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**\*333 LOCAL GUN BANS IN CALIFORNIA: A FUTILE EXERCISE**

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Within the limits of the City and County of San Francisco, the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited . . . [and] no resident of the City and County of San Francisco shall possess any handgun unless required for professional purposes. Proposition H (held invalid, 2006) [FN1]

THIS ARTICLE EXAMINES THE AUTHORITY of California local governments to “license” firearms possession--i.e., the authority to permit or deny the possession of firearms and/or ammunition within a locality's geographical limits. [FN2] Particular attention will be focused on two cases that invalidated attempts by the City and County of San Francisco (“San Francisco”) to ban firearms. [FN3] The inevitable conclusion from these and other cases construing the relevant statutes is that local governments may not ban handguns and other firearms that state law does not forbid the law-abiding adult citizenry from possessing.

Part I will briefly examine the limited constitutional issues that inform the debate, at least in California. Part II examines the state statutes governing local firearms regulations, noting that implicit in \*334 that framework is the California Legislature's repeated recognition that civilian firearms ownership is part of the solution to violent crime. Part III examines the seminal California case

on local gun bans, Doe v. City & County of San Francisco, [FN4] and subsequent firearms jurisprudence leading up to the recent decision invalidating San Francisco's Proposition H. [FN5] Part IV examines the state Unsafe Handgun Act [FN6] and its impact on local attempts to ban handguns in California.

It may be useful to begin with a brief overview of recent local firearms ordinances, including Proposition H. Proposition H, which San Francisco adopted by public referendum in November 2005, banned and confiscated all handguns and forbade the sale of any kind of firearm and all firearm ammunition. [FN7] This was the most extreme gun ban ever enacted in the United States, except for the confiscation of all firearms enacted by the seceding state of Tennessee during the Civil War. [FN8] By way of comparison, the District of Columbia has banned handgun possession, excepting only handguns registered by the current owner in that city before 1976. [FN9] But no American jurisdiction goes so far as banning the sale of rifles and shotguns, nor making currently-owned guns virtually useless by banning the sale of all ammunition, like Proposition H. In a decision rendered shortly after Proposition H became effective, the San Francisco Superior Court invalidated it as contrary to, and preempted by, state law. [FN10]

Proposition H was the latest in a series of sweeping gun laws enacted by the City and County of San Francisco. Thirty-seven years earlier, in 1968, San Francisco enacted an ordinance requiring that all handgun owners register their firearms. [FN11] Despite the state law precluding firearms licensing, [FN12] discussed in detail below, the ordinance was upheld by the California Supreme Court in *Galvan v. Superior* \*335 Court. [FN13] The court reasoned that Penal Code section 12026 barred localities from “licensing”—i.e., exercising authority to permit or ban guns. [FN14] In contrast, registration requires only enumeration of the guns people own, with no pretense that the city has authority over whether guns may be owned or not. [FN15]

Three years later, in 1972, a San Francisco ordinance that purported to require a permit to buy a handgun was quickly stricken down by the Court of Appeal as contrary to two different state laws: Penal Code section 12026 and a new law, Government Code section 53071, [FN16] which had been enacted to preempt local laws requiring either registration or licensing of firearms of any type. [FN17] In *Sippel v. Nelder*, the Court of Appeal found, as had the California Supreme Court in *Galvan*, that under section 12026, law-abiding, responsible adult Californians are “entitled” to purchase and possess a handgun, even without resorting to section 53071’s express preemption language. [FN18]

Section 12026 expressly excludes from those to whom it grants handgun rights any person who is prohibited from such possession by state laws, such as Penal Code section 12021. [FN19] But, as the *Sippel* opinion noted, the plaintiff in the instant case did not fall within the excepted classes prescribed by Penal Code section 12021, and he was therefore entitled, under Penal Code section 12026, to possess a concealed firearm at his residence without obtaining a license or permit of any kind. [FN20]

It bears emphasis that under the reasoning of the *Galvan* and *Sippel* cases, local ordinances banning handguns would have been invalid even prior to the enactment of Government Code section 9619 (now, section 53071), since they directly conflict with Penal Code section 12026.

In 1982, San Francisco adopted an ordinance that sought to distinguish itself from a licensing or registration regulation by banning \*336 and confiscating handguns outright. [FN21] Although the ordinance purported to ban the possession of all handguns, it did not seek to abolish all exceptions. Among those exceptions was the power the state grants to local police chiefs and sheriffs to issue concealed carry licenses under Penal Code section 12050. [FN22]

This ordinance was challenged by mandamus actions filed directly in the Court of Appeal, whose panel unanimously struck down the ordinance as contrary to section 12026 and preempted by section 53071. [FN23] Though the City sought review, no member of the Rose Bird Supreme Court voted to hear the matter. Despite later rulings that distinguish

and arguably limit Doe, it remains the most significant pronouncement on the scope of Penal Code section 12026 and Government Code section 53071. Doe’s scope, and even its validity, was a central issue in determining the legality of Proposition H. [FN24]

In the mid-1990s, multiple cities enacted ordinances banning gun stores from selling affordable self-defense handguns, which the ordinances defined as “Saturday Night Specials.” [FN25] One of the first cities that adopted such an ordinance, West Hollywood, was sued in *California Rifle & Pistol Ass’n v. City of West Hollywood*. [FN26] The Second District Court of Appeal upheld the ordinance, distinguishing it from the one invalidated in Doe, in that it did not prohibit the general acquisition of guns, but rather only a certain type of gun, and it was not a “licensing” or “registration” law. [FN27]

### \*337 I. Constitutional Provisions Protecting Gun Ownership and Acquisition

#### A. The Second Amendment

The Second Amendment to the United States Constitution enunciates the “right of the people to keep and bear Arms.” [FN28] Gun control advocates have offered two theories in arguing that the Second Amendment has no impact on firearms prohibitions: (1) that what the Second Amendment actually protects is the right of the states to have armed militias; [FN29] and (2) that the Amendment guarantees only a “collective right,” by which is meant a “right” that does not guarantee individuals anything and cannot be vindicated by litigants suing either on their own behalf or even on behalf of the collectivity. [FN30]

As William Van Alstyne has noted, these theories originated in the gun control debates of the twentieth century and were unknown to the Founding Fathers. [FN31] Neither were these theories known to nineteenth-century constitutional analysts, who analyzed the Second Amendment as a right of people to have guns, analogizing it to the rights guaranteed under the First Amendment, the right to jury trial, the right of habeas corpus, and other constitutional rights. [FN32]

In California, the debate is academic. The Ninth

Circuit has accepted the states' right theory of the Second Amendment [FN33] and found that the Constitution does not prohibit the state from enacting legislation aimed at private gun control. [FN34] The California Supreme Court has also come to the same conclusion. [FN35]

**\*338 B. State Constitutional Protection of a Right to Arms**

California is one of a handful of states that lacks an explicit guarantee of the right to arms in its constitution. Article I, section 1 of the state constitution does guarantee the right to self-defense. [FN36] However, the California Supreme Court has declared, in dictum, that this constitutional provision does not encompass any right to arms. [FN37] This was dictum because the meaning and scope of the California constitutional right to self-defense was not before the court, it not having been raised or argued by the parties. Had supporters of the right to bear arms been afforded an opportunity to brief the issue, the court may have been informed that eighteenth and nineteenth-century Americans followed the view of “[n]atural law philosophers [who] saw self-defense as the premier natural right. From it they adduced . . . the right to arms,” [FN38] and that modern philosophers who have considered the question agree that a right to arms is implicit in the philosophical right to self-defense. [FN39] The court also may have realized that a United States Supreme Court opinion by Justice Holmes intimates that the Federal Constitution embraces a right to self-defense that includes a constitutional right to arms. [FN40]

Another advantage of having the issue argued and briefed would have been that the court might have found some other function it could have ascribed to the constitutional right to self-defense. This would have allowed the court to mention that function instead of just saying that the right to self-defense does not encompass a right to arms without suggesting any other function the right to self-defense conceivably might have.

**\*339 II. The California Statutory Scheme Regulating Firearms**

In lieu of state constitutional protection of civilian firearms ownership, California does have

several statutory protections in place. This regulatory scheme clearly reflects the Legislature's determination that firearms possession by law-abiding responsible adults can deter [FN41] or thwart crime. [FN42] In addition, state law and public policy rely on civilian possession of firearms as an important element in game management. [FN43] This includes even handgun ownership, as handgun hunting is recognized and regulated in California. [FN44]

**\*340 A. The Uniform Firearms Act**

In analyzing California's 1923 Uniform Firearms Act [FN45] (“UFA”), one must bear in mind the California Supreme Court's admonition that, to understand a statute, one must “take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject . . . .” [FN46] To the same effect, the court has invoked Justice Holmes' assertion that “a page of history is worth a volume of logic . . . .” [FN47]

For the UFA, the relevant period of history is the first quarter of the twentieth century during which complete handgun bans and handgun permit laws were being enacted across the United States and the world. [FN48] These anti-gun laws reflected the tumultuous events of the late nineteenth and early twentieth centuries, in which assassins had taken or menaced the lives of the Russian Czar, the Empress of Austria, an Austrian Archduke (leading to the First World War), and many other luminaries including President McKinley, former President Theodore Roosevelt, Justice Oliver Wendell Holmes, Attorney General A. Mitchell Palmer, Henry Frick, J.P. Morgan, John D. Rockefeller, and the mayors of Chicago and New York.

Motivated by fears of political turmoil and labor unrest, gun permit laws appeared in England, Canada, Australia, New Zealand, and throughout Europe, while Germany and a few other nations banned civilian ownership of any kind of firearm. [FN49]

The first such twentieth-century American law was South Carolina's 1902 complete ban on handgun sales, [FN50] a policy the American **\*341** Bar Association urged other states to follow. [FN51]

In 1911, New York enacted the Sullivan Law, which required permits to buy or own a handgun. [FN52] Over the next twenty years, six more states enacted permit requirements to buy a handgun. [FN53] Across the nation, complete handgun bans or Sullivan-type laws were promoted under the slogan “[i]f nobody had a gun nobody would need a gun.” [FN54]

To forestall such legislation, gun owners promoted a package of legislative protections that came to be known as the UFA. Gun owner lobby groups drafted and recommended the UFA as a set of moderate gun controls to be adopted by all states instead of more severe regulations. As Professor Leddy writes,

It soon became clear that if target shooters and other legal gun owners did not want to see the lawful uses of guns completely banned they must become active politically with a program of [less onerous gun control] laws which would both protect gun ownership and reduce crime. This program was the Uniform Firearms Act [aka, the Uniform Revolver Act] . . . . [FN55]

The UFA was also endorsed by the National Conference of Commissioners on Uniform State Laws as an antidote to what it called “the wrong emphasis on more pistol legislation”—i.e., laws “aimed at regulating pistols in the hands of law-abiding citizens.” As an alternative, the National Conference lauded the UFA approach, which it described as “punishing severely criminals who use pistols” with “a program of laws which would both protect arms ownership and reduce crime.” [FN56]

As the National Rifle Association (“NRA”) proclaimed, “[t]his law was adopted in 1923 by California, North Dakota and New Hampshire.” [FN57] The UFA, as adopted by California in 1923, contained a host of moderate regulations that form the basis of many current California laws, such as those prohibiting handgun possession by convicted felons, requiring firearms dealers to be licensed, requiring that handguns have serial numbers, and requiring that persons carrying them concealed be licensed. [FN58]

