

## Note

### Studying Abroad: Foreign Legislative Responses to Mass Shootings and Their Viability in the United States

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*The United States of America is not the only country on Earth with violent or dangerous people. We are not inherently more prone to violence. But we are the only advanced country on Earth that sees this kind of mass violence erupt with this kind of frequency. It doesn't happen in other advanced countries. It's not even close.*<sup>1</sup>

December 14, 2012—Newtown, Connecticut—a twenty-year-old gunman walked into Sandy Hook Elementary School and killed twenty first-graders, six adults, and himself.<sup>2</sup> He used his mother's lawfully-purchased semiautomatic rifle and pistol.<sup>3</sup> He had long struggled with mental health issues.<sup>4</sup> June 12,

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1. Barack Obama, President of U.S., Remarks on Gun Control (Jan. 1, 2016).

2. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

3. *Id.*

4. Alison Leigh Cowan, *Adam Lanza's Mental Problems "Completely Untreated" Before Newtown Shootings, Report Says*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/22/nyregion/before-newtown-shootings->

2016—Orlando, Florida—a twenty-nine-year-old gunman walked into Pulse, a gay nightclub, and killed forty-nine dancing patrons and wounded fifty-three more.<sup>5</sup> He used multiple semi-automatic firearms he had lawfully purchased a week earlier.<sup>6</sup> October 1, 2017—Las Vegas, Nevada—a retired, wealthy sixty-four-year-old smashed out the windows of his thirty-second-floor Mandalay Bay Hotel room and opened fire on the 22,000 concertgoers below.<sup>7</sup> He fired for ten minutes, discharging more than 1,100 rounds, killing fifty-eight, and wounding 869 more before killing himself.<sup>8</sup> When police breached the room, they found more than twenty sophisticated military-grade semi-automatic weapons, bump stocks, and enough ammunition to arm a small army.<sup>9</sup> February 14, 2018—Parkland, Florida—a nineteen-year-old took an Uber to Marjory Stoneman Douglas High School where he shot and killed seventeen students and wounded fourteen more.<sup>10</sup> He used an AR-15 semi-automatic rifle which he had lawfully purchased from a nearby gun shop a year earlier.<sup>11</sup> Although law enforcement had received more than forty-five calls between 2008 and 2017 about the gunman and his family, including some specifically warning he might carry out a school shooting, no meaningful action was taken.<sup>12</sup>

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adam-lanzas-mental-problems-completely-untreated-report-says.html.

5. Marc Santora, *Last Call at Pulse Nightclub, and Then Shots Rang Out*, N.Y. TIMES (June 12, 2016), <https://www.nytimes.com/2016/06/13/us/last-call-at-orlando-club-and-then-the-shots-rang-out.html>.

6. Bart Jansen, *Weapons Gunman Used in Orlando Shooting Are High-Capacity, Common*, USA TODAY (June 14, 2016), <https://www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260>.

7. Mark Berman, *"It Seemed to Last Forever." One Year Later, Mystery of Las Vegas Massacre Remains*, WASH. POST (Oct. 1, 2018), <https://www.washingtonpost.com/nation/2018/10/01/it-seemed-last-forever-one-year-later-mystery-las-vegas-massacre-remains>.

8. *Id.*

9. *Id.*; Larry Buchanan et al., *Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html> (last updated Oct. 5, 2017).

10. Patricia Mazzei, *Slow Police Response and Chaos Contributed to Parkland Massacre, Report Finds*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/parkland-shooting-florida-commission-report.html>; Skyler Swisher & Paula McMahon, *Nikolas Cruz Passed Background Check, Including Mental Health Question, To Get AR-15 Rifle*, SOUTH FLA. SUN SENTINEL (Feb. 15, 2018, 8:15 PM), <http://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-guns-20180215-story.html>.

11. *Id.*

12. Curt Devine & Jose Pagliery, *Sheriff Says He Got 23 Calls About*

As difficult as they are to relive, the horrors of Newtown, Orlando, Las Vegas, and Parkland conceal a horrifying truth: mass shootings—incidents in which four or more individuals are shot and killed (not including the shooter)<sup>13</sup>—are on the rise in the United States. They are occurring more frequently<sup>14</sup> and have become more deadly.<sup>15</sup> Yet following each unspeakable tragedy, as cries for reform grow increasingly shrill, gun sales rise<sup>16</sup> and legislatures stonewall.<sup>17</sup> Meanwhile, in other developed countries, news-grabbing public mass shootings have powered reform—and with positive results.<sup>18</sup> Examples include

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*Shooter's Family, But Records Show More*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/us/parkland-shooter-cruz-sheriff-calls-invs/index.html>.

13. There is no common definition of mass shooting. *See, e.g.*, Rosana Smart, *Mass Shootings: Definitions and Trends*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/essays/mass-shootings.html> (“Media outlets, academic researchers, and law enforcement agencies frequently use different definitions when discussing mass shootings, leading to different assessments” of “mass shooting levels and trends.”). What is important is not whether one definition is used versus another, but rather whether the one that is used is “clearly and precisely explained” and “appropriate to the analysis.” *Id.* This Note uses the definition set forth in the text above because it is the “common approach in the literature”—that is, using “the FBI’s criteria for a mass murderer and set[ting] a casualty threshold of four fatalities by firearm, excluding the offender or offenders[.]” *Id.* Using the most common definition is particularly useful here because it facilitates comparative analysis.

14. AJ Willingham & Saeed Ahmed, *Mass Shootings in America Are A Serious Problem—And These 9 Charts Show Just Why*, CNN (Nov. 6, 2017), <http://www.cnn.com/2016/06/13/health/mass-shootings-in-america-in-charts-and-graphs-trnd/index.html>.

15. *Id.*

16. *Id.* (depicting, graphically, spikes in gun-sale-related background checks following mass shootings such as the 2012 Sandy Hook shooting as well as the 2015 San Bernardino shooting). Gun demand typically rises after high-profile mass shootings as reflected by FBI data showing that the number of background checks associated with new gun sales tends to surge after high-profile mass shootings, when public debates about gun control are high.

17. *See generally* Harry Enten, *Why Congress is Hesitant to Pass Gun Control, By the Numbers*, CNN (Feb. 15, 2018, 6:18 AM ET), <https://www.cnn.com/2018/02/15/politics/congress-gun-control-unlikely-to-pass/index.html>.

