

## The Secret History of Guns

*The Ku Klux Klan, Ronald Reagan, and, for most of its history, the NRA all worked to control guns. The Founding Fathers? They required gun ownership—and regulated it. And no group has more fiercely advocated the right to bear loaded weapons in public than the Black Panthers—the true pioneers of the modern pro-gun movement. In the battle over gun rights in America, both sides have distorted history and the law, and there's no resolution in sight.*

**Adam Winkler September 2011 Issue**

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**The eighth-grade students gathering on the west lawn of the state capitol in Sacramento were planning to lunch on fried chicken with California's new governor, Ronald Reagan, and then tour the granite building constructed a century earlier to resemble the nation's Capitol. But the festivities were interrupted by the arrival of 30 young black men and women carrying .357 Magnums, 12-gauge shotguns, and .45-caliber pistols.**

The 24 men and six women climbed the capitol steps, and one man, **Bobby Seale**, began to read from a prepared statement. "The American people in general and the black people in particular," he announced, must

take careful note of the racist California legislature aimed at keeping the black people disarmed and powerless Black people have begged, prayed, petitioned, demonstrated, and everything else to get the racist power structure of America to right the wrongs which have historically been perpetuated against black people The time has come for black people to arm themselves against this terror before it is too late.

**Seale then turned to the others. "All right, brothers, come on. We're going inside." He opened the door, and the radicals walked straight into the state's most important government building, loaded guns in hand. No metal detectors stood in their way.**

**It was May 2, 1967, and the Black Panthers' invasion of the California statehouse launched the modern gun-rights movement.**

The text of the Second Amendment is maddeningly ambiguous. It merely says, "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." Yet to each side in the gun debate, those words are absolutely clear.

Gun-rights supporters believe the amendment guarantees an individual the right to bear arms and outlaws most gun control. Hard-line gun-rights advocates portray even modest gun laws as infringements on that right and oppose widely popular proposals—such as background checks for all gun purchasers—on the ground that any gun-control measure, no matter how seemingly reasonable, puts us on the slippery slope toward total civilian disarmament.

This attitude was displayed on the side of the National Rifle Association's former headquarters: THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS SHALL NOT BE INFRINGED. The first clause of the Second Amendment, the part about "a well regulated Militia," was conveniently omitted. To the gun lobby, the Second Amendment is all rights and no regulation.

Although decades of electoral defeats have moderated the gun-control movement's stated goals, advocates still deny that individual Americans have any constitutional right to own guns. The Second Amendment, in their view, protects only state militias. Too politically weak to force disarmament on

the nation, gun-control hard-liners support any new law that has a chance to be enacted, however unlikely that law is to reduce gun violence. For them, the Second Amendment is all regulation and no rights.

While the two sides disagree on the meaning of the Second Amendment, they share a similar view of the right to bear arms: both see such a right as fundamentally inconsistent with gun control, and believe we must choose one or the other. Gun rights and gun control, however, have lived together since the birth of the country. Americans have always had the right to keep and bear arms as a matter of state constitutional law. **Today, 43 of the 50 state constitutions clearly protect an individual's right to own guns, apart from militia service.**

Yet we've also always had gun control. The Founding Fathers instituted gun laws so intrusive that, were they running for office today, the NRA would not endorse them. **While they did not care to completely disarm the citizenry, the founding generation denied gun ownership to many people: not only slaves and free blacks, but law-abiding white men who refused to swear loyalty to the Revolution.**

For those men who were allowed to own guns, the Founders had their own version of the "individual mandate" that has proved so controversial in President Obama's health-care-reform law: **they required the purchase of guns. A 1792 federal law mandated every eligible man to purchase a military-style gun and ammunition for his service in the citizen militia. Such men had to report for frequent musters—where their guns would be inspected and, yes, registered on public rolls.**

**Opposition to gun control was what drove the black militants to visit the California capitol with loaded weapons in hand. The Black Panther Party had been formed six months earlier, in Oakland, by Huey Newton and Bobby Seale.** Like many young African Americans, Newton and Seale were frustrated with the failed promise of the civil-rights movement. *Brown v. Board of Education*, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 were legal landmarks, but they had yet to deliver equal opportunity. **In Newton and Seale's view, the only tangible outcome of the civil-rights movement had been more violence and oppression, much of it committed by the very entity meant to protect and serve the public: the police.**

**Inspired by the teachings of Malcolm X, Newton and Seale decided to fight back. Before he was assassinated in 1965, Malcolm X had preached against Martin Luther King Jr.'s brand of nonviolent resistance. Because the government was "either unable or unwilling to protect the lives and property" of blacks, he said, they had to defend themselves "by whatever means necessary."** Malcolm X illustrated the idea for *Ebony* magazine by posing for photographs in suit and tie, peering out a window with an M-1 carbine semiautomatic in hand. Malcolm X and the Panthers described their right to use guns in self-defense in constitutional terms. "Article number two of the constitutional amendments," Malcolm X argued, "provides you and me the right to own a rifle or a shotgun."

