 F. Supp. 3d 240 (No. CL20-333).

<sup>190</sup> Judge F. Patrick Yeatts, Opinion Letter to David G. Brown & Toby J. Heytens (Apr. 27, 2020).

<sup>191</sup> *Id.* at 2–3.

<sup>192</sup> *Id.* at 2 (quoting VA. CONST. art. I, § 13).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 4.

ranges was invalid, even more so must be a ban on mere possession of common firearms and magazines.

Finding that the plaintiff shooting range was likely to prevail on the merits, the court further decided that the injunction would be in the public interest, explaining: “In his Americanized version of Blackstone’s *Commentaries on the Laws of England*, St. George Tucker called the right to keep and bear arms the ‘true palladium of liberty,’ and he called the right of self-defense ‘the first law of nature.’”<sup>195</sup>

In sum, banning handguns and long guns such as in H.B. 961 would appear to violate the right to keep and bear arms as interpreted by both the U.S. Supreme Court and the Virginia courts. The Second Amendment Sanctuaries are not engaged in frivolous discourse.

#### *D. A Split Federal Court Decision Would Not Apply to the Proposed Bans Here*

In 2013, Maryland enacted a law banning certain firearms but grandfathering those that were possessed on the effective date.<sup>196</sup> Sale, but not possession, of certain magazines was prohibited.<sup>197</sup> The generic features of the banned firearms were narrow and did not include a rifle with a pistol grip or adjustable stock.<sup>198</sup> By contrast, Virginia H.B. 961 would have banned mere possession of enormous numbers of common firearms, with far broader generic definitions, and magazines.<sup>199</sup>

The Fourth Circuit Court of Appeals, in *Kolbe v. Hogan*, held that strict scrutiny applied and that the banned guns and magazines “come within the coverage of the Second Amendment.”<sup>200</sup> However, the *en banc* court upheld the Maryland law based on the seemingly-incredible assertion that there is only a “slight” difference between the banned semiautomatics (which fire only a single shot per trigger pull) and fully automatic machine guns (which fire continuously as long as the trigger is pulled).<sup>201</sup> According to the four dissenting judges, the majority simply ignored the *Heller* common-use test.<sup>202</sup>

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<sup>195</sup> *Id.* at 5–6 (quoting 1 BLACKSTONE’S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE GENERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA. App. 300 (George Tucker) (1803)).

<sup>196</sup> H.D. 1191, 2013 Gen. Assemb., Reg. Sess. (Md. 2013); Trip Gabriel, *New Gun Restrictions Pass the Legislature in Maryland*, N.Y. TIMES (Apr. 4, 2013), <https://www.nytimes.com/2013/04/05/us/tighter-gun-rules-pass-the-maryland-legislature.html>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>200</sup> 813 F.3d 160, 168, 178 (4th Cir. 2016).

<sup>201</sup> *Kolbe v. Hogan*, 849 F.3d 114, 121, 125 (4th Cir. 2017) (*en banc*).

<sup>202</sup> *Id.* at 155–56 (Traxler, J., dissenting).

At any rate, *Kolbe* would not save H.B. 961, which would enact far more radical bans. *Kolbe* does not stand for the proposition that any ban, no matter how draconian, is constitutional. Moreover, the U.S. Supreme Court has not upheld any such ban.

*Kolbe*'s decision on the Second Amendment is not binding on the Virginia Supreme Court, which could disagree with the Fourth Circuit and create a conflict that only the U.S. Supreme Court could resolve.

Above all, the Virginia Supreme Court is the final interpreter of the Virginia arms guarantee, and its decision thereon would not be subject to review by the U.S. Supreme Court.<sup>203</sup> A guarantee under a state bill of rights may be interpreted as having more protection than a similar guarantee under the federal constitution.<sup>204</sup>

In sum, while Maryland's law was upheld by a badly-split Fourth Circuit, the Virginia proposal is far more restrictive and appears to be invalid under the U.S. Supreme Court's decisions on the Second Amendment. Further, the final arbiter of the Virginia arms guarantee is the Virginia Supreme Court.