18. Sarah Parker, *Balancing Act: Regulation of Civilian Firearm Possession*, in *SMALL ARMS SURVEY 2011: STATES OF SECURITY* ch. 9, 8 (Eric G. Berman et al. eds., 2011), <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-09-EN.pdf>. (“[M]ass shootings have motivated changes to civilian possession laws in at least seven of the [twenty-eight] countries under review [in this analysis], many addressing specific factors that underpinned the shootings.”). Regarding results, although no study has (or possibly can) affirmatively prove a causal link between new gun regulations and reduced firearm homicides, several studies have

Australia, Canada, Finland, Germany, Great Britain, and New Zealand.<sup>19</sup> Australia, for instance, tightened its gun regulations following the 1996 Port Arthur massacre and has not suffered a mass shooting since.<sup>20</sup> The United States, by contrast, suffered 110 mass shootings between 2000 and 2012,<sup>21</sup> with their frequency accelerating in recent years.<sup>22</sup>

America's struggle with gun violence is no secret. Some scholars argue that Congress should adopt laws and policies that have successfully limited mass shootings elsewhere. Regrettably missing from this line of research, however, is rigorous evaluation of these measures' viability—both empirically and legally—in the United States.

This Note seeks to fill that gap by examining developed countries' legal response to widely-publicized mass shootings and evaluating the viability of those responses, practically and legally, in the United States. Part I supplies the background for this analysis, accomplishing three tasks. First, it provides a general overview of civilian gun laws globally, categorizing different approaches to gun regulation. Second, it tells the story of Australia's, Germany's, and Great Britain's response to gun massacres, highlighting the impetus for reform, the legal

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established a strong correlation. *See, e.g.*, Julian Santaella-Tenorio et al., *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIO. REVS. 140, 140 (2016) (finding, based on a review of evidence from 130 studies in ten countries, that simultaneous implementation of laws targeting multiple gun restrictions were associated with reductions in firearm deaths; that laws restricting gun purchases (e.g., background checks) were associated with lower rates of intimate partner homicides; and that laws restricting access to guns (e.g., safer storage) correlated with lower rates of unintentional firearm deaths in children).

19. *See* Parker, *supra* note 18.

20. Ashley Mata, Comment, *Kevlar™ for the Innocent: Why Modeling Gun Regulation after Great Britain, Australia, and Switzerland Will Reduce the Rate of Mass Shootings in America*, 45 CAL. WESTERN INT'L L.J. 169, 178 (2014).

21. *Id.* at 171 (citing J. Pete Blair et al., *Active Shooter Events from 2000 to 2012*, FBI: L. ENFORCEMENT BULL. (Jan. 7, 2014), <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>).

22. According to a 2014 study by the Harvard School of Public Health and Northeastern University, the number of mass shootings tripled from 2011 to 2014 (on average, a mass shooting occurred once every 64 days, up from once every 200 days during the previous 29 years), while at the same time the gun homicide rate has significantly dropped over the past two decades. Amy P. Cohen et al., *Rate of Mass Shootings Has Tripled Since 2011, Harvard Research Shows*, MOTHER JONES (Oct. 15, 2014), <https://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research>. *See generally* Jen Christensen, *Why the U.S. Has the Most Mass Shootings*, CNN (Oct. 5, 2017), <http://www.cnn.com/2015/08/27/health/u-s-most-mass-shootings>.

response, and, to the extent possible, the effectiveness of the response. Third, returning home, the section provides an overview of U.S. gun law, including both Second Amendment jurisprudence and the federal-state, two-tiered gun regulation system. Part II considers whether the legislative solutions adopted in Australia, Great Britain, and Germany could work in the United States, analyzing, first, whether they address actual shortcomings in U.S. gun law and, second, whether they would comport with the Second Amendment.<sup>23</sup> The Note concludes that despite calls to adopted legal approaches successful abroad, most of these solutions likely are nonviable in the United States because they either do not meaningfully address shortcomings in U.S. gun law or are unlikely to pass constitutional muster. Often, measures that would likely be effective are the ones that would likely fail Second Amendment scrutiny, while measures that would likely pass constitutional muster are the ones that likely would not effectively address the issue, thereby putting the drive to solve this problem on a collision course with the Second Amendment.

## I. BACKGROUND

### A. GUN LAWS GLOBALLY

Any meaningful discussion of the legal approach taken by other countries to gun regulation requires understanding the primary ways in which these laws vary. Accordingly, this Note proceeds with an overview of civilian firearm possession laws in developed countries, summarizing specific elements of national and sub-national control, before examining more closely the laws in Australia, Great Britain, and Germany.

There are more than 850 million guns in the world today.<sup>24</sup> Approximately 650 million (75 percent) of them are owned by civilians (as opposed to military or law enforcement personnel).<sup>25</sup>

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23. Second Amendment challenges are endemic to this area of public policy. For example, regarding the Florida legislation that was passed following the Parkland shooting, the NRA sued Florida just hours after the bill was signed into law. See Jeffrey Schweers, *NRA Sues Florida Over Gun Bill Same Day Gov. Scott Signed It into Law*, TALLAHASSEE DEMOCRAT (Mar. 9, 2018), <https://www.tallahassee.com/story/news/2018/03/09/nra-sues-florida-over-gun-bill-same-day-gov-scott-signed-law/412365002>.

24. See Parker, *supra* note 18, at 1.

25. *Id.*

Only a handful of countries have exceptionally stringent gun laws that essentially prohibit civilian gun possession (e.g., China);<sup>26</sup> the overwhelming majority of countries permit civilian gun possession in some form, with varying restrictions.<sup>27</sup>

While diverse, these restrictions vary around several common core elements.<sup>28</sup> First, a fundamental distinction can be made between gun laws in single political systems and two-tiered political systems. In federalist countries (e.g., Australia, United States), civilian firearm possession is primarily regulated by the sub-national entities (i.e., states or territories), rather than the federal government.<sup>29</sup> In Australia, for example, no single federal law covers all six states and two territories.<sup>30</sup> In the United States, similarly, extensive state legislation supplements basic federal laws, with some states enacting more or less extensive controls than other states.<sup>31</sup>

A second fundamental distinction between countries is whether they regard civilian firearm ownership as a basic right or as a privilege. Guatemala,<sup>32</sup> Mexico,<sup>33</sup> and the United States<sup>34</sup> are the only countries where civilians have a constitutionally protected right to own a gun (unless certain factors apply, such as, for instance, a serious criminal conviction), while in the overwhelming majority of countries, there is a presumption against civilians owning firearms unless certain conditions and requirements are met.<sup>35</sup> This distinction influences the nature and, sometimes, the extent of the regulations countries impose.<sup>36</sup>

Beyond these two fundamental distinctions, approaches to gun regulation divide into three categories: (1) regulation of the *firearm*, (2) regulation of the civilian *user*, and (3) regulation of

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26. *Id.* at 62 n.1.

27. *Id.* at 1.