**Guns became central to the Panthers' identity, as they taught their early recruits that "the gun is the only thing that will free us—gain us our liberation."** They bought some of their first guns with earnings from selling copies of Mao Zedong's *Little Red Book* to students at the University of California at Berkeley. In time, the Panther arsenal included machine guns; an assortment of rifles, handguns, explosives, and grenade launchers; and "boxes and boxes of ammunition," recalled Elaine Brown, one of the party's first female members, in her 1992 **memoir**. Some of this matériel came from the federal government: one member claimed he had

connections at Camp Pendleton, in Southern California, who would sell the Panthers anything for the right price. One Panther bragged that, if they wanted, they could have bought an M48 tank and driven it right up the freeway.

**Along with providing classes on black nationalism and socialism, Newton made sure recruits learned how to clean, handle, and shoot guns. Their instructors were sympathetic black veterans, recently home from Vietnam.** For their “righteous revolutionary struggle,” the Panthers were trained, as well as armed, however indirectly, by the U.S. government.

**Civil-rights activists, even those committed to nonviolent resistance, had long appreciated the value of guns for self-protection. Martin Luther King Jr. applied for a permit to carry a concealed firearm in 1956, after his house was bombed. His application was denied, but from then on, armed supporters guarded his home. One adviser, Glenn Smiley, described the King home as “an arsenal.” William Worthy, a black reporter who covered the civil-rights movement, almost sat on a loaded gun in a living-room armchair during a visit to King’s parsonage.**

The Panthers, however, took it to an extreme, carrying their guns in public, displaying them for everyone—especially the police—to see. **Newton had discovered, during classes at San Francisco Law School, that California law allowed people to carry guns in public so long as they were visible, and not pointed at anyone in a threatening way.**

**In February of 1967, Oakland police officers stopped a car carrying Newton, Seale, and several other Panthers with rifles and handguns.** When one officer asked to see one of the guns, Newton refused. “I don’t have to give you anything but my identification, name, and address,” he insisted. This, too, he had learned in law school.

“Who in the hell do you think you are?” an officer responded.

“Who in the hell do you think you are?,” Newton replied indignantly. He told the officer that he and his friends had a legal right to have their firearms.

Newton got out of the car, still holding his rifle.

“What are you going to do with that gun?” asked one of the stunned policemen.

“What are you going to do with your gun?,” Newton replied.

By this time, the scene had drawn a crowd of onlookers. An officer told the bystanders to move on, but Newton shouted at them to stay. California law, he yelled, gave civilians a right to observe a police officer making an arrest, so long as they didn’t interfere. Newton played it up for the crowd. In a loud voice, he told the police officers, “If you try to shoot at me or if you try to take this gun, I’m going to shoot back at you, swine.” Although normally a black man with Newton’s attitude would quickly find himself handcuffed in the back of a police car, enough people had gathered on the street to discourage the officers from doing anything rash. Because they hadn’t committed any crime, the Panthers were allowed to go on their way.

The people who’d witnessed the scene were dumbstruck. Not even Bobby Seale could believe it. Right then, he said, he knew that Newton was the “baddest motherfucker in the world.” Newton’s message was clear: “The gun is where it’s at and about and in.” After the February incident, the Panthers began

a regular practice of policing the police. Thanks to an army of new recruits inspired to join up when they heard about Newton's bravado, groups of armed Panthers would drive around following police cars. When the police stopped a black person, the Panthers would stand off to the side and shout out legal advice.

Don Mulford, a conservative Republican state assemblyman from Alameda County, which includes Oakland, was determined to end the Panthers' police patrols. To disarm the Panthers, he proposed a law that would prohibit the carrying of a loaded weapon in any California city. When Newton found out about this, he told Seale, "You know what we're going to do? We're going to the Capitol." Seale was incredulous. "The Capitol?" Newton explained: "Mulford's there, and they're trying to pass a law against our guns, and we're going to the Capitol steps." Newton's plan was to take a select group of Panthers "loaded down to the gills," to send a message to California lawmakers about the group's opposition to any new gun control.

The Panthers' methods provoked an immediate backlash. The day of their statehouse protest, lawmakers said the incident would speed enactment of Mulford's gun-control proposal. Mulford himself pledged to make his bill even tougher, and he added a provision barring anyone but law enforcement from bringing a loaded firearm into the state capitol.