**\*342 B. Penal Code Section 12026 (Current Section 12026(b))**

Ironically, the California UFA was initially sponsored by an anti-gun advocate. When introduced, it included a permit requirement to either buy or possess a handgun. [FN59] The final product, however, was a dramatic triumph for gun owners. Not only was the permit requirement rejected, it was replaced by the provision from which springs current Penal Code section 12026(b). That provision assured (and in Penal Code section 12026(b) still assures) that law-abiding, responsible adults would never be subject to a licensing or permit law—i.e., a law that arrogates to localities the power to permit or ban handgun possession for people whom state law allows to own handguns. [FN60] Currently this handgun rights portion of section 12026 reads:

(b) No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code [related to certain persons convicted of crimes and to narcotics addicts] or Section 8100 or 8103 of the Welfare and Institutions Code [related to persons with mental disorders], to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident. In enacting (and subsequently reenacting) what is now section 12026(b), the Legislature decided that, in general, the benefits of allowing the law-abiding, responsible adult population to possess handguns outweigh the dangers. This policy objective is confirmed by a contemporaneous comment concerning California's adoption of the UFA, including what is now Penal Code section 12026(b). The July 15, 1923 San Francisco Chronicle reported that “[i]t was largely on the recommendation of R.T. McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson

[signed the UFA].” [FN61] The Chronicle quoted McKissick’s endorsement of the UFA as “frankly an effort upon the part of those who know something about firearms to forestall the flood of fanatical legislation intended to deprive all citizens of the United States of the right to own and use, for \*343 legitimate purposes, firearms capable of being concealed upon the person.” [FN62]

Obviously, this policy is highly controversial. Yet, however debatable the wisdom of that policy may be, that debate must occur in the legislature. Whether section 12026(b) is “ill or well founded in point of mere policy, is a matter, however, with which [judges] cannot concern [themselves] . . . .” [FN63]

Thus, as to section 12026(b), each of the factors the California Supreme Court holds that courts must address in interpreting a statute [FN64] may be summarized as follows. As to “the history of the times,” the early twentieth century was a period in which either bans on handgun possession or sales, or permit requirements to buy or possess handguns, were being enacted in other states and all over the world. As to the context of the statute’s preclusion of such legislation, it turns out that section 12026 was enacted instead of—and in contradiction to—a permit requirement to possess a handgun. As to “the object in view,” that object was to protect gun ownership by law-abiding, responsible adults. Finally, as to “the evil to be remedied,” that evil was the proposal to ban handguns or to require a permit to buy or possess them in the home or office.

To the same effect, it is pertinent to note the inconsistency between handgun bans and the UFA’s rationale, as discussed by the National Conference of Commissioners on Uniform State Laws. The Conference promoted the UFA against “the wrong emphasis on more pistol legislation”—i.e., laws “aimed at regulating pistols in the hands of law abiding citizen.” By contrast, the statute’s approach was to “punish[ ] severely criminals who use pistols” with “a program of laws which would both protect arms ownership and reduce crime.” [FN65]

### C. The “Right” to Acquire and Possess Handguns

When San Francisco enacted a handgun registration ordinance in 1969, it was challenged as

a violation of section 12026 on the ground that it was a local law requiring a permit to own handguns. The California Supreme Court rejected that challenge, holding that a registration law only requires that handguns be “registered,” [FN66] which \*344 is not at all the same as exercising the power section 12026 forbids to localities to “permit” or “license” handgun possession. [FN67]

Significantly, the opinion described the “no license or permit shall be required” language of section 12026 as conferring a “right” upon California’s residents to possess handguns in the privacy of their own homes and businesses, stating:

In 1923, the provision prohibiting carrying concealed firearms without a license was changed to concealable weapons (Stats. 1923, ch. 339, § 2, at p. 696), and a paragraph added substantially, Penal Code section 12026, that “no permit or license” could be required to possess a firearm at one’s residence or place of business. . . . The Legislature intended that the right to possess a weapon at certain places could not be circumscribed by imposing any requirements. . . . [FN68] Another and allied aspect of Galvan that gun ban advocates have ignored are the broad (and dictionary-preferred) meanings Galvan gave to the concepts of “permit” and “license” in Penal Code section 12026. Gun ban advocates read section 12026 narrowly as only prohibiting localities from enacting ordinances by which handgun possession depends on the locality issuing the owner a specific document called a license or permit. According to this reading, localities are free to ban handguns entirely so long as the ban is not in the form of a requirement that possessing a handgun is lawful only for people having a permit or license. This is the argument San Francisco presented in Doe, and the one defendant cities and amici supporting them have argued in subsequent cases. [FN69]

The only court that has considered this argument rejected it, stating that implicit in section 12026’s preclusion of local permit or license requirements is that the Legislature did not want localities banning handguns. [FN70] Moreover, the argument is precluded by the broad definition

Galvan gave the concept “license” as used in \*345 section 12026. [FN71] In construing that statute, Galvan did not even mention the narrow secondary definition of licensing as involving a physical document or certificate issued by a government agency. [FN72] Rather, the Galvan court went to great lengths to define the concept of “license” broadly as “permission or authority to do a particular thing or exercise a particular privilege.” [FN73] It was based on that broad definition that the court in Galvan upheld San Francisco’s handgun registration requirement. That requirement did not violate section 12026 because registering a handgun would not impinge on the owner’s right to have one, which is what the statute is about, according to Galvan. The court emphasized that registration requires no more than that owners disclose what handguns they possess and does not at all imply that the locality has the authority to preclude handgun possession. [FN74]

This reasoning of the Galvan decision demonstrates that section 12026 precludes localities from enacting handgun bans. In choosing to rest its holding on this foundation, the Galvan court necessarily implied that an ordinance that did arrogate to a locality the power to dictate whether handguns may be owned or possessed would violate section 12026. This was further clarified by the broad definition Galvan chose for licensing. From this, it is clear that section 12026 deprives localities of licensing power over handgun acquisition and/or possession--i.e., any power to ban acquisition and/or possession of a handgun that state law allows law-abiding responsible adults to acquire and possess. [FN75]

\*346 The analogy the Galvan court drew to voting is instructive in this respect. The opinion distinguished registering people to vote from “licensing” people to vote. [FN76] Licensing people to vote, Galvan said, means fixing the qualifications for voting; in contrast, registering voters involves only listing those who have met the required qualifications. [FN77] Of course, “licensing” in the sense of determining the qualifications for voting does not involve issuing a physical certificate called a license or permit.

In sum, the Galvan decision shows that Penal Code section 12026 preempts local attempts to ban handguns by establishing the exclusivity of state

laws in fixing the qualifications for handgun acquisition and ownership.

#### D. California Government Code Section 53071

In 1970, displeased with the Galvan result allowing handgun registration requirements, the Legislature enacted a new statute, Government Code section 9619, to supersede Galvan in that respect. Authored by Senator H.L. Richardson, a member of the NRA National Board of Directors, that statute later became Government Code section 53071. [FN78]

Section 53071 expressly declares the Legislature’s intent to occupy the entire field of firearm registration and licensing to the exclusion of local governments. [FN79] Further, section 53071 prohibits “all local regulations, relating to registration or licensing of commercially manufactured firearms . . . .” [FN80]

Since it was written in response to Galvan, section 53071 used the terms “licensing” and “registration” as Galvan defined them. That is to say, what section 53071 denies localities is the power to license [FN81] firearms--i.e.,\*347 the “permission or authority to do a particular thing or exercise a particular privilege.” [FN82]

#### E. Legislative Policy Recognition of the Social Utility of Private Gun Ownership

Local legislation is contrary to state law, and thus preempted, if it is “inimical” to accomplishment of the state law’s policies. [FN83] The rationale of ordinances like Proposition H—that guns are never an acceptable solution—contradicts and undermines multiple state laws, including section 12026. Separately and together, all of these laws establish that in some circumstances state policy regards guns as part of the answer to violent crime.

For instance, Penal Code section 12050 provides that upon a showing of good cause, any law-abiding, responsible adult of “good moral character” can obtain a license to carry a concealed loaded handgun (“CCW”) in public. [FN84] Even without a CCW license, Penal Code sections 12025.5 and 12031(j)(2) create special exceptions whereby law-abiding, responsible adults who have

been threatened and who obtain a restraining order may carry a loaded and concealed handgun. [FN85] Also, sections 12027(a) and 12031(b)(1) expressly allow civilians to possess concealed and loaded handguns when summoned to assist police in making an arrest or preserving the peace. [FN86] Penal Code section 12031(k) permits possession of a loaded gun when making a citizen's arrest. [FN87] Penal Code section 12031(j)(1) allows possession of a loaded firearm in public when a person has a reasonable belief that he or she is in immediate grave danger and the gun is necessary to protect person or property. [FN88] Though brandishing a firearm is illegal, Penal Code section 417 provides that brandishing in self-defense is not a crime. [FN89] These laws provide a decisive backdrop to Penal Code section 12026(b)'s declaration that trustworthy adults may \*348 possess handguns in their homes and offices, [FN90] and to Government Code section 53071's cognate preclusion of local prohibitions of all firearms. [FN91]

It is undeniable that one class benefited by this statutory scheme; private citizens who have not, through some demonstration of personal disability or irresponsibility, lost their right to own a gun. If the Legislature saw guns, or handguns, as only part of the crime problem, then the almost one-hundred pages of non-annotated state gun laws could be drastically shortened and simplified by just banning civilian handgun or firearm possession outright. Tellingly, the Legislature declined to take that approach. Rather, the state gun laws painstakingly set out myriad licensing schemes and exceptions and exemptions to permit trustworthy individuals to own guns to enforce the laws, defend property, or defend their lives, homes, and families.

These exceptions to the state's general statutory prohibitions, coupled with protections provided in Penal Code section 12026 and Government Code section 53071, express and reflect the state's policy determination that under certain circumstances armed civilians contribute to the statewide crime prevention effort. Simply put, the state has taken a two-pronged approach to respond to the statewide problem of criminal misuse of firearms: (1) it has denied access to firearms for those deemed most likely to misuse them; and (2) it protects the "right" of law-abiding citizens, active and retired law enforcement, and others to own and use firearms as a deterrent to criminal activity.

In sum, state law endorses handgun possession for self-defense, defense of others, and defense of property. Whether the state promotes or merely protects the possession of handguns by civilians to deter crime, the philosophy underlying the state regulatory scheme conflicts diametrically with the position taken by gun ban advocates. Moreover, a careful review of the state's policy, as reflected in its overall regulatory scheme and the provisions of sections 12026 and 53071, clarifies the scope of the First District Court of Appeal's decision in Doe as well as the failed attempts by gun ban advocates to limit the scope of that decision.