28. *See generally id.* (using twenty-eight countries that represent each region of the world (Africa, Americas, Asia, Europe, and Oceania), as well as fourteen sub-national entities (e.g., U.S. states, Australian territories) to discuss and analyze laws that apply to civilian access to and use of firearms).

29. *Id.* at 2.

30. *Id.*

31. *Id.*

32. CONSTITUCIÓN POLÍTICA REFORMADA POR ACUERDO LEGISLATIVO NO. 18-93 [CONSTITUTION WITH 1993 REFORMS] Nov. 17, 1993, art. 38 (Guat.).

33. Constitución Política de los Estados Unidos Mexicanos, CP, art. 10, Diario Oficial de la Federación [DOF] 05-02-1917, última reformas DOF 10-02-2014 (Mex.).

34. U.S. CONST. amend. II.

35. Parker, *supra* note 18, at 5.

36. *Id.*

the *use* of civilian guns.<sup>37</sup> Countries often employ a variety of measures within each category. Countries regulate the *firearm* by regulating which firearms are legal and which are not, and by requiring registration of guns. Countries regulate the civilian *user* by imposing restrictions on *who* can lawfully possess firearms, primarily through gun-user licensing systems that allow for the evaluation of risk posed by potential users (e.g., based on age, mental health, drug habits, criminal record, protection orders, and general public interest considerations).<sup>38</sup> Many countries also regulate transfers (civilians purchasing firearms from another civilian), with some countries banning them entirely (e.g., Australia, Singapore), and others allowing them under certain requirements (e.g., Canada, United Kingdom).<sup>39</sup> Countries regulate the *use* of civilian firearms by requiring a “genuine reason” for acquiring a firearm, allowing civilians to possess firearms only for certain purposes (e.g., hunting, sport shooting, and occasionally self-defense), and by imposing safe storage requirements (e.g., storing the firearm unloaded, storing ammunition separately, ensuring the firearm is in a locked receptacle).<sup>40</sup>

#### B. LEGAL RESPONSE TO MASS SHOOTINGS IN OTHER COUNTRIES

Many countries have experienced mass shooting events and many have enacted legislation in direct response. Australia, Great Britain, and Germany are most instructive and form the

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37. *Id.* at 1–2. This tripartite categorization of approaches to gun regulation is employed frequently in articles characterizing gun laws internationally.

38. *Id.* at 15.

39. *Id.* at 22–24.

40. *Id.* at 24, 31. *Compare* District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that a law in Washington D.C. banning the possession of handguns in the home and requiring any lawful firearm in the home to be disassembled or rendered inoperable by a trigger lock was unconstitutional because it impeded the Second Amendment right to bear arms), *and* McDonald v. Chicago, 561 U.S. 742 (2010) (holding that the Second Amendment limits state and local government authority to the same extent that it limits federal authority) *with* Parker, *supra* note 18, at 32 (discussing state laws that regulate firearms). In New Jersey, although securely storing firearms is not a condition of ownership or possession, it is a criminal offense for an adult to leave a loaded firearm within easy reach of a minor. Firearm owners also are eligible for a \$5 USD instant rebate when they purchase a trigger-locking device along with their firearm; and retailers must display a sign announcing the rebate. Parker, *supra* note 18, at 32.

basis of comparison here because they highlight different environments conducive to reform and depict a range legal responses with varying degrees of success. Each country's reform story is told in the following order: what happened, how the country responded, and the results.

### 1. Australia

The Australian Constitution contains no explicit right to own a gun.<sup>41</sup> Parliament has no constitutional authority to regulate firearms.<sup>42</sup> "Firearms regulation is the responsibility of the individual Australian states and territories."<sup>43</sup> Within this framework, Australia's gun laws were among the most lenient in the world until a series of high-profile mass shootings in the 1980s and 1990s led to significant reforms.

#### *a. The 1987 Melbourne Massacre and the National Committee on Violence*

In August 1987, a gunman shot and killed seven people on Hoddle Street in Melbourne.<sup>44</sup> Four months later, in December 1987, another gunman shot and killed eight individuals on Queen Street.<sup>45</sup> Both killings involved high-powered rifles.<sup>46</sup> Australia responded by establishing the National Committee on Violence, which produced a report recommending violence reduction strategies, including recommendations for firearm controls.<sup>47</sup> "Between 1991 and 1995 the Australasian Police Ministers' Council (APMC)—responsible for coordinating gun control among Australia's six states and two territories—drew up a series of recommendations for harmonizing the different registration and licensing systems in these jurisdictions."<sup>48</sup>

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41. *See generally Australian Constitution* (omitting the right to bear arms).

42. *Id.* at s 51.

43. LAW LIBRARY OF CONGRESS, FIREARMS-CONTROL LEGISLATION AND POLICY 17 (2013), <https://www.loc.gov/law/help/firearms-control/firearms-control.pdf>.

44. Parker, *supra* note 18, at 62 n.16.

45. *Id.*

46. *Id.*

47. *Id.* at 6.

48. *Id.*

*b. The 1996 Port Arthur Massacre and the National Firearms Agreement (Including Assault Rifle Ban) and Gun Buyback Program*

No concrete reform occurred until April 28, 1996, when Martin Bryant, a psychologically disturbed twenty-eight-year-old, used a semi-automatic Armalite rifle and a semi-automatic SKS assault weapon and shot and killed thirty-five people and wounded eighteen more in a murderous rampage at several locations in and around Port Arthur, Tasmania, a popular tourist area.<sup>49</sup> The rampage “broke the nation’s heart.”<sup>50</sup>

On May 10, 1996, at a specially convened meeting, the APMC agreed to a national plan, which regulating firearms and subsequently became the Nationwide Agreement on Firearms (commonly referred to as the “National Firearms Agreement”), backed by then Prime Minister John Howard.<sup>51</sup> Importantly, though the federal government lacked power to regulate gun ownership,<sup>52</sup> all state and territory governments committed to enacting uniform gun laws.<sup>53</sup> The Agreement made the following eight changes to Australia’s civilian gun laws: (1) it prohibited the ownership, possession, and sale of all automatic and semi-automatic weapons (other than in exceptional circumstances, i.e., those relating to military or law enforcement purposes and occupational categories) and the national government banned the importation of such weapons; (2) it required proof of a genuine reason to own, possess, or use a gun, and established standardized classifications to define a “genuine reason,” including reasons relating to sport shooting, recreational shooting/hunting, collecting, and occupational requirements (“personal protection” would not constitute a “genuine reason”

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49. See LAW LIBRARY OF CONGRESS, *supra* note 43, at 16; John Howard, *I Went After Guns. Obama Can, Too.*, N.Y. TIMES (Jan. 16, 2013), <http://www.nytimes.com/2013/01/17/opinion/australia-banned-assault-weapon-s-america-can-too.html>.