### III. LOCAL OFFICIALS HAVE AUTHORITY TO APPLY LIMITED RESOURCES TO COMBAT VIOLENT CRIME

#### *A. Enforcement of State Laws is Subject to Local Resources and Discretion*

The Virginia Constitution provides, "The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted."<sup>205</sup> The subjects of legislation that are "herein forbidden or restricted" obviously include infringement on the right to keep and bear arms and other constitutional guarantees.

The Attorney General Opinion notes that the General Assembly provides for the powers of counties and other localities.<sup>206</sup> But that does not mean that the General Assembly may require them to enforce unconstitutional laws or, given scarce resources, to neglect the suppression of violent crime in order to prioritize victimless "gun safety" measures (such as the proposed felony of possessing a rifle with an adjustable shoulder stock).

The sheriff and the attorney for the Commonwealth are constitutional officers who are elected by and are answerable to the

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<sup>203</sup> JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018).

<sup>204</sup> *See id.* at 171 (explaining that state courts have "independent authority to construe their own constitutions beyond the protections provided by the federal sibling").

<sup>205</sup> VA. CONST. art. IV, § 14.

<sup>206</sup> Att'y Gen. Opinion 19-059, *supra* note 6, at 2 (quoting VA. CONST. art. VII, § 2).

voters,<sup>207</sup> not to the governor or the Attorney General. The sheriff shall “exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law,” and “shall enforce the law or see that it is enforced in the locality from which he is elected.”<sup>208</sup> “The attorney for the Commonwealth shall exercise all the powers conferred and perform all the duties imposed upon such officer by general law.”<sup>209</sup> But they have considerable discretion regarding priorities in the enforcement of law based on available resources and danger to the community.<sup>210</sup> Respond to a wife-beating in progress and investigate a murder, or follow up on an informer’s tip that two elderly neighbors might trade guns without background checks? That’s a no-brainer.

To the extent it may be suggested that officers who do not adequately enforce the purported “gun safety” laws will be removed from office, neither the governor nor the Attorney General has any such power of removal. An elected officer may be removed from office by petition to the circuit court where the officer resides.<sup>211</sup> “The petition must be signed by a number of registered voters who reside within the jurisdiction of the officer equal to ten percent of the total number of votes cast at the last election for the office that the officer holds.”<sup>212</sup> Each such voter must sign under penalties of perjury.<sup>213</sup> Recall that most jurisdictions in Virginia have declared themselves Second Amendment Sanctuaries.<sup>214</sup>

Grounds for removal include “neglect of duty, misuse of office, or incompetence in the performance of duties” if such “has a material adverse effect upon the conduct of the office.”<sup>215</sup> That may be difficult to prove given the discretion to give priority to combating actual violent crime and crimes with actual victims.

The Commonwealth’s Attorney represents the Commonwealth in the trial, but if the proceeding is against the Commonwealth’s Attorney, the court appoints an attorney to represent the Commonwealth.<sup>216</sup> The officer is entitled to trial by jury of his or her peers.<sup>217</sup> Review of the case may be sought at the Virginia Supreme Court.<sup>218</sup>

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<sup>207</sup> VA. CONST. art. VII, § 4.

<sup>208</sup> VA. CODE ANN. § 15.2-1609 (LEXIS through 2020 Spec. Sess. I).

<sup>209</sup> *Id.* § 15.2-1626.

<sup>210</sup> *Id.* § 15.2-1627 (explaining the scope of discretion that Commonwealth Attorneys have when determining whether to prosecute misdemeanors).

<sup>211</sup> *Id.* § 24.2-233.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at § 24.2-235.

<sup>214</sup> *See supra* notes 25–27 and accompanying text.

<sup>215</sup> VA. CODE ANN. § 24.2-233(1) (LEXIS through 2020 Spec. Sess. I).

<sup>216</sup> VA. CODE ANN. § 24.2-237 (LEXIS through 2020 Spec. Sess. I).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*



A sheriff was acquitted of not adequately enforcing the alcohol and gambling laws—perhaps because his resources were directed to violent crime—in a case where the court held: “The burden was upon the Commonwealth to prove by clear and convincing evidence that defendant had knowledge of the flagrant violations of law and that he wilfully neglected to perform his duties in regard thereto.”<sup>219</sup> The jury found otherwise.<sup>220</sup>

The proposed “gun safety” measures are *mala prohibita* crimes without victims, so there are no victims to complain, and “violations” are private.<sup>221</sup> A neighbor sells an old gun to a friend without paying a gun dealer to process the sale and have a background check; a woman has a pistol for protection that has a magazine that holds thirteen rounds; a hunter has a rifle with a thumbhole stock. How would it be proven that these are “flagrant violations of law” about which a sheriff “wilfully neglected” to make arrests?