### \*349 III. Doe v. City and County of San Francisco

In 1982, San Francisco's then-Mayor Dianne Feinstein proposed an ordinance banning and confiscating handguns. [FN92] The ordinance purported to ban the possession of all handguns except for a very few exemptions. [FN93] Among those was an exemption for active law enforcement and military personnel. [FN94]

On August 3, 1982, after the ordinance was proposed but before its enactment, the California Attorney General issued an opinion at the request of Senator Bill Richardson addressing the issue of whether a city could enact such legislation. [FN95] The opinion concluded that such an ordinance would be invalid and that the area of residential handgun possession was preempted by state law. [FN96]

San Francisco enacted the ordinance anyway after a 6-5 vote of the city's legislative body, the Board of Supervisors. In response, two mandamus actions were filed as original matters in the California Court of Appeal. One of these actions, which was sponsored by the NRA, was brought on behalf of gun stores and gun owners. [FN97] The chief counsel for these petitioners was now-Chief Federal District Court Judge Vaughn Walker, who was then a lawyer with Pillsbury, Madison & Sutro. [FN98] The other suit was sponsored by a rival gun lobby group, the Second Amendment Foundation, and brought by an experienced civil rights practitioner, co-author of this article, Don Kates. [FN99] The petitioners in that action included the five dissenting members of the Board of Supervisors headed by its then-president (now Judge) Quentin Kopp, as well as: a welfare

recipient, a stock broker, a gay lawyer, an African-American minister, a Latina businesswoman and private detective, the publisher of the nation's largest gay \*350 newspaper, and an elderly woman who had lived in San Francisco all of her life, declaring that she did not intend to give up the handgun she kept for her protection, law or no law. [FN100]

The First District Court of Appeal consolidated the two actions and unanimously held the ordinance to be contrary to section 12026 and preempted by section 53071. [FN101]

#### A. The Holdings in Doe

Doe found the ordinance invalid on three independent grounds. First, the court held that it was expressly preempted under section 53071 as a licensing law. [FN102] The ordinance banned handgun possession for all except a special few people (termed express or de facto licensees), most notably those with a state permit to carry a concealed firearm. [FN103] This local ban violated section 53071's declaration that state licensing and registration provisions are exclusive. [FN104] The Doe court further invoked section 53071's preemption of local licensing laws or those "relating to licensing," stating that even if the ordinance is not "a direct licensing requirement, [it] is at least a local regulation relating to licensing." [FN105]

Second, having concluded the issues under section 53071, the court reiterated that "[t]he San Francisco Handgun Ordinance does create a license requirement for one seeking to possess a handgun at home . . ." [FN106] Accordingly, the court found that the 1982 ban conflicted with the plain wording of section 12026 that "no permit or license shall be required." [FN107] The court also noted rather pointedly that "[n]o permit or license' means 'no permit or license.'" [FN108]

Finally, Doe concluded that even if the 1982 ordinance did not impose a "licensing" requirement, the ordinance would still be invalid because section 12026 (now section 12026(b)) implicitly preempts local handgun bans.

\*351 [W]e infer from Penal Code section 12026 that the Legislature intended to occupy the field of residential handgun

possession to the exclusion of local governmental entities. A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or license. It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession. [FN109] This is the controversial language of Doe, which has prompted countless subsequent attacks on the case as well as on sections 12026 and 53071. [FN110] As emphasized in innumerable California Supreme Court cases, the goal of statutory interpretation is to ascertain what the legislature's intent was in enacting the law being construed. [FN111] Thus, the decisive question is: for what reason other than protecting handgun acquisition and possession would the 1923 Legislature have barred localities from requiring a permit or license in order for one to acquire or possess a handgun? A fortiori, if that was not section 12026's purpose, why would three subsequent legislatures have reenacted it without disavowing Doe's conclusion that section 12026 bars localities from banning handguns? Significantly, not one of the dozens of briefs assailing Doe that have been filed in various later cases have attempted what is required by the whole enterprise of statutory construction--suggesting some purpose for section 12026 other than that the Legislature wanted to protect the right to acquire and possess handguns. Nor is it possible to imagine any reason why the Legislature would have precluded localities from enacting handgun permit or license laws \*352 other than to preclude localities from limiting the access of law-abiding, responsible people to handguns. [FN112]

In light of section 12026's legislative history--and in abeyance of any other viable theory of its purpose --Doe must be deemed correct in holding that the legislative intent of the statute was to preclude local handgun bans and occupy the field of residential handgun possession to the exclusion of contrary local legislation.

#### B. Attacking Doe

Predictably, ever since the Doe opinion came

down, its conclusion has been subject to various attacks by gun ban advocates and by localities arguing for the validity of their gun laws.

### 1. CRPA v. West Hollywood

One authority cited against Doe is the Second District Court of Appeal's 1998 opinion in California Rifle & Pistol Ass'n v. City of West Hollywood [FN113] ("CRPA"), which upheld a local ban on the sale of a specific subclass of handguns that the ordinance defined as "Saturday Night Specials." [FN114] CRPA interpreted section 53071 to not apply to limited local sales bans if they banned only the sale of certain kinds of handguns but not others. [FN115]

The CRPA court's justification for allowing municipal regulation of the sale of one limited type of handgun was that the state had not addressed the whole field of handgun sales--i.e., it had not made any determination of which handguns could or could not be sold statewide. [FN116] Thus, it appears that CRPA left room for some quantum local handgun sales bans (in addition to the usual local zoning and business license restrictions), though not a flat handgun sales ban. [FN117]

\*353 However, the opinion itself presents insuperable problems for any attempt to portray CRPA as conflicting with Doe. The court in CRPA distinguished Doe from sections 12026 and 53071, on the ground that they preclude local bans on the purchase and possession of all handguns, not bans on the sale of only specific types of handguns. As the CRPA court stated:

In Doe . . . , San Francisco had enacted a ban on possession of handguns. Exempt from the ban, however, were those who possessed licenses under state law either to carry or to sell handguns. Thus possession of handguns in the home (which was specifically allowed under Penal Code section 12026 without any license or permit) was facially prohibited unless the possessor had a license. The court found that the effect was "to create a new class of persons who will be required to obtain licenses in order to possess handguns." . . . Government Code section 53071, however, expressly preempted the whole field of licensing requirements. The court

concluded that the city had in effect created a licensing requirement for handguns in the home in violation of the express preemption of that field in Government Code section 53071. [FN118] But, as to the validity of local wholesale handgun bans, the CRPA opinion went on:

Doe also noted that even if it did not consider the ordinance to contain a de facto licensing requirement, it would nevertheless find the ordinance impliedly preempted on the theory that Penal Code section 12026 (which preempts local requirements for permits or licenses to possess concealable weapons in the home) reflected a legislative intent to occupy the field of "residential handgun possession." However, the Doe court also noted that the decisions "suggest that the Legislature has not prevented local governmental bodies from regulating all aspects of the possession of firearms," and that "[i]t is at least arguable that the state Legislature's adoption of numerous gun regulations has not impliedly preempted all areas of gun regulation." [FN119] In this way, the court in CRPA interpreted and accepted Doe as precluding bans on handgun possession on private property. For example, in listing discrete areas of regulation fully preempted by state law, the CRPA court stated:

In summary, the Legislature has expressly declared that the City may not require the licensing or registration of firearms. (\*354Gov. Code, § 53071.) The Legislature has also declared that the City may not require permits or licenses to purchase, own, possess, keep, or carry a pistol, revolver, or other firearm capable of being concealed within a place of residence, place of business, or on private property lawfully owned or lawfully possessed. (Pen. Code, § 12026.) . . . [FN120] Thus, the court interpreted the issue before it as a regulation of the sale of some specific types of handguns, not as an outright handgun sales ban. It took pains to distinguish the situation before it from Doe. Far from rejecting Doe, the court acknowledged without cavil that Doe had found the area of "residential

handgun possession” a preempted field; it did not treat that finding as mere dictum that later courts could ignore.

This brings us to the central problem with the CRPA opinion: it fails, without even discussing the issue, to give effect to the express language of section 12026 regarding handgun sales. Section 12026 guarantees law-abiding, responsible adult Californians the right “to purchase, own, possess, [and] keep handguns.” [FN121] Thus, the distinction the CRPA court tried to draw between the West Hollywood ordinance as a sales ban and the possession ban ordinance Doe invalidated is illusory. Doe’s holding that section 12026 guarantees law-abiding, responsible adults a right to own a handgun necessarily accepts that they equally have the right to buy handguns.

Nevertheless, CRPA left cities at least some leeway to ban the sale of a subset of guns based on their deeming that subset to present some special danger to public safety above and beyond the dangers presented by handguns in general. In enacting section 12026, the Legislature was obviously aware of the well-known, though often exaggerated, dangers of handguns. [FN122] Nevertheless, the Legislature has necessarily adjudged the public benefits of handgun ownership to, in general, outweigh the dangers. [FN123] Pursuant to section 12026, localities are deprived of any power to comprehensively outlaw handgun possession on private property.

**\*355** Given Doe, Sippel, and section 12026’s creation of an express “entitle[ment]” to purchase handguns, the most that can be said is that, at the time it was decided, CRPA left cities some leeway to ban sales of a subset of guns based on that subset being deemed to present dangers to public safety above and beyond the dangers represented by handguns in general. But Doe’s conclusion remains that Penal Code section 12026 precludes any local handgun ban, for “[i]t strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession.” [FN124] In any event, CRPA’s conclusion that localities may ban sales of certain handguns became invalid with the enactment of the Unsafe Handgun Act. [FN125]

## 2. The Social Dangers of Handguns

The dangers of guns in the hands of violent criminals or the deranged are self-evident and attested by tragic experience. But California and federal law already prohibit juveniles, the insane, convicted felons, and violent misdemeanants from owning guns. [FN126] In contrast, England, Canada, Australia, Jamaica, and Ireland have banned and confiscated all handguns or large numbers of handguns and other guns. [FN127] The experience with such laws demonstrates that they do not \*356 disarm violent criminals, who instead just disobey these laws. [FN128] For instance, when England banned handguns in 1997, law-abiding owners turned in over 166,000 of them. “Yet that left untold numbers in criminal hands” and did not stop the “illegal importation of millions more guns.” [FN129] Five years later, “England’s National Crime Intelligence Service lamented that while ‘Britain has some of the strictest gun laws in the world [i]t appears that anyone who wishes to obtain a firearm [illegally] will have little difficulty in doing so.’” [FN130]

A recent comprehensive study summarizes England’s gun law and gun experience as follows:

The peacefulness England used to enjoy was not the result of strict gun laws. When it had no firearms restrictions [during the nineteenth and early twentieth centuries] England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence or even the increase in armed violence . . . . [FN131] This same study goes on to note that

[a]rmed crime, never before a problem in England, has now become one. Handguns are banned but the kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957 the use of guns in serious crime increased one hundredfold. [FN132] In short, the actual effect of banning guns to the general populace is that only those who are of no danger comply, while those who are violent do not comply and cannot be disarmed. Banning guns just deprives victims of what is the most effective--and often the only--weapon that allows them to resist the

violent. [FN133] “Only a gun can allow \*357 a 110-pound woman to defend herself easily against a 200-pound man.” [FN134]

At the same time, disarming the responsible law-abiding populace negligibly affects violence rates because violent crimes are committed by a small minority of extreme aberrants, not the general populace. Only fifteen percent of Americans in general have a criminal record of any kind, [FN135] but the overwhelming majority of serious violent criminals have arrests (generally many), [FN136] as well as histories of severe mental problems [FN137] and/or of prior violence. [FN138] According to criminologist Delbert Elliot, the whole corpus of modern criminological research demonstrates that murderers, robbers, and other life-threatening criminals “almost uniformly have a long history of [prior] involvement in criminal behavior.” [FN139]

In short, the criminological evidence validates California's long established pattern of outlawing handguns for criminals and the insane\*358 while guaranteeing their possession for the law-abiding, responsible adult populace.