50. Richard Glover, *How Australia Beat the Gun Lobby and Passed Gun Control*, WASH. POST (Oct. 3, 2017), <https://www.washingtonpost.com/news/global-opinions/wp/2017/10/03/how-australia-beat-the-gun-lobby-and-passed-gun-control>. According to Glover, the Port Arthur massacre struck the nation so deeply because “[w]e had never experienced anything like it. It was such an offense to our image of ourselves: calm, laconic, peaceful, rule-abiding, a nation determined to allow the person next door to live his or her own life while we lived our own.”

51. LAW LIBRARY OF CONGRESS, *supra* note 43, at 17.

52. See Howard, *supra* note 49.

53. LAW LIBRARY OF CONGRESS, *supra* note 43, at 16.

for owning, possessing, or using a firearm); (3) established a basic licensing requirement such as that an individual must be aged eighteen years or over, be a “fit and proper person,” be able to prove his or her identity, and undertake adequate safety training (courses would be subject to accreditation and be “comprehensive and standardised across Australia”); (4) a requirement for a separate permit for the acquisition of every firearm, with a twenty-eight-day waiting period applying to the issuing of such permits; (5) establishment of a nationwide firearms registration; (6) the establishment of uniform, strict requirements for the security and storage of firearms, including a requirement that ammunition be stored in locked containers separate from any firearms, with which all licensees must under inspection by licensing authorities demonstrate compliance in order to be eligible to receive the license; (7) a uniform requirement that all firearms sales be conducted only by or through licensed firearms dealers; and (8) minimum standards for the refusal or cancellation of licenses, including criminal convictions for violent offenses in the past five years, unsafe storage of firearms, failure to notify of a change of address, and “reliable evidence of a mental or physical condition which would render the applicant unsuitable for owning, possessing or using a firearm.”<sup>54</sup>

The Agreement was implemented by the states and territories through the passage of new or amended legislation. The most sweeping reform was the widespread ban of automatic and semi-automatic weapons. Importantly, the banned guns were not confiscated; they were bought back. Specifically, the Agreement “provided for the establishment of a twelve-month national amnesty and compensation program, to be accompanied by a public education campaign, after which the jurisdiction would apply ‘severe penalties’ for breaches of the firearms control laws.”<sup>55</sup> To implement the national buyback program, the federal Parliament enacted the National Firearms Program Implementation Act of 1996 and, to provide funding for the program, the Medicare Levy Amendment Act of 1996.<sup>56</sup> The cost of the National Firearms Buyback Program was met by a special

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54. *Id.* at 16, 19–21; Australasian Police Ministers’ Council, Special Firearms Meeting, Canberra, 10 May 1996: Resolutions, <http://www.austlii.edu.au/au/other/apmc>.

55. LAW LIBRARY OF CONGRESS, *supra* note 43, at 21.

56. *Medicare Levy Amendment Act 1996* (Cth) (Austl.); *National Firearms Program Implementation Act 1996* (Cth) (Austl.).

one-off 0.2 percent tax imposed on all Australians' national health insurance.<sup>57</sup>

As a result of the buyback program, which ran from October 1, 1996, to September 30, 1997, more than 640,000 prohibited firearms were surrendered nationwide while an additional 60,000 non-prohibited firearms were voluntarily surrendered without compensation.<sup>58</sup> In all, the buyback has been credited with reducing the number of civilian firearms in circulation in Australia by about a fifth (21.5 percent) and with substantially reducing the number of households possessing a firearm.<sup>59</sup> Collected firearms were then destroyed.<sup>60</sup>

*c. 2002 Handgun Ban in Response to Lower-Profile Handgun Shooting*

Australia was not done with reform. On October 21, 2002, a gunman armed with several loaded *handguns* shot and killed *two* people and injured five others in a classroom at Monash University in Melbourne, Victoria.<sup>61</sup> Although technically not a mass shooting because only two, not three, individuals were killed,<sup>62</sup> the 2002 shooting “renewed debate about gun control laws, particularly in relation to handguns.”<sup>63</sup> The gunman “was a licensed pistol owner and member of the Sporting Shooters Association of Australia,” and was later found to be mentally impaired and was sentenced to twenty-five years in a psychiatric hospital.<sup>64</sup>

As after the Port Arthur massacre, the APMC again met, in November 2002, and agreed to various resolutions tightening handgun restrictions.<sup>65</sup> Following the endorsement of the Council of Australian Governments in December, these resolutions became the National Handgun Control Agreement, and were implemented through state and territory legislative

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57. See Glover, *supra* note 50; Howard, *supra* note 49.

58. LAW LIBRARY OF CONGRESS, *supra* note 43, at 22.

59. *Id.*

60. See Glover, *supra* note 50; Howard, *supra* note 49.

61. LAW LIBRARY OF CONGRESS, *supra* note 43, at 23.

62. S. Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings*, 12 INJ. PREVENTION 365, 366 (2006).

63. LAW LIBRARY OF CONGRESS, *supra* note 43, at 23.

64. *Id.*

65. *Id.*

amendments.<sup>66</sup> As with the preceding automatic and semi-automatic ban, the federal Parliament also enacted the National Handgun Buyback Act of 2003, which provided federal funding for states to implement the buyback program for prohibited handguns.<sup>67</sup> The program was implemented by the individual states and territories, and resulted in the surrender of approximately 70,000 handguns and more than 278,000 parts and accessories.<sup>68</sup>

*d. Result*

Not a single mass shooting has occurred in Australia since the 1996 reforms, and the positive impact of the 1996 and 2002 reforms is widely accepted.<sup>69</sup> As Prime Minister Howard more recently wrote in a *New York Times* Op-Ed, the 1996 reforms:

not only reduced the gun-related homicide rate, but also the suicide rate. The Australian Institute of Criminology found that gun-related murders and suicides fell sharply after 1996. The American Law and Economics Review found that our gun buyback scheme cut firearm suicides by 74 percent. In the 18 years before the 1996 reforms, Australia suffered 13 gun massacres—each with more than four victims—causing a total of 102 deaths. There has not been a single massacre in that category since 1996.<sup>70</sup>

2. Great Britain

While Great Britain has traditionally maintained more stringent gun laws than Australia, it responded aggressively to

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66. *Id.*

67. *National Handgun Buyback Act 2003* (Cth) (Austl.).

68. LAW LIBRARY OF CONGRESS, *supra* note 43, at 24.

69. See Glover, *supra* note 50; see also LAW LIBRARY OF CONGRESS, *supra* note 43. For an in-depth statistical analysis of this positive impact, see Chapman, *supra* note 62, at 365 (explaining that “[d]eclines in firearm-related deaths before the law reforms accelerated after the reforms for total firearm deaths ( $p = .04$ ), firearm suicides ( $p = .007$ ) and firearm homicides ( $p = .015$ ), but not for the smallest category of unintentional firearm deaths, which increased . . . .The rates per 100,000 of total firearm deaths, firearm homicides and firearm suicides all at least doubled their existing rates of decline after the revised gun laws.”).