Republicans in California eagerly supported increased gun control. Governor Reagan told reporters that afternoon that he saw "no reason why on the street today a citizen should be carrying loaded weapons." He called guns a "ridiculous way to solve problems that have to be solved among people of good will." In a later press conference, Reagan said he didn't "know of any sportsman who leaves his home with a gun to go out into the field to hunt or for target shooting who carries that gun loaded." **The Mulford Act**, he said, "would work no hardship on the honest citizen."

The fear inspired by black people with guns also led the United States Congress to consider new gun restrictions, after the summer of 1967 brought what the historian Harvard Sitkoff called the "most intense and destructive wave of racial violence the nation had ever witnessed." Devastating riots engulfed Detroit and Newark. Police and National Guardsmen who tried to help restore order were greeted with sniper fire.

A 1968 federal report blamed the unrest at least partly on the easy availability of guns. Because rioters used guns to keep law enforcement at bay, the report's authors asserted that a recent spike in firearms sales and permit applications was "directly related to the actuality and prospect of civil disorders." They drew "the firm conclusion that effective firearms controls are an essential contribution to domestic peace and tranquility."

Political will in Congress reached the critical point around this time. In April of 1968, James Earl Ray, a virulent racist, used a Remington Gamemaster deer rifle to kill Martin Luther King Jr. in Memphis, Tennessee. King's assassination—and the sniper fire faced by police trying to quell the resulting riots—gave gun-control advocates a vivid argument. Two months later, a man wielding a .22-caliber Iver Johnson Cadet revolver shot Robert F. Kennedy in Los Angeles. The very next day, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, the first federal gun-control law in 30 years. Months later, the Gun Control Act of 1968 amended and enlarged it.

Together, these laws greatly expanded the federal licensing system for gun dealers and clarified which people—including anyone previously convicted of a felony, the mentally ill,

illegal-drug users, and minors—were not allowed to own firearms. More controversially, the laws restricted importation of “Saturday Night Specials”—the small, cheap, poor-quality handguns so named by Detroit police for their association with urban crime, which spiked on weekends. Because these inexpensive pistols were popular in minority communities, one critic said the new federal gun legislation “was passed not to control guns but to control blacks.”

Indisputably, for much of American history, gun-control measures, like many other laws, were used to oppress African Americans. The South had long prohibited blacks, both slave and free, from owning guns. In the North, however, at the end of the Civil War, the Union army allowed soldiers of any color to take home their rifles. Even blacks who hadn’t served could buy guns in the North, amid the glut of firearms produced for the war. President Lincoln had promised a “new birth of freedom,” but many blacks knew that white Southerners were not going to go along easily with such a vision. As one freedman in Louisiana recalled, “I would say to every colored soldier, ‘Bring your gun home.’”

After losing the Civil War, Southern states quickly adopted the Black Codes, laws designed to reestablish white supremacy by dictating what the freedmen could and couldn’t do. One common provision barred blacks from possessing firearms. To enforce the gun ban, white men riding in posses began terrorizing black communities. In January 1866, Harper’s Weekly reported that in Mississippi, such groups had “seized every gun and pistol found in the hands of the (so called) freedmen” in parts of the state. The most infamous of these disarmament posses, of course, was the Ku Klux Klan.

In response to the Black Codes and the mounting atrocities against blacks in the former Confederacy, the North sought to reaffirm the freedmen’s constitutional rights, including their right to possess guns. General Daniel E. Sickles, the commanding Union officer enforcing Reconstruction in South Carolina, ordered in January 1866 that “the constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed.” When South Carolinians ignored Sickles’s order and others like it, Congress passed the Freedmen’s Bureau Act of July 1866, which assured ex-slaves the “full and equal benefit of all laws and proceedings concerning personal liberty ... including the constitutional right to bear arms.”

That same year, Congress passed the nation’s first Civil Rights Act, which defined the freedmen as United States citizens and made it a federal offense to deprive them of their rights on the basis of race. Senator James Nye, a supporter of both laws, told his colleagues that the freedmen now had an “equal right to protection, and to keep and bear arms for self-defense.” President Andrew Johnson vetoed both laws. Congress overrode the vetoes and eventually made Johnson the first president to be impeached.