### 3. Is the Holding from Doe Dictum?

Another avenue of attack against Doe claims that its conclusion—that localities cannot ban handguns—is dictum, since the actual basis on which Doe invalidated the 1982 ordinance was that it was a permit law, forbidden under section 12026. [FN140]

But to claim that the language quoted above is mere dictum is to make a categorical error, the category in question being the concept of alternative holdings. Whenever a party presents an argument that the court rejects on two separate grounds, those grounds are each alternative holdings and neither is dictum. [FN141] In Doe, San Francisco characterized its handgun ban as a complete ban rather than a permit law. [FN142] The court responded by first stating that the ban was a permit law within the meaning of section 12026. [FN143] Second, it held that even if the ordinance were not a permit law, it was a handgun ban implicitly preempted by section 12026. [FN144] These are alternative holdings, a concept the court in Southern Cal. Chapter of Associated Builders and Contractors, Inc. v. Cal. Apprenticeship Council

explains as follows:

[It is] well settled that where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity. [FN145]

Equally well settled is that a statement made in an opinion is a holding, not dictum, if it is “relevant to the material facts before the court.” [FN146] The issue before the Doe court was the legality of the 1982 handgun ban. Doe's reasoning that section 12026 precluded that ban, and handgun bans in general, unquestionably addresses the material facts before the court. Thus, it is not mere dictum. Moreover, the \*359 court in Doe clearly viewed its implied preemption ruling as an alternate holding. After first addressing “express preemption,” it then presented the alternative holding under a separate heading entitled “Implied Preemption.” [FN147]

In sum, Doe's conclusion that localities cannot ban handgun possession is a holding. It is also compelled by section 12026's legislative history from the 1923 UFA. [FN148]

### 4. Has the Legislature Reaffirmed Doe?

Another avenue taken by Doe's critics is to declare that Doe is flat out wrong. In the recent litigation over San Francisco's Proposition H, the defendant San Francisco acknowledged that it was bound by Doe regardless of whether Doe was rightly decided. [FN149] But the position that Doe's conclusion is wrong was argued through an amicus brief filed by the LCAV. [FN150]

As discussed above, however disagreeable some may find Doe, it clearly was rightly decided. Moreover, Doe's critics invariably neglect a crucial obstacle to any claim that its conclusion is wrong. That obstacle is the fact that since Doe, the Legislature has reenacted Penal Code section 12026 without change to disavow the Doe holdings; indeed, the statute has been reenacted three times. [FN151] The fact that the Legislature has revised a statute without change to disavow a prior judicial

construction of it serves to validate that construction. Also, the fact that Doe has been reenacted, not just once but multiple times, further ratifies Doe's interpretation of section 12026 as one that the Legislature accepts. [FN152]

**\*360** In fact, these reenactments now make Doe's holding binding, even if it had originally been dictum. [FN153] A 2004 California Supreme Court decision summarized as follows the doctrine enunciated by dozens of cases dating back more than a century: "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." [FN154]

In other words, by reenacting section 12026 without expressly disavowing Doe, the Legislature retroactively adopted Doe's analysis regardless of whether that analysis was correct when the opinion was delivered. Conceptually, the effect is as if the Legislature had rewritten section 12026 to incorporate the language of Doe, or with the observation that "this statute was correctly construed by the Court of Appeal in Doe v. City and County of San Francisco." Following this case law, the courts generally decline to even consider whether a pre-reenactment judicial construction was correct. Arguments that it was incorrect are irrelevant since they "do not affect our point that the Legislature is presumed to have been aware of [the prior cases], yet did not expressly reject this line of authority" when it reenacted the statute the prior cases were construing. [FN155] Even if a reenactment makes other changes to a statute, where those changes do not affect the meaning of the words judicially construed, the decision construing those words is deemed to have been reaffirmed, not repudiated by the changes in other respects. [FN156] By thrice reenacting section 12026 without disavowing Doe's conclusion that it preempts local handgun bans, the Legislature conclusively validated that conclusion, even if Doe had been wrongly decided originally.

Moreover, it is not necessary to even presume that the Legislature was aware of Doe's conclusion that section 12026 precludes handgun bans. The fact that the Legislature was aware of Doe is shown by its subsequent enactment of Penal Code

subsections 626.85(h) and (i). These statutes provide that "[n]otwithstanding [s]ection 12026," students may not have firearms in college or university-managed student housing. [FN157] By prefacing those new laws with a reference to **\*361** Penal Code section 12026, [FN158] the Legislature demonstrated its understanding that section 12026 creates a general right for law-abiding, responsible adults to have handguns in their homes. It is to this generally applicable right that Penal Code subsections 626.85(h) and (i) represent a special exception. Courts may not disregard such express legislative references by a later law to an earlier one. [FN159]

### 5. Has Doe Been Overruled?

In arguing that Doe was wrongly decided, the LCAV brief in the Proposition H case relied heavily on a pair of California Supreme Court cases. [FN160] In 2002, that court took up firearm preemption issues in a pair of cases certified to it with specific questions posed by the Ninth Circuit Court of Appeals. [FN161] The cases involved ordinances enacted by Alameda and Los Angeles Counties banning gun shows at county fairgrounds--i.e., gun bans on county-owned public property. [FN162] In Great Western Shows v. County of Los Angeles, the county sought to halt the gun shows by banning the sale of guns and ammunition at the Los Angeles County Fairgrounds; [FN163] in Nordyke v. King, Alameda County sought to ban possession of firearms at its fairgrounds. [FN164] Because the Ninth Circuit saw a "tension" between Doe and other appellate cases like CRPA, it referred these two gun show cases to the California Supreme Court to answer several certified questions. [FN165]

The specific and narrow issues were stated unambiguously by the California Supreme Court at the outset of Great Western. The issues were defined as follows:

1. Does state law regulating the sale of firearms and gun shows preempt a county ordinance prohibiting gun and ammunition sales on county property? **\*362**
2. May a county, consistent with article XI, section 7 of the California Constitution, regulate the sale of firearms on its property located in an incorporated city within the borders of the

county? [FN166]

The California Supreme Court's holding in Great Western was concomitantly narrow, being based on the county's ability to control activities on its own property. As the opinion stated:

[A] county has broad latitude under California Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, "as the interests of its inhabitants require." . . . the County is not compelled to grant access to its property to all comers. Nor do the gun show statutes mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes. For all the above reasons, we conclude that the Ordinance is not preempted by the sale of firearms and/or ammunition on County property. We do not decide whether a broader countywide ban of gun shows would be preempted. [FN167]

The court in Great Western based its decision on Los Angeles County's discretion to use its county-owned public property to suit its needs and on language in state statutes governing gun shows expressly contemplating additional local regulation. [FN168]

As in Great Western, the court in Nordyke was faced with a narrow issue of first impression. The question certified for review was stated by the California Supreme Court at the outset of that opinion as follows:

We granted the request of the United States Court of Appeals for the Ninth Circuit, for certification pursuant to California Rules of Court, rule 29.5 to address the following question: Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property? [FN169]

As it did in Great Western, the court in Nordyke relied heavily upon the county's statutory right to regulate activities on its own property. [FN170] The court answered the narrow issue presented with the following

equally narrow holding:

We further conclude that under California Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property, including the most fundamental decision \*363 as to how the property will be used, and that nothing in the gun show statutes evince an intent to override that authority. The gun show statutes do not mandate that counties use their property for such shows. . . . In sum, whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property. [FN171] Thus, both Great Western and Nordyke stand for a narrow proposition that state gun show regulations--which expressly contemplate additional local regulation--do not preclude local governments from banning the sale or possession of firearms and ammunition at gun shows on county-owned public property. Neither case addressed the validity of such laws beyond the limited context of the facts presented. Indeed, the court in both cases went out of its way to disabuse anyone of that notion. Also, neither case addressed banning handgun possession or sales on private property.

As noted above, the Legislature has affirmed Doe's construction of section 12026 by thrice reenacting that statute without change. Thus, it cannot easily be presumed that Doe has been implicitly discredited by California Supreme Court cases construing laws other than section 12026, such as the gun show laws in Great Western and Nordyke. At the very least, such a conclusion would have to be supported by unmistakable language in these two cases. In fact, however, no such language exists. To the contrary, Great Western cited Doe approvingly. [FN172] Before Great Western turned to the specific questions presented, it first examined the whole spectrum of firearms preemption cases. [FN173] After discussing cases where ordinances were found valid, the court noted Doe as an example of a case where an ordinance did conflict with state law--a case wherein the ordinance was properly preempted. [FN174] Thus, far from

implicitly rejecting the holding in Doe, the court implicitly approved it, noting the “direct conflict between the statute and the Ordinance” Doe invalidated. [FN175]

Further, in discussing Doe, the Great Western opinion referenced both statutes that the Doe court relied upon in finding that San Francisco’s 1982 ordinance banning handgun possession conflicted with and was preempted by state laws. [FN176] In short, the court recognized and \*364 approved Doe’s alternate holdings based on Penal Code sections 57031 and 12026 without any criticism or attempt to limit them. Nor did the court treat these alternate holdings as dictum. Had the California Supreme Court wished to discredit Doe, narrow its scope, or otherwise criticize the case, it had every opportunity to do so. But it did not.

#### IV. The Unsafe Handgun Act

In 1999, the California Legislature enacted the Unsafe Handgun Act [FN177] (“UHA”). The UHA was precipitated by a growing number of local Saturday Night Special ordinances (like the one challenged in the CRPA case), which called to the Legislature’s attention the need to address the issue in a comprehensive and technically competent manner at the state level. [FN178]

The UHA established a detailed protocol for designating which handguns may be sold in the state. [FN179] The UHA charges the California Department of Justice (“DOJ”) with conducting handgun testing, collecting a licensing fee, and issuing a roster of handgun models that, having passed the tests, “may be sold in this state pursuant to this title.” [FN180]

On its face, the Legislature’s choice of this language precludes any local law barring the sale of handguns so approved by the DOJ. Thus, a ban on the sale of handguns that appear on the DOJ roster (such as Proposition H, section 2 [FN181]) would be invalid, being an enactment whose effect is “penalizing conduct which the state law expressly authorizes.” [FN182]

Nor may it be argued that the UHA is simply a gun safety measure and so should not be held to preempt local gun bans whose purpose is to reduce violent crime. The legislative history of the UHA

leaves no doubt that its goals included curbing handgun crime as well as promoting gun safety. That history shows that: (1) in general, banning cheaply-made guns has long been advocated as a means of reducing \*365 gun availability to criminals; [FN183] (2) the first two times the Legislature enacted the UHA, it was vetoed by then-Governor Pete Wilson because it was not simply a gun safety law but also sought to ban sales of handguns that the Legislature (but not the Governor) saw as specially prone to criminal misuse; [FN184] and (3) cities and groups supporting the UHA’s enactment wrote the Legislature urging that the UHA be enacted as a measure that would reduce crime by banning certain guns. [FN185] The UHA was signed by Governor Wilson’s successor, Governor Gray Davis. [FN186]

It bears emphasis that the Legislature was well aware when the UHA was being enacted that it would preempt local gun laws. When the UHA was being drafted, both state and local legislators and officials realized it would preempt current Saturday Night Special bans and future attempts at local handgun bans. [FN187] The Legislature had been expressly informed by a city having a Saturday Night Special ordinance\*366 that its ordinance, and those of other cities, would be preempted by passage of the UHA. [FN188] That city urged the Legislature to insert language exempting local gun bans from preemption. [FN189] Concomitantly, the Legislature was further informed by a Senate Committee Report that the UHA might preempt existing and future local handgun sales ordinances. [FN190] In response, the author of the UHA inserted a provision to preserve local ordinances against preemption by the UHA. [FN191] When the UHA was eventually enacted, however, the Legislature stripped out the offered amendments intended to create an exception to the preemptive impact of the UHA. [FN192] This indicates the Legislature’s knowledge and intent to preclude local interference with its handgun legislation or laws inimical to the UHA. The Legislature recognized that the UHA would preempt any “local [contrary] ordinance, both those already in existence and any proposed locally in the future.” [FN193]

As already stated, CRPA left cities some leeway to ban sales of a subset of guns based on that subset being deemed to present dangers to public safety above and beyond the dangers represented by

handguns in general. With the passage of the UHA, however, that option has been preempted.