70. See Howard, *supra* note 49.

a series of gun massacres in the latter half of the twentieth century. Like the Melbourne and Porter Arthur massacres in Australia, the shootings which inspired reform in Great Britain all involved lawfully licensed weapons.

*a. The Hungerford Massacre and the Firearms (Amendment) Act of 1988*

In August 1987, using two high-velocity semi-automatic rifles, a U.S. M1 carbine, and an assault rifle that he lawfully owned,<sup>71</sup> Michael Ryan shot and killed sixteen people, including his mother, and wounded fourteen more before killing himself in Hungerford, Berkshire.<sup>72</sup> In response to the Hungerford massacre, Great Britain passed the Firearms (Amendment) Act 1988,<sup>73</sup> which expanded the class of prohibited weapons to include most semi-automatic rifles and smooth-bore shotguns, as well as self-loading or pump-action shotguns.<sup>74</sup> A year later, Robert Sartin, who suffered from schizophrenia, killed one person and wounded sixteen more using a shotgun.<sup>75</sup>

*b. Dunblane and the Firearms (Amendment) Act of 1997*

Nearly ten years after the Hungerford massacre, in March 1996, Thomas Hamilton, much like the Sandy Hook gunman, “walked into a primary (elementary) school in Dunblane, Scotland, and shot and killed sixteen small children, aged four to five, and their teacher” in the school gym before killing himself.<sup>76</sup> Hamilton used two rifles and four handguns—all lawfully held—and had lawfully held firearms for almost twenty

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71. Michael McCarthy, *Echoes of the Day Horror was Visited on Hungerford*, INDEPENDENT (June 3, 2010), <https://www.independent.co.uk/voices/commentators/michael-mccarthy-echoes-of-the-day-horror-was-visited-on-hungerford-1990077.html>.

72. *Id.*; see also Hugh Muir, *Gun Panic Sets In . . . But Is It Justified?*, GUARDIAN (Oct. 10, 2003), <https://www.theguardian.com/uk/2003/oct/11/uk-guns.hughmuir>.

73. Firearms (Amendment) Act 1988, c. 45, <http://www.legislation.gov.uk/ukpga/1988/45/contents>.

74. Parker, *supra* note 18, at 7.

75. LAW LIBRARY OF CONGRESS, *supra* note 43, at 91 (citing Nicholas Timmins, *Are We Hostages to Gun Culture?*, INDEPENDENT (Mar. 14, 1996), <https://www.independent.co.uk/news/uk/are-we-hostages-to-gun-culture-1341917.html>).

76. *Id.*

years prior to the incident.<sup>77</sup> Following the Dunblane massacre, a public inquiry on firearm control was undertaken that led to the passage of the Firearms (Amendment) Act of 1997,<sup>78</sup> which effectively banned the private ownership of handguns (other than “air guns, firearms for starting athletics races, and guns of historic interest.”<sup>79</sup>).<sup>80</sup> Additionally, much like Australia, the British government established a £150 million (approximately \$200 million) national compensation program to compensate handgun owners for firearms that they voluntarily handed in to police stations during an amnesty period that ran for eighth months, from July 1997 to February 1998.<sup>81</sup> As a result of the amnesty and buyback program, 162,000 weapons and 700 tons of ammunition were surrendered.<sup>82</sup> Today, only police officers, members of the armed forces, and individuals with written permission from the Home Secretary may lawfully own a handgun in Great Britain.<sup>83</sup> From 2008 to 2009, firearms were used in only 0.3 percent of all recorded crimes and were responsible for the deaths of just thirty-nine people.<sup>84</sup>

*c. Result*

Great Britain has suffered only one mass shooting in the roughly twenty years since the 1997 reforms. That incident occurred in 2010, when Derrick Bird shot and killed twelve people and wounded twenty-five more in Cumbria, a county in

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77. *Id.* (citing Sarah Boseley & Michael White, *Who Licensed Him to Kill*, *GUARDIAN*, Mar. 15, 1996, at 1).

78. Firearms (Amendment) Act 1997, c. 5, <http://www.legislation.gov.uk/ukpga/1997/5/contents>.

79. Parker, *supra* note 18, at 7.

80. Ian Burrell, *Legitimate Firearm Users Think That Tougher Restrictions Miss the Target*, *INDEPENDENT* (Jan. 15, 2001), <https://www.independent.co.uk/news/uk/this-britain/legitimate-firearm-users-think-that-tougher-restrictions-miss-the-target-5366257.html>.

81. LAW LIBRARY OF CONGRESS, *supra* note 43, at 94 (citing Right to Compensation Under Firearms (Amendment) Act 1997, *LAWYER*, May 12, 1998, at 11, noting that the buyback program “was criticized by some who considered that companies were not typically compensated for any losses they faced or incurred as a result of legislative changes.”).

82. *Id.* (citing Burrell, *supra* note 80).

83. *Id.* at 89 (citing Firearms Act 1968, c. 27 § 5, <http://www.legislation.gov.uk/ukpga/1968/27/section/5>).

84. *Id.* (citing HOME OFFICE STATISTICAL BULLETIN, *HOMICIDES, FIREARM OFFENCES AND INTIMATE VIOLENCE 2008/09*, 37 (Kevin Smith et al. eds., Jan. 21, 2010), <http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs10/hosb0110.pdf>).

northwest England, using firearms he lawfully possessed.<sup>85</sup> Notably, however, many observed that although Bird lawfully possessed the firearms, as did the Hungerford gunman, Bird was less successful in inflicting fatalities, killing twelve of the thirty-seven individuals he shot. The Hungerford gunman killed four more individuals than Bird (sixteen) despite shooting six fewer individuals (thirty-one).<sup>86</sup> Many attributed this to the success of the Firearms Act (Amendment) of 198, which “ban[ned] the private ownership of semi-automatic rifles and restrict[ed] the use of shotguns with a magazine capacity of more than two rounds.”<sup>87</sup> Indeed, both gunman lawfully possessed the firearms used to perpetrate the shootings,<sup>88</sup> but the Hungerford gunman had possessed a more lethal collection: two high-velocity semi-automatic rifles capable of rapid fire, a U.S. M1 carbine, and a Chinese version of the Russian AK-47 assault rifle.<sup>89</sup> Unlike previous mass shootings, the Cumbria massacre did not foster additional reforms in firearms legislation.<sup>90</sup>

### 3. Germany

No right to bear arms exists under Germany’s constitution today.<sup>91</sup> Nor is such a right part of the German legal tradition historically.<sup>92</sup> Guns are not nearly as prevalent in Germany as they are in the United States.<sup>93</sup> By any measure, Germany’s “problem” with guns pales in comparison to that of the United

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85. *Id.* at 92 (citing Martin Wainwright, *Derrick Bird Inquest Returns Verdict of Unlawful Killings and Suicide*, *GUARDIAN* (Mar. 25, 2011), <http://www.guardian.co.uk/uk/2011/mar/25/derrick-bird-inquest-unlawful-suicide>; James Meikle & Helen Carter, *Cumbria Shootings: Government Warns Against Rash Changes to Gun Laws*, *GUARDIAN* (June 3, 2010), <http://www.guardian.co.uk/uk/2010/jun/03/cumbria-shootings-theresa-may-gunlaws-review>).