“Moreover, the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion.”<sup>222</sup> A prosecutor must “ensure that criminal prosecutions are pursued only to seek justice. Consequently, the Commonwealth’s attorney should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.”<sup>223</sup> He or she may choose which cases to prosecute or not prosecute, based on *actual* danger to the community.<sup>224</sup> A violent criminal with any kind of gun is a danger to the community. A good citizen with a rifle that has a compensator on the barrel is a danger to no one.

A Commonwealth’s Attorney’s declination to prosecute harmless violations of “gun safety” measures would not be subject to judicial review.<sup>225</sup> The Virginia Constitution provides, “The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others . . . .”<sup>226</sup> “[T]he structure of tripartite government creates a judicial presumption in favor of ‘broad’ prosecutorial discretion. ‘This broad discretion rests largely on

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<sup>219</sup> Commonwealth *ex rel.* Davis v. Malbon, 78 S.E.2d 683, 689–90 (Va. 1953).

<sup>220</sup> *Id.* at 690.

<sup>221</sup> *Malum Prohibitum*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>222</sup> Bradshaw v. Commonwealth, 323 S.E.2d 567, 572 (Va. 1984).

<sup>223</sup> Commonwealth of Va., Off. of the Att’y Gen., Opinion Letter on Discretionary Exercise of Governmental Power 01-078 (Dec. 19, 2001), <https://www.oag.state.va.us/files/Opinions/2001/01-078.pdf>.

<sup>224</sup> *See id.* (explaining that prosecutors have discretion over which cases to prosecute); *see also* VA. CODE ANN. § 15.2-1627 (LEXIS through 2020 Spec. Sess. I) (giving prosecutors discretion to prosecute misdemeanors).

<sup>225</sup> Wayte v. United States, 470 U.S. 598, 607 (1984).

<sup>226</sup> VA. CONST. art. III, § 1.

the recognition that the decision to prosecute is particularly ill-suited to judicial review.”<sup>227</sup>

In sum, scarce resources dictate that sheriffs and other law enforcement authorities focus on preventing serious crime and apprehending violent criminals. Commonwealth’s Attorneys have the ultimate discretion in what cases to prosecute or not prosecute. The governor has no authority to impose “consequences” on localities that do not use their resources pursuing victimless “gun safety” crimes.

*B. Commonwealth’s Attorneys Claim Discretion Not to Prosecute Victimless Crimes Like Marijuana Offenses*

As an example of prosecutorial discretion not to enforce a specific law, Fairfax County Commonwealth’s Attorney Steve Descano issued Policy Directive 20-01 on January 2, 2020, which “directs the Office’s prosecutors to move to dismiss simple possession of marijuana charges levied against adults.”<sup>228</sup> Thus far, no Attorney General opinion has been issued stating that a Commonwealth’s Attorney may not “nullify” the marijuana laws.

The Policy Directive notes: “Removing adult simple-possession-of-marijuana cases from prosecutors’ dockets allows prosecutors more time to focus on serious crimes that often involve victims.”<sup>229</sup> It further explains that the “downstream consequences of prosecuting adults for simple possession of marijuana represent another type of cost: the unjustified negative effect on the prosecuted individual, their family, and the community. Successful prosecution of these cases results in the individual having a criminal record that can never be expunged.”<sup>230</sup>

Similarly, adult simple possession of a rifle with a pistol grip or adjustable stock is not a “serious crime” and involves no “victim.” Two friends trading hunting guns without a background check harms no one. Incarcerating and giving such persons felony records will destroy their lives. And unlike possession of marijuana, possession of arms is constitutionally protected.

In short, what’s good for the goose is good for the gander. If Commonwealth’s Attorneys have discretion not to prosecute marijuana cases, they have all the more discretion not to prosecute cases that they believe would violate constitutional rights.