### Conclusion

The principal obstacle to the enactment of local gun bans in California is Penal Code section 12026. That statute was enacted in 1923 as part of the UFA's enactment of a scheme of California state laws drafted and supported by the National Rifle Association. [FN194] The UFA's dual purposes were described as "both protect[ing] arms ownership and reduc[ing] crime." [FN195] Concomitantly, the president of the Sacramento Gun Club, who a contemporary article in the San Francisco Chronicle \*367 credited with convincing the governor to sign the UFA, described it as "an effort upon the part of those who know something about firearms to forestall the flood of fanatical legislation intended to deprive all citizens of the United States of the right to own and use . . . firearms capable of being concealed upon the person." [FN196]

Section 12026 prohibits local licensing or permitting of handguns. In Galvan, the California Supreme Court construed section 12026 as depriving localities of the power to "license" handguns in the sense of "permission or authority to do a particular thing or exercise a particular privilege." [FN197] Subsequently, Doe struck down a local handgun ban under section 12026 based on the California Legislature's intention "to occupy the field of residential handgun possession to the exclusion of local governmental entities." [FN198] The Legislature later reaffirmed that conclusion by thrice reenacting section 12026 without change to repudiate Doe. Moreover, in the wake of Galvan's definition of "licensing," the Legislature enacted Government Code section 53071, which prohibits "all local regulations, relating to registration or licensing of commercially manufactured firearms . . ." [FN199]

Last, but scarcely least, all the foregoing must be considered in the context of a long pattern of state legislation carefully preserving the right of law-abiding responsible adults to use firearms for self-defense and the prevention of crime. For upwards of a century, the rationale underlying gun prohibitions has consisted of vociferous denial that gun ownership is a sensible precaution against

violent crime. But, for at least that long, the pattern of California legislation has reflected the contrary view that guns are part of the solution to crime, that guns allow good people to defend themselves and their families, and that they can deter criminal conduct from occurring in the first place. Local legislators are entitled to disagree. However, until gun ban advocates convince the Legislature to repeal sections 12026(b) and 53071, local gun bans will remain contrary to state law and pretermitted thereby.

### \*368 Appendix A: Proposition H

#### ARTICLE 36A. Sale, Manufacture and Distribution of Firearms and Ammunition; Possession of Handguns

SEC. 3600A. Statement of Findings and Text of Ordinance Prohibiting the Sale, Manufacture and Distribution of Firearms and Ammunition in the City and County of San Francisco and Limiting the Possession of Handguns in the City and County of San Francisco

This ordinance is enacted to implement an initiative ordinance approved by the electors of San Francisco as Proposition "H" at the election held on November 8, 2005. The provisions of Proposition "H" are set forth herein for convenience and may only be amended as provided by law. Proposition "H" reads as follows:

#### Section 1. Findings

The people of the City and County of San Francisco hereby find and declare:

1. Handgun violence is a serious problem in San Francisco. According to a San Francisco Department of Public Health report published in 2002, 176 handgun incidents in San Francisco affected 213 victims in 1999, the last year for which data is available. Only 26.8% of firearms were recovered. Of all firearms used to cause injury or death, 67% were handguns.

2. San Franciscans have a right to live in a safe and secure City. The presence of handguns poses a significant threat to the safety of San Franciscans.

3. It is not the intent of the people of the City

and County of San Francisco to affect any resident of other jurisdictions with regard to handgun possession, including those who may temporarily be within the boundaries of the City and County.

4. Article XI of the California Constitution provides Charter created counties with the "home rule" power. This power allows counties to enact laws that exclusively apply to residents within their borders, even when such a law conflicts with state law or when state law is silent. San Francisco adopted its most recent comprehensive Charter revision in 1996.

5. Since it is not the intent of the people of the City and County of San Francisco to impose an undue burden on inter-county commerce and transit, the provisions of Section 3 apply exclusively to residents of the City and County of San Francisco.

**\*369** Section 2. Ban on Sale, Manufacture, Transfer or Distribution of Firearms in the City and County of San Francisco

Within the limits of the City and County of San Francisco, the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited.

Section 3. Limiting Handgun Possession in the City and County of San Francisco

Within the limits of the City and County of San Francisco, no resident of the City and County of San Francisco shall possess any handgun unless required for professional purposes, as enumerated herein. Specifically, any City, state or federal employee carrying out the functions of his or her government employment, including but not limited to peace officers as defined by California Penal Code Section 830 et. seq. and animal control officers may possess a handgun. Active members of the United States armed forces or the National Guard and security guards, regularly employed and compensated by a person engaged in any lawful business, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment, may also possess handguns. Within 90 days from the effective date of this Section, any resident of the City and County of San Francisco may surrender his or her handgun at any district station of the San Francisco Police

Department, or to the San Francisco Sheriff's Department without penalty under this section.

Section 4. Effective Date

This ordinance shall become effective January 1, 2006.

Section 5. Penalties

Within 90 days of the effective date of this Section, the Board of Supervisors shall enact penalties for violations of this ordinance. The Mayor, after consultation with the District Attorney, Sheriff and Chief of Police shall, within 30 days from the effective date, provide recommendations about penalties to the Board.

Section 6. State Law

Nothing in this ordinance is designed to duplicate or conflict with California State Law. Accordingly, any person currently denied the privilege of possessing a handgun under state law shall not be covered by this ordinance, but shall be covered by the California state law which denies that privilege. Nothing in this ordinance shall be construed to create or require any local license or registration for any **\*370** firearm, or create an additional class of citizens who must seek licensing or registration.

Section 7. Severability

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this ordinance which can be given effect without the invalid or unconstitutional provision or application. To this end, the provisions of this ordinance shall be deemed severable.

Section 8. Amendment

By a two-thirds vote and upon making findings, the Board of Supervisors may amend this ordinance in the furtherance of reducing handgun violence.

(Added by Ord. 55-06, File No. 060151, App. 3/31/2006)

SEC. 3601A. Penalty for Sale, Distribution, Transfer and Manufacture of Firearms and Ammunition or Possession of Handguns Within City and County of San Francisco.

(a) In enacting Proposition "H" the voters required the Board of Supervisors to enact penalties for its violation. The following sections set forth the penalties for violation of Proposition H.

(b) Any person who shall violate the provisions of Police Code Section 3600A that prohibit the sale, distribution, transfer and manufacture of all firearms and ammunition within the limits of the City and County of San Francisco or that prohibit the possession of any handgun within the limits of the City and County of San Francisco shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000 and by imprisonment in the County Jail not to exceed six months, or by both.

(c) Any firearm or ammunition sold, distributed, transferred, or manufactured or any handgun possessed within the City and County of San Francisco in violation of the provisions of Police Code Section 3600A is hereby declared to be a nuisance, and shall be surrendered to the Police Department of the City and County of San Francisco. The Chief of Police is authorized to seize such firearms, ammunition and handguns and shall destroy or cause to be destroyed such firearms, ammunition and handguns, except upon the certificate of a judge of a court of record, or of the District Attorney that the preservation thereof is necessary or proper to the ends of justice.

\*371 (d) This Section shall be enforced to the full extent of the authority of the City and County of San Francisco. If any subsection, sentence, clause, phrase, or word of this Section or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this Section which can be given effect without the invalid or unconstitutional provision or application. To this end, the provisions of this section shall be deemed severable.

(Added by Ord. 55-06, File No. 060151, App. 3/31/2006).

[FN1]. The authors are among the counsel for plaintiffs in *Fiscal v. City & County of San Francisco* (San Francisco Superior Court case no. CPF-05-505960), the case in which the Proposition H handgun ban was held invalid by the San Francisco Superior Court. That decision is currently pending on appeal.

[FN1]. The foregoing is the substance of the second section of Proposition H. The third section also prohibited and confiscated all handguns by ordinary residents of the city. See *infra* Appendix A.

[FN2]. See *Galvan v. Superior Court*, 452 P.2d 930, 933 (Cal. 1969) (construing a municipal firearms ordinance in light of a state law using the word "license" which the Supreme Court defined as meaning "permission or authority to do a particular thing or exercise a particular privilege").

[FN3]. See *Doe v. City & County of San Francisco*, 186 Cal. Rptr. 380 (Ct. App. 1982); Statement of Decision, *Fiscal v. City & County of San Francisco*, No. 05-3674 (Cal. Super. Ct. June 12, 2006) (on file with authors).

[FN4]. 186 Cal. Rptr. 380 (Ct. App. 1982).

[FN5]. Proposition H, enacted in 2005, would have banned and confiscated all handguns owned by ordinary civilians and forbidden the sale of long guns and firearms ammunition. See Appendix A.

[FN6]. Cal. Penal Code §§ 12125-12233 (West 2000).

[FN7]. See *infra* Appendix A.

[FN8]. See Robert Moon, *A Brief Historical Note on Gun Control in Tennessee*, 82 Case & Comment 38, 38 (1977). One reason for Tennessee disarming its population was presumably because enraged opponents of secession were very numerous, even a majority in many counties. Another reason may have been to gather arms with which to equip the state's own forces.

[FN9]. D.C. Code §§ 7-2502.01, 7-2502.02(a)(4) (LexisNexis 2001 & Supp. 2006).

[FN10]. Statement of Decision, *Fiscal v. City & County of San Francisco*, No. 05-3674 (Cal. Super.

Ct. June 12, 2006) (on file with authors).

[FN11]. See Doe v. City & County of San Francisco, 186 Cal. Rptr. 380, 382 (Ct. App. 1982).

[FN12]. See Cal. Penal Code § 12026 (West 2000).

[FN13]. 452 P.2d 930, 933 (Cal. 1969).

[FN14]. Id. at 933.

[FN15]. Id. at 933-34.

[FN16]. Cal. Gov't Code § 53071 (West 1997).

[FN17]. Sippel v. Nelder, 101 Cal. Rptr. 89 (Ct. App. 1972).

[FN18]. Id. at 90.

[FN19]. This statute prohibits any person who has been convicted of a felony, or any person "who is addicted to the use of any narcotic drug" from possessing, owning, or purchasing a handgun. See Cal. Penal Code § 12021(a)(1) (West 2000).

[FN20]. Sippel, 101 Cal. Rptr. at 90.

[FN21]. See Doe v. City & County of San Francisco, 186 Cal. Rptr. 380, 381 (Ct. App. 1982).

[FN22]. See *id.*; see also Cal. Penal Code § 12050 (West 2000) (providing that "[t]he sheriff of a county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying satisfies any one of [the listed conditions] and has completed a course of training..., may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person....").

[FN23]. Doe, 186 Cal. Rptr. at 384, 385.