86. McCarthy, *supra* note 71.

87. *Id.*

88. LAW LIBRARY OF CONGRESS, *supra* note 43, at 92 (citing Meikle & Carter, *supra* note 85).

89. McCarthy, *supra* note 71.

90. LAW LIBRARY OF CONGRESS, *supra* note 43, at 92.

91. GRUNDGESETZ [GG] [BASIC LAW], *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

92. LAW LIBRARY OF CONGRESS, *supra* note 43, at 80 (citing KLAUS OSWALD, *DAS NEUE WAFFENRECHT: MIT SACHKUNDEPRÜFUNG 9* (1980)).

93. Annalisa Merelli, *Dear America, Here’s How Other Countries Stop Mass Shootings*, *QUARTZ* (Feb. 22, 2018), <https://qz.com/1212809/compare-us-mass-shootings-and-gun-control-to-germany-china-russia-switzerland-and-australia>.

States. For example, in 2010, the Federal Criminal Police Office reported a total of 3,216 homicides in Germany. Of these, a mere 147 were committed by gunshot.<sup>94</sup> The modern era of strict German gun laws began in 1972 with the enactment of the first federal Weapons Act.<sup>95</sup>

*a. Successive Reforms in Response to 2002, 2006, and 2009 School Shootings*

Though the Weapons Act of 1972 enacted a stringent system of gun control, that system was not as strict as it would become when Germany suffered a series of school shootings in the early 2000s. In 2002, a nineteen-year-old entered a high school in the city of Erfurt from which he had been expelled and, “armed with a semi-automatic pistol, shot and killed sixteen persons, most of them teachers,” before shooting himself.<sup>96</sup> Germany responded by enacting a new Weapons Act, which “restricted the use of large caliber weapons by young people and strengthened requirements for the safe storage of firearms.”<sup>97</sup>

Then, in 2006, an eighteen-year-old entered his former school armed with a sawed-off percussion rifle and sawed-off bolt-action rifle and shot and wounded five people before killing himself.<sup>98</sup> The shooting led to increased statutory restrictions on the online distribution of violent computer games to juveniles but did not generate any gun regulation reforms.<sup>99</sup> In 2009, a

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94. LAW LIBRARY OF CONGRESS, *supra* note 43, at 82 (citing the German, unabridged version of FED. REPUBLIC OF GER. CRIMINAL POLICE OFFICE, POLICE CRIME STATISTICS YEARBOOK 2010 (2011), [https://www.bka.de/SharedDocs/Downloads/EN/Publications/PoliceCrimeStatistics/2002Bis2013/pks2010\\_englisch.html](https://www.bka.de/SharedDocs/Downloads/EN/Publications/PoliceCrimeStatistics/2002Bis2013/pks2010_englisch.html)).

95. *Id.* at 81 (citing Waffengesetz [WaffG] [Weapons Act], reenacted Mar. 8, 1976, BGBl. I at 432 (Ger.)).

96. *Id.* at 82 (citing a Commissioner report from the German state of Thuringia).

97. *Id.* at 80.

98. *Id.* at 82 (citing Ralf Götze, *Aufgesetzter Kopfschuss*, TAZ (Nov. 22, 2006), archived at <http://www.taz.de/!316978/>); *Ex-Pupil Wounds 11 in German School Shooting: “I Loathe People”*, SPIEGEL ONLINE (Nov. 20, 2006), <http://www.spiegel.de/international/ex-pupil-wounds-11-in-german-school-shooting-i-loathe-people-a-449492.html>).

99. LAW LIBRARY OF CONGRESS, *supra* note 43, at 82 (citing, among others, Erstes Gesetz zur Änderung des Jugendschutzgesetzes [First Act Amending the Youth Protection Act], June 24, 2008, BGBl. I at 1075 (Ger.)); Julia Jüttner, *German School Shooting: Armed to the Teeth and Crying for Help*, SPIEGEL ONLINE (Nov. 21, 2006), <http://www.spiegel.de/international/german-school-shooting-armed-to-the-teeth-and-crying-for-help-a-449814.html>).

seventeen-year-old entered his old school in Winnenden and commenced a shooting spree using a semi-automatic pistol, “killing a total of fifteen individuals and himself and wounding many more.”<sup>100</sup> German authorities discovered that the shooter had taken the gun from an unlocked closet in his father’s bedroom.<sup>101</sup> Investigators also determined that, prior to the massacre, the boy had been undergoing psychiatric counseling.<sup>102</sup>

In response to the Winnenden massacre, Germany passed legislation that (a) created a federal gun register with reporting requirements that allow the tracing of every legally owned firearm, including those acquired through inheritance; (b) “contain[ed] a highly differentiated regime for licensing the acquisition, possession, and carrying of permitted weapons that *restricts*, according to criteria of need, *the number and types of guns that can be owned or purchased*, and has specific age restrictions for different types of weapons;” (c) contained stringent and enforceable requirements for the safe storage of guns; and (d) allowed authorities to monitor the safe storage of weapons in private homes more effectively (specifically authorizing them to, at any time, “request access to the premises of any registered gun owner to monitor whether proper safe-storage procedures are being observed”).<sup>103</sup>

#### *b. Result*

No mass school shootings have occurred in Germany since 2009.<sup>104</sup>

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100. LAW LIBRARY OF CONGRESS, *supra* note 43, at 82–83; *see also* Hendrik Sackmann & Nicola Leske, *Teenage Gunman Kills 15 in German School Attack*, REUTERS (Mar. 11, 2009), <https://www.reuters.com/article/us-germany-school-deaths/teenage-gunman-kills-15-in-german-school-attack-idUSTRE52A27H20090311>.

101. LAW LIBRARY OF CONGRESS, *supra* note 43, at 82; *Germany Remembers Winnenden School Shooting, Lawsuit Pending*, DW (Mar. 11, 2016), <https://www.dw.com/en/germany-remembers-winnenden-school-shooting-lawsuit-pending/a-19111382>.