One prosecutor in the impeachment trial, Representative John Bingham of Ohio, thought that the only way to protect the freedmen’s rights was to amend the Constitution. Southern attempts to deny blacks equal rights, he said, were turning the Constitution—“a sublime and beautiful scripture—into a horrid charter of wrong.” In December of 1865, Bingham had proposed what would become the Fourteenth Amendment to the Constitution. Among its provisions was a guarantee that all citizens would be secure in their fundamental rights:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The key phrase, in Bingham's view, was privileges or immunities of citizens—and those “privileges or immunities,” he said, were “chiefly defined in the first eight amendments to the Constitution.” Jacob Howard of Michigan, the principal sponsor of Bingham's amendment in the Senate, reminded his colleagues that these amendments guaranteed “the freedom of speech and of the press,” “the right to be exempt from unreasonable searches and seizures,” and “the right to keep and bear arms.”

Whether or not the Founding Fathers thought the Second Amendment was primarily about state militias, the men behind the Fourteenth Amendment—America's most sacred and significant civil-rights law—clearly believed that the right of individuals to have guns for self-defense was an essential element of citizenship. As the Yale law professor Akhil Reed Amar has observed, “Between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.”

The Fourteenth Amendment illustrates a common dynamic in America's gun culture: extremism stirs a strong reaction. The aggressive Southern effort to disarm the freedmen prompted a constitutional amendment to better protect their rights. A hundred years later, the Black Panthers' brazen insistence on the right to bear arms led whites, including conservative Republicans, to support new gun control. Then the pendulum swung back. The gun-control laws of the late 1960s, designed to restrict the use of guns by urban black leftist radicals, fueled the rise of the present-day gun-rights movement—one that, in an ironic reversal, is predominantly white, rural, and politically conservative.

Today, the NRA is the unquestioned leader in the fight against gun control. Yet the organization didn't always oppose gun regulation. Founded in 1871 by George Wingate and William Church—the latter a former reporter for a newspaper now known for hostility to gun rights, The New York Times—the group first set out to improve American soldiers' marksmanship. Wingate and Church had fought for the North in the Civil War and been shocked by the poor shooting skills of city-bred Union soldiers.

In the 1920s and '30s, the NRA was at the forefront of legislative efforts to enact gun control. The organization's president at the time was Karl T. Frederick, a Princeton- and Harvard-educated lawyer known as “the best shot in America”—a title he earned by winning three gold medals in pistol-shooting at the 1920 Summer Olympic Games. As a special consultant to the National Conference of Commissioners on Uniform State Laws, Frederick helped draft the Uniform Firearms Act, a model of state-level gun-control legislation. (Since the turn of the century, lawyers and public officials had increasingly sought to standardize the patchwork of state laws. The new measure imposed more order—and, in most cases, far more restrictions.)

Frederick's model law had three basic elements. The first required that no one carry a concealed handgun in public without a permit from the local police. A permit would be granted only to a “suitable” person with a “proper reason for carrying” a firearm. Second, the law required gun dealers to report to law enforcement every sale of a handgun, in essence creating a registry of small arms. Finally, the law imposed a two-day waiting period on handgun sales.

The NRA today condemns every one of these provisions as a burdensome and ineffective infringement on the right to bear arms. Frederick, however, said in 1934 that he did “not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.” The NRA's

executive vice president at the time, Milton A. Reckord, told a congressional committee that his organization was “absolutely favorable to reasonable legislation.” According to Frederick, the NRA “sponsored” the Uniform Firearms Act and promoted it nationwide. **Highlighting the political strength of the NRA even back then, a 1932 Virginia Law Review article reported that laws requiring a license to carry a concealed weapon were already “in effect in practically every jurisdiction.”**

**When Congress was considering the first significant federal gun law of the 20th century—the National Firearms Act of 1934, which imposed a steep tax and registration requirements on “gangster guns” like machine guns and sawed-off shotguns—the NRA endorsed the law.** Karl Frederick and the NRA did not blindly support gun control; indeed, they successfully pushed to have similar prohibitive taxes on handguns stripped from the final bill, arguing that people needed such weapons to protect their homes. Yet the organization stood firmly behind what Frederick called “reasonable, sensible, and fair legislation.”

One thing conspicuously missing from Frederick’s comments about gun control was the Second Amendment. When asked during his testimony on the National Firearms Act whether the proposed law violated “any constitutional provision,” he responded, “I have not given it any study from that point of view.” In other words, the president of the NRA hadn’t even considered whether the most far-reaching federal gun-control legislation in history conflicted with the Second Amendment. Preserving the ability of law-abiding people to have guns, Frederick would write elsewhere, “lies in an enlightened public sentiment and in intelligent legislative action. It is not to be found in the Constitution.”