[FN24]. See Statement of Decision, Fiscal v. City & County of San Francisco, No. 05-3674 (Cal. Super. Ct. June 12, 2006) (on file with authors).

[FN25]. In 1996, one of the authors of this article, Don Kates, spoke on a panel sponsored by the Journal of Criminal Law & Criminology. Also on the panel was the leading academic advocate of gun control, Boalt Hall's Franklin Zimring. As to

Saturday Night Specials, Professor Zimring forthrightly declared: "I have been studying 'Saturday Night Specials' for twenty-five years and have yet to find one. There is no content to the term other than [that it is used to describe] a gun that poor people with dark skins can use to shoot each other.... There is no principled way to define or ban SNS."

[FN26]. Cal. Rifle & Pistol Ass'n v. City of West Hollywood, 78 Cal. Rptr. 2d 591 (Ct. App. 1998).

[FN27]. *Id.* at 599.

[FN28]. U.S. Const. amend. II.

[FN29]. See, e.g., Dennis A. Henigan, Arms, Anarchy and the Second Amendment, 26 Val. U. L. Rev. 107, 108-10 (1991).

[FN30]. Unlike "collective rights," such as the right to assemble and the right not to be discriminated against in voting on account of race or sex, all of which can be vindicated by individual litigants, the right to arms applies not to individuals but "to the whole people as body politic," which supposedly means that it does not guarantee anything to anyone. See, e.g., John Randolph Prince, The Naked Emperor: The Second Amendment and the Failure of Originalism, 40 Brandeis L. J. 659, 694 (2002).

[FN31]. William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236, 1243 n.19 (1994) ("If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.") (quoting Professor Halbrook).

[FN32]. See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359 (1998) (consisting of 183 pages detailing every nineteenth-century reference to the Second Amendment the authors found).

[FN33]. See Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002).

[FN34]. *Id.* at 1087.

[FN35]. See Kasler v. Lockyer, 2 P.3d 581, 586 (Cal. 2000).

[FN36]. See Cal. Const. art. 1, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty....”).

[FN37]. Kasler, 2 P.3d at 586.

[FN38]. Don B. Kates, The Second Amendment and the Ideology of Self-Protection, 9 Const. Comment. 87, 102 (1992). Cf. Nelson Lund, The Second Amendment, Political Liberty and the Right to Self-Preservation, 39 Ala. L. Rev. 103, 118 n.35, 119 (1987) (quoting Hobbes, who believed “man is forbidden [by God and His natural laws] to do, that, which is destructive of his own life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh that it may be best preserved,” and Locke, who deemed the rights of man to include those things which “tend[ ] to the Preservation of the Life, the Liberty, Health, Limb or Goods of another”).

[FN39]. See Michael Huemer, Is There a Right to Own a Gun?, 29 Soc. Theory & Prac. 297-324 (2003); Lester Hunt & Todd C. Hughes, The Liberal Basis of the Right to Bear Arms, 14 Public Affairs Q. 1, 7 (2000); Lance Stell, Gun Control, in A Companion to Applied Ethics 192-209 (R.G. Frey & C.H. Wellman, eds., Blackwell 2003); see also Samuel C. Wheeler, Self-Defense Rights and Coerced Risk-Acceptance, 11 Public Affairs Q. 421, 433-34 (1997); Samuel C. Wheeler, Arms as Insurance, 13 Pub. Aff. Q. 111, 115 (1999).

[FN40]. Patsone v. Pennsylvania, 232 U.S. 138, 143 (1913).

[FN41]. Based on twenty-five years of statistics from all United States counties, economists John Lott and David Mustard conclude that the widely publicized enactment of state laws under which millions of concealed handgun carry permits have been issued resulted in a marked decrease in confrontation crime including murder. See John R. Lott Jr., More Guns, Less Crime: Understanding Crime and Gun Control Law (1998); John R. Lott & David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns, 26 J. Legal Stud. 1 (1997); see also David B. Mustard, Culture

Affects Our Beliefs About Firearms, but Data Are Also Important, 151 U. Pa. L. Rev. 1387, 1393 (2003). A number of different scholars who criticized their methodology have redone the study using different, assertedly better, methods but came to the same results. Some of these studies even concluded that Lott & Mustard had underestimated the deterrent effect. See, e.g., John R. Lott, Guns, Crime, and Safety: Introduction, 44 J.L. & Econ. 605 (2001); Florenz Plassmann & T. Nicolaus Tideeman, Does the Right to Carry Concealed Handguns Deter Countable Crimes? Only a Count Analysis Can Say, 44 J.L. & Econ. 771 (2001); see also Florenz Plassman & John Whitley, Confirming ‘More Guns, Less Crime,’ 55 Stan. L. Rev. 1313, 1315 (2003). But scholars who oppose gun ownership vehemently disagree. See, e.g., Albert W. Altschuler, Two Guns, Four Guns, Six Guns, More: Does Arming the Public Reduce Crime, 31 Val. U. L. Rev. 365 (1997); Ian Ayres & John J. Donohue, Shooting Down the ‘More Guns, Less Crime’ Hypothesis, 55 Stan. L. Rev. 1193 (2003); Daniel Black and Daniel Nagin, Do Right-to-Carry Laws Deter Violent Crime, 27 J. Legal Stud. 209 (1998); Franklin Zimring & Gordon Hawkins, Concealed Handguns: The Counterfeit Deterrent, 7 Responsive Community 46, 55-57 (1997).

[FN42]. The latest analysis of various studies concludes that there is “a great deal of self-defensive use of firearms” in the United States. “[I]n fact, [there are] more defensive gun uses [by victims] than crimes committed with firearms.” James B. Jacobs, Can Gun Control Work? 14 (2002) (emphasis added).

[FN43]. See, e.g., Fish & Game Code § 325 (West 1998) (authorizing special hunting seasons where “game mammals...have increased in numbers in any areas, districts, or portions thereof...to such an extent that the mammals or birds are damaging public or private property, or are overgrazing their range”); Fish & Game Code §§ 1801(e)-(g) (West 1998) (declaring the contribution of hunting and its importance in achieving state environmental and game management policy); Fish & Game Code § 4180 (West 1998) (authorizing unlicensed out-of-season hunting of pestiferous or destructive animals); Fish & Game Code § 4188 (West 1998 & Supp. 2007) (requiring the Department to inform landowners having special permits to rid their lands of dangerous or pestiferous animals that they may

open the lands to hunters out of season). In addition, the Department's duties include the proclamation of general hunting seasons of such duration as it determines will suffice to prevent over-population of animal species leading to destruction of the environment and the animals's death by starvation. See, e.g., *Wildlife Alive v. Chickering*, 553 P.2d 537, 545 (Cal. 1976).

[FN44]. See Cal. Code Regs. tit. 14, §§ 311(l), 353(c), (d) (2006).

[FN45]. The California version of the UFA is Laws of 1923 ch. 339. The UFA was also called the Uniform Revolver Act. Both names are misnomers. The UFA is not a "Uniform Firearms Act" because it applied only to handguns not to rifles or shotguns. Neither was it a "Uniform Revolver Act" because it applied to all handguns, not just revolvers.

[FN46]. *Harry Carian Sales v. Agric. Labor Relations Bd.*, 703 P.2d 27, 36 (Cal. 1985) (citation omitted).

[FN47]. *Santa Clara Local Transp. Auth. v. Guardino*, 902 P.2d 225, 234 (Cal. 1995).

[FN48]. Restricting Handguns: The Liberal Skeptics Speak Out 14B20, 29B30 (Don B. Kates ed., 1979); Lee Kennett & James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* 213 (1975); David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (1992); Edward Leddy, *Magnum Force Lobby: The National Rifle Association Fights Gun Control* 85B89 (1987); Joyce Lee Malcolm, *Guns and Violence: The English Experience* 141B47 (2002); Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 Ariz. J. Int'l & Comp. L. 483 (2000); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 209B10 n.23 (1983).

[FN49]. See Kopel, supra note 48, at 141, 195, 237; Malcolm, supra note 48, at 141B47; Halbrook, supra note 48, at 484.

[FN50]. Restricting Handguns, supra note 48, at 15.

[FN51]. See William B. Swaney, *For a Better*

*Enforcement of the Law*, 8 A.B.A. 588, 591 (1922).

[FN52]. Kennett & Anderson, supra note 48, at 174-75.

[FN53]. See *Restricting Handguns*, supra note 48, at 29.

[FN54]. Kennett & Anderson, supra note 48, at 192.

[FN55]. Leddy, supra note 48, at 87 (emphasis added).

[FN56]. Id. at 87, 88 (emphasis added).

[FN57]. Id. at 88 (citation omitted).

[FN58]. Laws of 1923, ch. 339, 1923 Cal. Stat. 696, 697, 702.

[FN59]. See 14 Am. Inst. Crim. L. & Criminology 135 (1923B24) (setting forth section three of the UFA, which establishes the permit requirement).

[FN60]. See Cal. Penal Code § 12026(b) (West 2000).

[FN61]. New Firearms Law Effective on August 7, S.F. Chron., July 15, 1923, at 3.

[FN62]. Id.

[FN63]. *Atherton v. Bd. of Supervisors*, 48 Cal. 157, 160 (1874).

[FN64]. *Harry Carian Sales v. Agric. Labor Relations Bd.*, 703 P.2d 27, 36 (Cal. 1985).

[FN65]. Leddy, supra note 48, at 87, 88 (emphasis added).

[FN66]. *Galvan v. Super. Ct.*, 452 P.2d 930, 935 (Cal. 1969).

[FN67]. Id.

[FN68]. Id. at 934-35 (emphasis added).

[FN69]. See, e.g., *Brief of LCAV as Amici Curiae Supporting Respondents' Opposition to Writ of Mandate at 12-18*, *Fiscal v. City & County of San Francisco*, No. CPF-05-505960 (Cal. Super. Ct. Jan.

25, 2006). This was not, however, directly argued by San Francisco in *Fiscal*. In the Superior Court, San Francisco accepted that the Court of Appeal decision in *Doe* had bindingly rejected that argument and held that the entire field of residential handgun possession is preempted by state law. In its present appeal, however, San Francisco argues that the Court of Appeal should disavow *Doe* in that respect. See Appellant's Opening Brief at 30-34, *Fiscal v. City & County of San Francisco*, No. A115018 (Cal. Ct. App. Dec. 28, 2006) (on file with authors).

[FN70]. "It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." *Doe v. City & County of San Francisco*, 186 Cal. Rptr. 380, 385 (Ct. App. 1982).

[FN71]. Galvan, 452 P.2d at 933.

[FN72]. Where a dictionary gives multiple meanings for a word, courts will accept the first dictionary meaning over a subsequent one. *Muscarello v. United States*, 524 U.S. 125, 128-29 (1998). The preferred dictionary meanings of "license" and "permit" refer to any kind of government permission to do something rather than being narrowly limited to the issuance of a specific document giving permission. Compare Webster's Encyclopedic Unabridged Dictionary of the English Language (1989) (defining "license" as: "1. permission to do or not to do something. 2. Formal permission from a constituted authority to do something. [or] 3. a certificate of such permission; an official permit...."), with Black's Law Dictionary 829 (5th ed. 1979) (defining "license" broadly as "[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort.").

[FN73]. Galvan, 452 P.2d at 933.

[FN74]. After Galvan held that section 12026 did not bar local registration requirements, the Legislature enacted Government Code section 53071 (West 1997), which bans such requirements, or local licensing, as to any kind of firearm, not just handguns. See discussion infra Part II.D.