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<sup>227</sup> Boyd v. Cnty. of Henrico, 592 S.E.2d 768, 781 (Va. 2004) (quoting *Wayte*, 470 U.S. at 607).

<sup>228</sup> Steve Descano, Commonwealth’s Attorney for the County of Fairfax, Policy Directive 20-01, (Jan. 2, 2020).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

#### IV. LITTLE PUBLIC COMPLIANCE MAY BE EXPECTED WITH GUN CONFISCATION AND REGISTRATION LAWS

For about two centuries after the Second Amendment was proposed in 1789, rifles and magazines were generally lawful to possess throughout the United States.<sup>231</sup> California passed the first “assault weapons” ban in 1989,<sup>232</sup> and New Jersey passed the first ban on certain magazines in 1990.<sup>233</sup> Only a handful of states have passed similar legislation.<sup>234</sup> Because no victims exist to file complaints, violation of these laws are difficult to detect, and thus they are not very enforceable. Enforcement is typically limited to searches of houses and vehicles based on other reasons that bring persons to the attention of law enforcement. Moreover, there has been a low rate of voluntary compliance with such laws by the public.

Because house-to-house searches are not an option, ferreting out violators requires pulling officers from patrolling crime-ridden neighborhoods and reassigning them to conduct undercover surveillance at gun shows, shooting ranges, and other places where guns may be seen. But the average police officer has no expertise to know, much less to test, whether a firearm has a forbidden feature, such as whether a barrel attachment is a legal device or a compensator.<sup>235</sup>

One cannot tell just by looking on the outside that a firearm necessarily has a banned feature. That may require examination, which may constitute a search requiring a warrant. Proof of some features may require testing by trained experts with specialized equipment.

A social cost to assigning law enforcement officers to pursue otherwise law-abiding citizens in hopes of catching someone with a piece of wood or metal shaped the wrong way may be to alienate citizens from peace officers. Violation of privacy rights, entrapment, denunciations, and degradation of the rule of law are invariable effects of prohibition, whether applied to alcohol in 1920 or to guns a century later in 2020.<sup>236</sup>

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<sup>231</sup> Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 56 (2002); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–53, 870–72 (2015).

<sup>232</sup> 1989 Cal. Stat. 64–70.

<sup>233</sup> 1990 N.J. Sess. Law Serv. 32 (West).

<sup>234</sup> Jesse Paul, *7 States Have an Assault Weapons Ban. Colorado is Not Among Them—At Least Not Yet*, COLO. SUN (Mar. 24, 2021, 4:05 PM), <https://coloradosun.com/2021/03/24/assaults-weapons-ban-colorado-boulder-shooting/>.

<sup>235</sup> *Compensator*, GLOSSARY OF THE ASSOCIATION OF FIREARM & TOOL MARK EXAMINERS (6th ed. 2013), [https://afte.org/uploads/documents/AFTE\\_Glossary\\_Version\\_6.1\\_10619\\_DRAFT\\_.PDF](https://afte.org/uploads/documents/AFTE_Glossary_Version_6.1_10619_DRAFT_.PDF) (“A device attached to or integral with the muzzle end of the barrel that uses propelling gases to reduce recoil.”).

<sup>236</sup> See Mark Thornton, *Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure* (1991) (explaining how alcohol prohibition increased crime and prison occupancy).

Criminals do not obey laws against violent crime; much less would they obey “gun safety” measures. Countless numbers of citizens at large who are law-abiding gun owners cannot be expected to comply with laws that on their face violate what they perceive to be their constitutional rights. Yet they will face felony convictions and imprisonment if they possess the wrong thing, such as a rifle with a thumbhole stock or a magazine that holds thirteen rounds.

In countries that have no Second Amendment protection, most gun owners have refused to comply with confiscatory orders, despite financial incentives as well as disincentives, from imprisonment to the death penalty. Two dramatic examples have taken place in New Zealand and France.

In New Zealand, semiautomatic long guns were banned but the government offered compensation to their owners.<sup>237</sup> When the deadline passed, some two-thirds of the banned guns had not been turned in, despite the threat of five years of imprisonment.<sup>238</sup>

In World War II, the Nazis threatened the death penalty in occupied countries for all who failed to turn in their firearms.<sup>239</sup> Despite countless French citizens facing firing squads for gun possession, fewer than one-third of the hunting guns in civilian hands were surrendered.<sup>240</sup>

In the United States, some of the handful of states to ban “assault weapons” allowed existing owners to register and keep them. The overwhelming majority did not register their firearms. Examples include California and New York.