**In the 1960s, the NRA once again supported the push for new federal gun laws. After the assassination of President John F. Kennedy in 1963 by Lee Harvey Oswald, who had bought his gun through a mail-order ad in the NRA’s American Rifleman magazine, Franklin Orth, then the NRA’s executive vice president, testified in favor of banning mail-order rifle sales.** “We do not think that any sane American, who calls himself an American, can object to placing into this bill the instrument which killed the president of the United States.” Orth and the NRA didn’t favor stricter proposals, like national gun registration, but **when the final version of the Gun Control Act was adopted in 1968, Orth stood behind the legislation.** While certain features of the law, he said, “appear unduly restrictive and unjustified in their application to law-abiding citizens, the measure as a whole appears to be one that the sportsmen of America can live with.”

A growing group of rank-and-file NRA members disagreed. In an era of rising crime rates, fewer people were buying guns for hunting, and more were buying them for protection. The NRA leadership didn’t fully grasp the importance of this shift. In 1976, **Maxwell Rich, the executive vice president,** announced that the NRA would sell its building in Washington, D.C., and relocate the headquarters to Colorado Springs, retreating from political lobbying and expanding its outdoor and environmental activities.

Rich’s plan sparked outrage among the new breed of staunch, hard-line gun-rights advocates. The dissidents were led by **a bald, blue-eyed bulldog of a man named Harlon Carter, who ran the NRA’s recently formed lobbying arm, the Institute for Legislative Action.** In May 1977, Carter and his allies staged a coup at the annual membership meeting. Elected the new **executive vice president,** Carter would transform the NRA into a lobbying powerhouse committed to a **more aggressive view of what the Second Amendment promises to citizens.**

The new NRA was not only responding to the wave of gun-control laws enacted to disarm black radicals; it also shared some of the Panthers' views about firearms. Both groups valued guns primarily as a means of self-defense. Both thought people had a right to carry guns in public places, where a person was easily victimized, and not just in the privacy of the home. They also shared a profound mistrust of law enforcement. (For years, the NRA has demonized government agents, like those in the Bureau of Alcohol, Tobacco, Firearms and Explosives, the federal agency that enforces gun laws, as "jack-booted government thugs." Wayne LaPierre, the current executive vice president, warned members in 1995 that anyone who wears a badge has "the government's go-ahead to harass, intimidate, even murder law-abiding citizens.") For both the Panthers in 1967 and the new NRA after 1977, law-enforcement officers were too often representatives of an uncaring government bent on disarming ordinary citizens.

A sign of the NRA's new determination to influence electoral politics was the 1980 decision to endorse, for the first time in the organization's 100 years, a presidential candidate. Their chosen candidate was none other than Ronald Reagan, who more than a decade earlier had endorsed Don Mulford's law to disarm the Black Panthers—a law that had helped give Reagan's California one of the strictest gun-control regimes in the nation. Reagan's views had changed considerably since then, and the NRA evidently had forgiven his previous support of vigorous gun control.

**In 2008, in a landmark ruling, the U.S. Supreme Court declared that the government cannot ever completely disarm the citizenry. In *District of Columbia v. Heller*, the Supreme Court clearly held, for the first time, that the Second Amendment guarantees an individual's right to possess a gun.** In an opinion by Justice Antonin Scalia, the Court declared unconstitutional several provisions of the District's unusually strict gun-control law, including its ban on handguns and its prohibition of the use of long guns for self-defense. Indeed, under D.C.'s law, you could own a shotgun, but you could not use it to defend yourself against a rapist climbing through your bedroom window.

Gun-rights groups trumpeted the ruling as the crowning achievement of the modern gun-rights movement and predicted certain victory in their war to end gun control. Their opponents criticized the Court's opinion as right-wing judicial activism that would call into question most forms of gun control and lead inevitably to more victims of gun violence.

So far, at least, neither side's predictions have come true. **The courts have been inundated with lawsuits challenging nearly every type of gun regulation; in the three years since the Supreme Court's decision, lower courts have issued more than 200 rulings on the constitutionality of gun control. In a disappointment to the gun-rights community, nearly all laws have been upheld.**

**The lower courts consistently point to one paragraph in particular from the *Heller* decision. Nothing in the opinion, Scalia wrote, should**

**be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.**

This paragraph from the pen of Justice Scalia, the foremost proponent of constitutional originalism, was astounding. True, the Founders imposed gun control, but they had no laws resembling Scalia's list of Second Amendment exceptions. They had no laws banning guns in sensitive places, or laws

prohibiting the mentally ill from possessing guns, or laws requiring commercial gun dealers to be licensed. Such restrictions are products of the 20th century. Justice Scalia, in other words, embraced a living Constitution. In this, *Heller* is a fine reflection of the ironies and contradictions—and the selective use of the past—that run throughout America’s long history with guns.

#### **ABOUT THE AUTHOR**

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