102. LAW LIBRARY OF CONGRESS, *supra* note 43, at 82–83; *see also* DW, *supra* note 101.

103. Waffengesetz [WaffG] [Weapons Act], Oct. 11, 2002, BGBl. I at 3970 (Ger.) (emphasis added); LAW LIBRARY OF CONGRESS, *supra* note 43, at 80, 83.

104. The Winnenden massacre was the last to occur in a school. The only other mass shooting that has occurred in Germany, as of this writing, occurred in a shopping mall in Munich. Emma Anderson, *Five Things to Know About Guns in Germany*, LOCAL (June 16, 2016), <https://www.thelocal.de/2016>

## C. U.S. GUN LAW

U.S. gun law derives from three sources: the Second Amendment, federal law (legislative and regulatory), and state and local law. The Second Amendment secures a right which cannot be infringed; federal law establishes baseline minimum standards for our gun law system; and state and local law sometimes adds supplementary regulations.

Because the American gun lobby is sure to challenge any legislative responses to mass shootings whether that response occurs at the federal, state, or local level, any analysis of the legal viability in the U.S. of the legislative responses described above must necessarily begin with an understanding of the legal test against which these responses will be judged. This section describes the components of the U.S. gun law framework—namely, the Second Amendment right to keep and bear arms, existing federal gun legislation, and supplemental state and local laws.

## 1. The Second Amendment Right

The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>105</sup> The Supreme Court has only considered Second Amendment claims in a handful of cases.<sup>106</sup>

*a. United States v. Miller (1939)*

The National Firearms Act of 1934 provided for the taxation and registration of automatic weapons and sawed-off shotguns.<sup>107</sup> It generated the principal Second Amendment case of the twentieth century.<sup>108</sup> In *United States v. Miller* (1939), the Court declared that the Second Amendment was limited to safeguarding the possession of firearms for militia service.<sup>109</sup>

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0616/five-things-to-know-about-guns-in-germany-us-gun-control-laws.

105. U.S. CONST. amend. II.

106. *Amendment II*, USLEGAL, <https://system.uslegal.com/u-s-constitution/amendment-ii/> (last visited June 1, 2019).

107. National Firearms Act, 26 U.S.C. § 5801 et seq. (1934).

108. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 892 (Kermit L. Hall et al. eds., 2d ed. 2005).

109. *United States v. Miller*, 307 U.S. 174, 178 (1939); ERWIN CHERMERINSKY,

Specifically, the Court upheld a federal law prohibiting possessing sawed-off shotguns by explaining that they were not weapons used in militia service at the time the Bill of Rights was ratified.<sup>110</sup> The unanimous opinion stated that the Second Amendment did not protect the right of citizens to own firearms that were not ordinary militia weapons.<sup>111</sup> As the defendant in *Miller* had been charged with possession of an unregistered sawed-off shotgun, the Court noted that it had no evidence that such a weapon constituted ordinary militia equipment.<sup>112</sup>

*b. The Modern Standard: Heller (2008)*

Between 1791, when the Second Amendment was ratified, and the start of the twentieth century—for more than two hundred years—the Supreme Court had never declared any law regulating possession of firearms unconstitutional.<sup>113</sup> That changed in 2008, when the Court decided *District of Columbia v. Heller*.<sup>114</sup> In *Heller*, the District of Columbia enacted the strictest gun-control law in the country.<sup>115</sup> The law made it a crime to carry an unregistered firearm and prohibited the registration of handguns, but authorized the police chief to issue one-year licenses.<sup>116</sup> Moreover, residents were required to keep lawfully-owned firearms “unloaded and disassembled or bound by a trigger lock or similar device” unless they were located in a place of business or being used for lawful recreational activities.<sup>117</sup>

Heller, a special police officer, applied to register a handgun he wished to keep at home, but the District refused.<sup>118</sup> He sued to enjoin the District from enforcing the prohibition on handgun registration, the licensing requirement (insofar as it prohibited carrying an unlicensed firearm in the home), and the trigger-lock requirement (insofar as it prohibited the use of functional

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CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 956 (5th ed. 2015).

110. CHEMERINSKY, *supra* note 109, at 956.

111. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 108, at 892.

112. *Id.* at 892.

113. CHEMERINSKY, *supra* note 109, at 956.

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

115. D.C. CODE §§ 7-2501.01(12), 7-2502.01(A), 7-2502.02(A)(4)(2001); *Heller*, 554 U.S. at 574.

116. *Heller*, 554 U.S. at 575.

117. D.C. CODE § 7-2507.02 (2001); *Heller*, 554 U.S. at 575.

118. *Heller*, 554 U.S. at 575.

firearms in the home).<sup>119</sup> The District argued that the Second Amendment protects only the right to possess and carry a firearm in connection with militia service.<sup>120</sup> *Heller* argued that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.<sup>121</sup>

In a 5-4 decision, the Supreme Court invalidated the ordinance as violating the Second Amendment.<sup>122</sup> The majority opinion, after a textual analysis of the Amendment and an examination of post-ratification commentary, pre-Civil War cases, and post-Civil War legislation and cases, said that all of these confirm that the Second Amendment *was not meant to be limited to a right to have firearms for militia service*.<sup>123</sup> The Court concluded:

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra*, at 54–55, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>124</sup>

Justice John Paul Stevens and Justice Stephen Breyer wrote dissenting opinions, both joined by all dissenting Justices. After carefully tracing the history of the Second Amendment,

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119. *Id.* at 575–76.

120. *Id.* at 577.

121. *Id.* at 577.

122. *Id.* at 635; CHEMERINSKY, *supra* note 109, at 956.

123. *Heller*, 554 U.S. at 602–26; CHEMERINSKY, *supra* note 109, at 957.

124. *Heller*, 554 U.S. at 636; CHEMERINSKY, *supra* note 109, at 957.

Stevens came to the opposite conclusion of the majority—that the Second Amendment creates a right to have firearms for the purpose of militia service.<sup>125</sup> Justice Stevens concluded:

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulation civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy. Absent compelling evidence that is nowhere to be found in the Court’s opinion, I could not possibly conclude that the Framers made such a choice.<sup>126</sup>

Justice Breyer argued that “a reasonableness test should be used for the Second Amendment and that the District of Columbia ordinance was reasonable in light of the problem of handgun violence in the United States.”<sup>127</sup>

Importantly, the *Heller* Court was clear that the Second Amendment is not unlimited.<sup>128</sup> Indeed, the Court clarified that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>129</sup> Because the District of Columbia is a part of the federal government, the court had no occasion to consider

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125. *Heller*, 554 U.S. at 636–80 (Stevens, J., dissenting); CHEMERINSKY, *supra* note 109, at 957.