[FN75]. California Penal Code section 12026 (West 2000) specifies that the right it creates is granted

only to persons who may acquire handguns under state law. California Penal Code sections 12021, 12021.1, and 12101 (West 2000) prohibit guns to juveniles and persons who have been convicted of certain crimes. California Welfare and Institutions Code section 8103 (West 1999) excludes people of unsound mind from owning guns.

[FN76]. Galvan, 452 P.2d at 933-34.

[FN77]. Id. at 933-34 ("licensing regulates activity based on a determination of the personal qualifications of the licensee, while registration catalogs all persons with respect to an activity, or all things that fall within certain classifications. Thus, voter registration lists merely enumerate all those persons who satisfy the [voting] requirements (are 'licensed') to vote.") (emphasis added).

[FN78]. Cal. Gov't Code § 53071 (West 1997).

[FN79]. Id.

[FN80]. Id. (emphasis added).

[FN81]. Section 53071 also prohibits localities from requiring that firearms be registered. Id.

[FN82]. Galvan, 452 P.2d at 933.

[FN83]. *Sherwin-Williams Co. v. City of L.A.*, 844 P.2d 534, 536 (Cal. 1993).

[FN84]. Cal. Penal Code § 12050 (West 2000 & Supp. 2006).

[FN85]. Cal. Penal Code §§ 12025.5, 12031(j)(2) (West 2000).

[FN86]. Cal. Penal Code §§ 12027(a), 12031(b)(1) (West 2000).

[FN87]. Cal. Penal Code § 12031(k) (West 2000).

[FN88]. Cal. Penal Code § 12031(j)(1) (West 2000). Under Penal Code section 12026, law-abiding responsible adults are entitled to possess firearms (even concealed ones) on their own premises. Section 12031 generally prohibits possession of loaded firearms outside of one's own premises, but section 12031(j)(1) exempts from this prohibition people who are in immediate reasonable

fear.

[FN89]. Cal. Penal Code § 417 (West 1999).

[FN90]. Cal. Penal Code § 12026(b) (West 2000).

[FN91]. Cal. Gov't Code § 53071 (West 1997).

[FN92]. See Mary Anne Ostrom, S.F. Voters Consider Tough Handgun Ban, San Jose Mercury News, Nov. 4, 2005, at 12A (“In the wake of the 1978 handgun slayings of then Mayor George Moscone and supervisor Harvey Milk, one of Dianne Feinstein’s first acts as Moscone’s replacement was to enact a handgun ban. It was struck down a couple of years later, however, by the state Supreme Court. Feinstein, now a U.S. Senator, is not taking a position on Proposition H, because she feels the state’s top court has already ruled, a spokesman said.”).

[FN93]. Id.

[FN94]. Id.

[FN95]. 65 Op. Cal. Att'y Gen. 457 (1982).

[FN96]. Id.

[FN97]. See Pet. for Writ of Mandate, Req. for Temporary Stay Order and Mem. in Support Thereof at 1-3, Soracco v. City & County of San Francisco, No. A018445 (Cal. Ct. App. July 16, 1982).

[FN98]. Doe v. City & County of San Francisco, 186 Cal. Rptr. 380, 380 (Ct. App. 1982).

[FN99]. Id.

[FN100]. See Pet. for Writ of Mandate Against Handgun Ban, Req. for Temporary Stay Order and Mem. in Support Thereof at 1, 3, 4, Doe v. City & County of San Francisco, No. A018441 (Cal. Ct. App. July 19, 1982).

[FN101]. Doe, 186 Cal. Rptr. at 381.

[FN102]. Id. at 384.

[FN103]. Id.

[FN104]. Id. at 384.

[FN105]. Id.

[FN106]. Id. at 385.

[FN107]. Id.

[FN108]. Id.

[FN109]. Id. (emphasis added). The last sentence in the passage has been italicized because it is both indubitably correct and decisive of the issue of whether localities can ban handguns.

[FN110]. In 1984, two years after the decision in Doe, California state Proposition 15, a massive collection of anti-gun laws, was brought to the ballot by anti-gun advocates but defeated by the electorate. One feature of Proposition 15 was to repeal sections 12026 and 53071. Repeal or evisceration of one or both of those statutes has been a feature of numerous subsequent legislative proposals to allow localities to ban guns. See, e.g., Assemb. B. 136, 1997 Leg., Reg. Sess. (Cal. 1997); Assemb. B. 247, 1997 Leg., Reg. Sess. (Cal. 1997); S.B. 643, 1997 Leg., Reg. Sess. (Cal. 1997); Assemb. B. 634, 1995 Leg., Reg. Sess. (Cal. 1995), which was identical to Assemb. B. 2706, 1993 Leg., Reg. Sess. (Cal. 1993) rejected in the 1993-94 session. Other approaches to the same effect from the 1993-94 session included S.B. 1293, 1993 Leg., Reg. Sess. (Cal. 1993); Assemb. B. 2865, 1993 Leg., Reg. Sess. (Cal. 1993); and Assemb. B. X1 37, 1993 Leg., Reg. Sess. (Cal. 1993). The passage from Doe quoted in the text above has also been assailed in numerous amicus briefs filed by organizations and cities in cases involving local gun bans, including in Doe and Cal. Rifle & Pistol Ass'n v. City of West Hollywood, 78 Cal. Rptr. 2d 591 (Ct. App. 1998).

[FN111]. See, e.g., People v. Acosta, 124 Cal. Rptr. 2d 435, 440 (Ct. App. 2002) (“[O]ur fundamental task...is to determine the Legislature’s intent so as to effectuate the law’s purpose.”) (citation omitted); Lesser Commc’ns, Inc. v. City of Walnut Creek, 802 P.2d 317, 324 (Cal. 1990) (“Basic to all statutory construction, however, is ascertaining and implementing the intent of the adopting body.”).

[FN112]. The only other conceivable explanation

for what is now section 12026(b) is that the 1923 Legislature and several subsequent ones were opposed to permit or licensing laws per se. This cannot be the case for the 1923 UFA, which originated section 12026 two handgun license programs in different contexts. See Laws of 1923, ch. 339, § 5 (prohibiting concealed carry without a license), § 8 (license to carry a concealed handgun), and § 11 (license to operate a gun store) at 697-99, 701.

[FN113]. 78 Cal. Rptr. 2d 591 (Ct. App. 1998).

[FN114]. As discussed in Part IV infra, the Legislature subsequently enacted a scheme to deal with "Saturday Night Specials" which uses actual testing and criteria for safety and reliability, and which the Legislature recognized would preempt forty or so city ordinances following and including West Hollywood's.

[FN115]. CRPA, 78 Cal. Rptr. 2d at 596.

[FN116]. Id.

[FN117]. As discussed in Part IV infra, this is no longer the case regarding the Unsafe Handgun Act ("UHA") (Cal. Penal Code §§ 12125-12133 (West 2000 & Supp. 2006)). In enacting the UHA, the Legislature has addressed and preempted the field, including an express declaration that handguns which meet the UHA's testing and registration requirements firearms "may be sold" within the state. Cal. Penal Code § 12131(a) (West 2000 & Supp. 2006).

[FN118]. CRPA, 78 Cal. Rptr. 2d at 599.

[FN119]. Id. (citing Doe v. City & County of San Francisco, 186 Cal. Rptr. 380, 384-85 (Ct. App. 1982)).

[FN120]. Id. at 597.

[FN121]. Cal. Penal Code § 12026 (West 2000) (emphasis added).

[FN122]. See infra Part III.B.2.

[FN123]. Recall the UFA's rationale, as enunciated by the National Conference of Commissioners on Uniform State Laws, grew out of "the wrong

emphasis on more pistol legislation"--i.e., laws "aimed at regulating pistols in the hands of law abiding citizen." The UFA approach (and that of California gun law generally) is to "punish[ ] severely criminals who use pistols" with "a program of laws which would both protect arms ownership and reduce crime." Leddy, *supra* note 48, at 87, 88 (emphasis added).

[FN124]. Doe v. City & County of San Francisco, 186 Cal. Rptr. 380, 385 (Ct. App. 1982). Actually, Doe is somewhat misleading in describing Penal Code section 12026 as a "preemption law." Section 12026 is "the Legislature's recognition of the right [of law-abiding, responsible adults] to possess handguns on private property." 77 Op. Cal. Att'y. Gen. 147, 152 (1994). Thus, section 12026 is not your usual preemption law because it is not addressed to localities specifically. It creates a right which is applicable against any level or agency of government until the Legislature sees fit to alter it. However, section 12026 can be seen as a preemption law in the sense of preempting local handgun bans "contradictory to" the statute. Cal. Penal Code § 12026 (West 2000); see also Sherwin-Williams Co. v. City of L.A., 844 P.2d 534, 536 (Cal. 1993) (stating that local laws are preempted if contrary to state law).

[FN125]. Cal. Penal Code §§ 12125-12133 (West 2000 & Supp. 2006).

[FN126]. See, e.g., Cal. Penal Code § 12021(a) (West 2000) (prohibiting firearms possession by convicted felons and narcotics addicts); Cal. Penal Code §§ 12021, 12021.1(c) (prohibiting firearms possession by persons convicted of certain misdemeanor, and referring to juveniles convicted of felonies as adults); Cal. Welf. & Inst. Code § 8103 (West 1998 & Supp. 2006) (prohibiting firearms possession by those judged to be a danger to others as a result of a mental disorder, by persons who have been found not guilty of certain crimes by reason of insanity, and by persons who have been found mentally incompetent to stand trial, among others). See also 18 U.S.C. § 922 (2000).

[FN127]. Gary A. Mauser, Have Restrictive Firearm Laws Improved Public Safety? An Evaluation of the Firearm Laws in the United Kingdom, Australia, Canada, the Republic of Ireland and Jamaica (Dec. 1, 2005) (unpublished

manuscript, on file with The University of San Francisco Law Review).

[FN128]. For discussions of gun-banning nations's experiences see David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (1992); David B. Kopel, Paul Gallant & Joanne D. Eisen, *Microdisarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969 (2005); Don B. Kates, *The Limits of Gun Control: A Criminological Perspective*, in *Suing the Firearms Industry: A Legal Battle at the Crossroads of Gun Control and Mass Torts* (Timothy D. Lytton ed., 2005); Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y (forthcoming 2007).

[FN129]. Don B. Kates, *The Hopelessness of Trying to Disarm the Kind of People Who Murder*, 12 Bridges 313, 319 (2005).

[FN130]. *Id.* (emphasis added).

[FN131]. See Joyce Lee Malcolm, *Guns and Violence: The English Experience* 219 (2002).

[FN132]. *Id.* at 209.

[FN133]. "Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual's physical strength for their effectiveness. Only a gun can allow a 110-pound woman to defend herself easily against a 200-pound man." Linda Gorman & David B. Kopel, *Self-Defense: The Equalizer*, 15 F. For Applied Res. & Pub. Pol'y 92 (2000).

[FN134]. *Id.* See also Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in *Psychol. & Soc. Pol'y* 234 (1992) ("when used for protection, firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way.").

[FN135]. Mark Cooney, *The Decline of Elite*

*Homicide*, 35 Criminology 381, 386 (1997).