Under California’s 1989 ban, citizens registered only 46,062 out of as many as 600,000 “assault weapons” in the state.<sup>241</sup> Under New York’s 2013 ban, only 23,847 citizens registered their “assault weapons,” while

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<sup>237</sup> Emanuel Stoakes, *After Mosque Shootings, New Zealand’s Weapons Buyback Runs Into an Obstacle: Gun Owners*, WASH. POST (Dec. 20, 2019, 7:35 AM), [https://www.washingtonpost.com/world/asia\\_pacific/after-mosque-attacks-new-zealands-gun-buyback-runs-into-an-obstacle-gun-owners/2019/12/20/b4071106-208f-11ea-b034-de7dc2b5199b\\_story.html](https://www.washingtonpost.com/world/asia_pacific/after-mosque-attacks-new-zealands-gun-buyback-runs-into-an-obstacle-gun-owners/2019/12/20/b4071106-208f-11ea-b034-de7dc2b5199b_story.html).

<sup>238</sup> *Id.*

<sup>239</sup> Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT’L & COMPAR. L. 483, 527 (2000).

<sup>240</sup> STEPHEN P. HALBROOK, GUN CONTROL IN NAZI-OCCUPIED FRANCE: TYRANNY AND RESISTANCE 203 (2018).

<sup>241</sup> Carl Ingram, *Few Takers for Assault Gun Grace Period*, L.A. TIMES (Feb. 17, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-02-17-mn-1716-story.html>.

nearly one million failed to comply,<sup>242</sup> despite the threat of incarceration for a *minimum* of three-and-one-half years and up to seven years.<sup>243</sup>

While H.B. 961, the “assault weapon” and magazine ban bill, failed to pass in the 2020 session, it was continued to the 2021 session by vote of the Senate Judiciary Committee.<sup>244</sup> More such proposals may be expected. The Second Amendment Sanctuaries will be re-energized, and bill supporters will say that they have no legal effect. The debate will be *déjà vu* all over again.

### CONCLUSION

In response to draconian bills to criminalize the keeping and bearing of arms, almost all Virginia counties and many municipalities declared themselves Second Amendment sanctuaries. Contrary to the Attorney General’s assertion that they have “no legal effect,” such declarations may have broad legal ramifications when considered as petitions for redress of grievances, policies for law enforcement that prioritize serious crimes, and agendas for Commonwealth’s Attorneys to exercise their discretion only to prosecute worthy offenses. There is a perfect harmony between recognition of constitutional rights and using scarce resources to enforce laws the constitutionality of which are beyond question, rather than laws deemed by large segments of the public as unconstitutional.

Enacting a new Gun Prohibition will only lead to perverse results. Criminals will utterly disregard the purported “gun safety” laws, which will be obeyed only by some citizens who are aware of and understand them. But a ban on firearms in common possession of law-abiding citizens will result in massive non-compliance, which will also be the fate of a requirement that such firearms be registered. Imposing what many perceive as a radical new regime of unprecedented restrictions on a populace that perceives them as unconstitutional will create disrespect for and erode the rule of law.

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<sup>242</sup> Frank Miniter, *Nearly One Million New Yorkers Didn't Register Their "Assault Weapons,"* FORBES (June 24, 2015, 9:31 AM), <https://www.forbes.com/sites/frankminiter/2015/06/24/nearly-one-million-new-yorkers-didnt-register-their-assault-weapons/?sh=26f4cc15702f#5alc73b5702f>.

<sup>243</sup> S. 2230, 2013 S., 2013–2014 Reg. Sess. (N.Y. 2013); N.Y. PENAL LAW § 265.02(10) (McKinney, Westlaw through L. 2021, chapters 1 to 49, 61 to 68).

<sup>244</sup> *HB 961 Assault Firearms, Certain Firearm Mags., etc.; Prohibiting Sale, Transp., etc., Penalties*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB961> (last visited Mar. 17, 2021).