[FN136]. See Dean G. Rojek, *The Homicide and Drug Connection*, in Paul H. Blackman et al., *The Varieties of Homicide and Its Research* 135 (2000) (noting that exclusive of all other offenses they may have had, eighty percent of Atlanta murder arrestees in 1997 had at least one prior drug offense); Anthony A. Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 Police Q. 20, 29-30 (2006) (noting that "[s]ome 95% of homicide offenders, [and] 82% of aggravated gun assault offenders," had previously been "arraigned at least once in Massachusetts courts...."); FBI, *Uniform Crime Report--1975* at 43 (showing that homicide arrestees nationally over five-year period had adult records showing an average prior criminal career of at least six years duration including four major felony arrests).

[FN137]. See, e.g., Sheilagh Hodgins, *Mental Disorder, Intellectual Deficiency, and Crime*, 49 Arch. Gen. Psych. 476 (1992) (collecting such studies); Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 Homicide Stud. 160 (1998) (noting that psychological studies of juvenile murderers variously find that eighty to one hundred percent are psychotic or have psychotic symptoms); Pekka Santtila & Jaana Haapasalo, *Neurological and Psychological Risk Factors Among Young Homicidal, Violent, and Nonviolent Offenders in Finland*, 1 Homicide Stud. 234 (1997) (summarizing American and foreign studies on the extensive psychiatric histories of murderers).

[FN138]. See, e.g., Paige Hall-Smith et al., *Partner Homicide in Context*, 2 Homicide Stud. 400, 410 (1998). In a study of North Carolina wife-murders, prior wife beating had occurred in almost ninety-six percent of cases. *Id.*

[FN139]. Delbert S. Elliott, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1089 (1998) (emphasis added).

[FN140]. Among the places in which this claim has been made was the amicus brief filed in the Proposition H case by a gun prohibition advocacy, the Legal Community Against Violence. See Brief

of LCAV as Amici Curiae Supporting Respondents' Opposition to Writ of Mandate at 4, *Fiscal v. City & County of San Francisco*, No. CPF-05-505960 (Cal. Super. Ct. Jan. 25, 2006).

[FN141]. See *Southern Cal. Chapter of Assoc. Builders v. Cal. Apprenticeship Council*, 841 P.2d 1011, 1015 n.3 (Cal. 1992).

[FN142]. *Doe v. City & County of San Francisco*, 186 Cal. Rptr. 380, 383 (Ct. App. 1982).

[FN143]. *Id.* at 385.

[FN144]. *Id.*

[FN145]. Southern Cal., 841 P.2d at 1015 n.3 (quoting *Bank of Italy Etc. Ass'n v. Bentley*, 20 P.2d 940, 942 (1933)).

[FN146]. *Dunn v. Super. Ct.*, 26 Cal. Rptr. 2d 365, 368 (Ct. App. 1993).

[FN147]. *Doe*, 186 Cal. Rptr. at 385.

[FN148]. See discussion, *supra* Part II.A.

[FN149]. San Francisco conceded that the 2005 ordinance violated section 12026 as Doe had construed that statute, but contended that the ordinance was nevertheless valid under its "home rule" powers as a charter city. See Memorandum of Points and Authorities in Support of Respondents' Opposition to Motion for Writ of Mandate and/or Prohibition or Other Appropriate Relief at 22-30, *Fiscal v. City & County of San Francisco*, No. 05-3674 (Cal. Super. Ct. June 12, 2006).

[FN150]. See Brief of LCAV as Amici Curiae Supporting Respondents' Opposition to Writ of Mandate at 4, *Fiscal v. City & County of San Francisco*, No. CPF-05-505960 (Cal. Super. Ct. Jan. 25, 2006).

[FN151]. See Cal. Stat. ch. 322, § 1 (1995); Cal. Stat. ch. 958, § 2 (1989); Cal. Stat. ch. 577, § 2 (1988).

[FN152]. See *People v. Bouzas*, 807 P.2d 1076, 1081 (Cal. 1991); *Olmstead v. Arthur J. Gallagher & Co.*, 86 P.3d 354, 360 (Cal. 2004); *People v. Massie*, 967 P.2d 29, 40B41 (Cal. 1998) (citations

omitted).

[FN153]. See *Peltier v. McCloud River R.R. Co.*, 41 Cal. Rptr. 2d 182, 189 n.6 (Ct. App. 1995) (refusing to consider arguments that a previous case's interpretation of a statute was wrong, given that statute's reenactment without change to the language interpreted).

[FN154]. *Olmstead*, 86 P.3d at 360 (citations omitted).

[FN155]. *Peltier*, 41 Cal. Rptr. 2d at 189 n.6.

[FN156]. *Peltier*, 41 Cal. Rptr. 2d at 189 nn.6-7 (citing *Bouzas*, 807 P.2d at 1077-81).

[FN157]. Cal. Penal Code §§ 626.9(h), (i) (West 1999 & Supp. 2007).

[FN158]. See Cal. Penal Code §§ 626.9(h), (i) (West 1999 & Supp. 2007).

[FN159]. See *People v. Super. Ct.*, 917 P.2d 628, 641 (Cal. 1996) (upholding the state legislature's express reference in a later statute to an earlier statute).

[FN160]. See Brief of LCAV as Amici Curiae Supporting Respondents' Opposition to Writ of Mandate at 4, *Fiscal v. City & County of San Francisco*, No. CPF-05-505960 (Cal. Super. Ct. Jan. 25, 2006) (relying on *Nordyke v. King*, 44 P.3d 133 (Cal. 2002) and *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002)).

[FN161]. *Nordyke v. King*, 44 P.3d 133 (Cal. 2002); *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002).

[FN162]. *Nordyke*, 44 P.3d at 136; *Great Western*, 44 P.3d at 124.

[FN163]. See *Great Western*, 44 P.3d at 123-24.

[FN164]. See *Nordyke*, 44 P.3d at 136.

[FN165]. *Great Western Shows, Inc. v. Los Angeles County*, 229 F.3d 1258, 1263 (9th Cir. 2000) (noting that "there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California and an Opinion of

its Attorney General").

[FN166]. Great Western, 44 P.3d at 123.

[FN167]. Id. at 130-31 (emphasis added).

[FN168]. Id. at 128 (noting that the state gun show regulations "expressly anticipate the existence of 'applicable local laws'").

[FN169]. Nordyke, 44 P.3d at 135.

[FN170]. Id. at 137.

[FN171]. Id. at 137-38.

[FN172]. Great Western Shows, Inc. v. County of Los Angeles, 44 P.3d 120, 126-27 (Cal. 2002).

[FN173]. Id. at 124-27.

[FN174]. Id. at 126.

[FN175]. Id. at 128.

[FN176]. Id. at 126.

[FN177]. Cal. Penal Code §§ 12125-12133 (West Supp. 2006).

[FN178]. See, e.g., West Hollywood, Cal. Mun. Code § 4122 (repealed 2000). This ordinance, and those like it, was superseded by the UHA.

[FN179]. See Cal. Penal Code §§ 12125-12133 (West Supp. 2006).

[FN180]. Cal. Penal Code § 12131(a) (West 2000 & Supp. 2006). One of the prerequisites to being listed on the DOJ roster is that the manufacturer must also pay a fee.

[FN181]. See *infra* Appendix A.

[FN182]. Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr. 2d 164, 170 (Ct. App. 1993).

[FN183]. See, e.g., Philip J. Cook, The 'Saturday Night Special': An Assessment of Alternative Definitions from a Policy Perspective, 72 J. Crim. L. & Criminology 1735, 1740 (1981) ("Individuals who would not ordinarily be able to afford an

expensive gun commit a disproportionate share of violent crimes. [Increasing handgun prices by imposing a minimum tax on sales] would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem.... The major normative argument against [this]...is that it is overt economic discrimination.... [But a] high tax is not the only method of increasing the minimum price of handguns and subtle approaches may be more acceptable politically. One method would establish minimum standards stipulating the quality of metal and safety features of a gun. The effect of this approach would be the same as the minimum tax: to eliminate the cheapest of the domestically manufactured handguns.... If sufficiently high standards on safety and metal quality were adopted, the cost to manufacturers of meeting these standards would ensure a high minimum price.") (emphasis added).

[FN184]. See Petitioner's Request for Judicial Notice, *Fiscal v. City & County of San Francisco*, No. CPF-05-505960 (Cal. Super. Ct. Dec. 29, 2005) (consisting of documents from the volume on the UHA prepared by the Legislative Intent Service for the petitioners). Cf. *Commodore Home Sys., Inc. v. Super. Ct.*, 649 P.2d 912, 917 (Cal. 1982) ("undated memo in Assemblyman Lockyer's files, furnished by the Legislative Intent Service."); *Arya Group, Inc. v. Cher*, 91 Cal. Rptr. 2d 815, 818 n.3 (Ct. App. 2000) ("we have taken judicial notice of the materials provided by the Legislative Intent Service. (Evid. Code, §§ 452, subd. (c), 459...."); *Gaetani v. Goss-Golden West Sheet Metal Profit Sharing Plan*, 101 Cal. Rptr. 2d 432, 438 (Ct. App. 2000) ("We, like the trial court, take judicial notice of these materials, most furnished by a commercial firm, the Legislative Intent Service.").

[FN185]. See, e.g., Letter from Mary Leigh Blek on behalf of Orange County Citizens for the Prevention of Gun Violence to Senator Richard Polanco (Feb. 1, 1999) (on file with authors); Letter from Roxanne L. Miller on behalf of the City of San Jose to Senator John Vasconcellos (Apr. 1, 1999) (on file with authors); Letter from Pete McHugh on behalf of the Board of Supervisors of Santa Clara County to Senator John Vasconcellos (May 20, 1999) (on file with authors).

[FN186]. See UHA, 1999 Cal. Laws ch. 248, 90

(noting that S.B. 15, otherwise known as the UHA, was approved by the Governor on August 27, 1999).

[FN187]. See, e.g., Rep. of the S. Comm. on Public Safety regarding S.B. 15, 1999 Leg., Reg. Sess., at 10 (Apr. 6, 1999) (document on file with authors); Letter from Roxanne L. Miller on behalf of the City of San Jose to Senator John Vasconcellos (Apr. 1, 1999) (on file with authors).

[FN188]. See Letter from Roxanne L. Miller on behalf of the City of San Jose to Senator John Vasconcellos (Apr. 1, 1999) (on file with authors).

[FN189]. See *id.*

[FN190]. See Rep. of the S. Comm. on Public Safety, *supra* note 187, at 10.

[FN191]. See Proposed Non-Preemption Amendment to S.B. 15, 1999 Leg., Reg. Sess. (Cal. 1999) (on file with authors).

[FN192]. See S.B. 15, 1999 Leg., Reg. Sess. (Cal. 1999).

[FN193]. Rep. of the S. Comm. on Public Safety, *supra* note 187, at 9.

[FN194]. See Leddy, *supra* note 48, at 88.

[FN195]. Leddy, *supra* note 48, at 87 (emphasis added) (quoting from the description of the UFA's purposes given in urging its enactment by the National Conference of Commissioners on Uniform State Laws).

[FN196]. New Firearms Law Effective on August 7, S.F. Chron., July 15, 1923, at 3.

[FN197]. *Galvan v. Super. Ct.*, 452 P.2d 930, 933 (Cal. 1969).

[FN198]. *Doe v. City & County of San Francisco*, 186 Cal. Rptr. 380, 385 (Ct. App. 1982).

[FN199]. *Id.* at 384 (applying that language in holding that section 53071 preempts a local handgun possession ban).

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