126. *Heller*, 554 U.S. at 680 (Stevens, J., dissenting); CHEMERINSKY, *supra* note 109, at 957–58.

127. *Heller*, 554 U.S. at 705 (Breyer, J., dissenting) (arguing that “the District’s decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.”); CHEMERINSKY, *supra* note 109, at 958.

128. CHEMERINSKY, *supra* note 109, at 958.

129. *Heller*, 554 U.S. at 626–27.

whether the Second Amendment applies to state and local governments.<sup>130</sup> That is, until 2010.

*c. The Modern Standard Revisited: McDonald (2010)*

Immediately following *Heller*, the National Rifle Association filed lawsuits in federal court challenging local gun control laws so as to present the issue to the Supreme Court of whether the Second Amendment applies to state and local governments.<sup>131</sup>

In *McDonald v. City of Chicago* (2010), the Supreme Court ruled, 5-4, that the Second Amendment applies to state and local governments.<sup>132</sup> McDonald had sought a declaration that the City of Chicago's weapons ban, which effectively prohibited handgun possession by almost all private citizens residing in the city, violated the Second and Fourteenth Amendments.<sup>133</sup> The case involved ordinances adopted in Chicago, Illinois and Oak Park, Illinois. Oak Park had an ordinance that makes it "unlawful for any person to possess . . . any firearm," a term that includes "pistols, revolvers, guns[,] and small arms . . . commonly known as handguns."<sup>134</sup> "A Chicago ordinance provides that '[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.'"<sup>135</sup> "Chicago law also prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the city."<sup>136</sup> Critical to this analysis, in both *Heller* and *McDonald*, the Supreme Court focused only on laws that prohibit virtually *all* possession of handguns. The Court in *McDonald* had no occasion to consider the constitutionality of more limited regulations.<sup>137</sup>

The most important implication of *McDonald* is that state and local gun control laws, including state and local tort liability

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130. CHEMERINSKY, *supra* note 109, at 958.

131. *Id.* at 958–59; see also Andrew Chung & Lawrence Hurley, *Supreme Court to Hear Biggest Gun Rights Case Since 2010*, REUTERS (Jan. 22, 2019, 8:42 AM), <https://www.reuters.com/article/us-usa-court-guns/supreme-court-to-hear-biggest-gun-rights-case-since-2010-idUSKCN1PG1QQ>.

132. *McDonald v. Chicago*, 561 U.S. 742, 791 (2010); CHEMERINSKY, *supra* note 109, at 959.

133. *McDonald*, 561 U.S. at 742–43.

134. CHEMERINSKY, *supra* note 109, at 959 (quoting Oak Park, Ill., Municipal Code §§ 27-2-1 (2007), 27-1-1 (2009)).

135. *Id.* at 959 (quoting Chicago, Ill., Municipal Code § 8-20-040(a) (2009)).

136. *Id.* at 959.

137. *Id.*

for gun manufacturers and dealers, can now be challenged on Second Amendment grounds. Until *McDonald*, such constitutional claims were not cognizable.<sup>138</sup> But it is also important to observe that *McDonald*, like *Heller* two years earlier, “did not recognize an absolute right, and left open the possibility of significant regulation and liability.”<sup>139</sup> In both cases, the Court emphasized that it had “found a right to have firearms in one’s home for the purpose of personal safety.”<sup>140</sup> The key question left unanswered in both decisions concerns the level of scrutiny to be used for Section Amendment challenges.<sup>141</sup> At the time of this writing, federal courts of appeals “are split as to whether it should be strict scrutiny, intermediate scrutiny, or some form of ‘interest balancing’ test.”<sup>142</sup> “Undoubtedly, the outcome of many Second Amendment challenges will depend on this unresolved question.”<sup>143</sup>

## 2. United States’ Patchwork System of Gun Regulation

The process of lawfully obtaining a gun in the United States starts with dealers who apply to be federal firearm licensees (FFLs).<sup>144</sup> This designation means that they are registered with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) and must abide by ATF procedures. As of 2018, there were 135,314 FFLs in various categories: about 56,360 retail dealers, 54,228 collectors, 12,889 firearm manufacturers, 7,674 pawnbrokers, the rest distributed among the seven other,

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138. *Id.*

139. *Id.* at 959–60.

140. *McDonald v. Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); *CHEMERINSKY*, *supra* note 109, at 960.

141. *CHEMERINSKY*, *supra* note 109, at 960.

142. *Id.* (citing, for example, *Tyler v. Hillsdale County Sheriff’s Dept.*, 775 F.3d 308 (6th Cir. 2014) (applying strict scrutiny); *NRA v. ATF* (“NRA I”), 700 F.3d 185, 195 (5th Cir. 2012) (“[T]he appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny); *United States v. Chester* (Chester II), 628 F.3d 673, 683 (4th Cir. 2010) (“[W]e conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.”)).

143. *Id.*

144. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *How to Become a Federal Firearm Licensee in 10 Easy Steps*, (Mar. 22, 2016), <https://www.atf.gov/resource-center/how-become-federal-firearms-licensee-10-easy-steps>.

smaller, groups.<sup>145</sup> Anyone who buys a gun from an FFL must complete “Form 4473,” a three-page form in which the buyer confirms that he or she meets the federal requirements for purchasing a firearm—that is, that he or she is at least eighteen years of age; is not a felon or under felony indictment; is not an unlawful user of marijuana, depressants, stimulants, or narcotics; is not subject to a restraining order; is not an illegal immigrant; and is not “adjudicated as a mental defective.”<sup>146</sup>

The gun-buying process starts in earnest with the background check. The prospective purchaser’s data is swallowed electronically by the NICS system, where they are checked with databases of prohibited buyers.<sup>147</sup> Some states rely on the FBI to do background checks using the NICS database; other “point-of-contact” states do the checks themselves using both NICS and state databases.<sup>148</sup> Generally, 70 percent of applications are not matched with a prohibited buyer, and the purchase from the FFL continues.<sup>149</sup> The remaining applications are routed to a special group called the NICS Section, which has access to “protected information,” for a second check.<sup>150</sup> “Roughly 75 percent of those cases result in an immediate determination (either approve or deny) while the FFL is still on the line.”<sup>151</sup> “This means that over 90 percent of applications result in a fast decision that inconveniences neither the buyer nor the FFL.”

A purchaser is not likely to be denied. Since its inception in 1999, “NICS has issued about 1.3 million denials—about half of one percent of all checks performed.”<sup>152</sup> Of those denials, about half (57 percent) “were applicants who were ‘convicted of a crime punishable by more than one year or a misdemeanor punishable by more than two years.’ A distant second in denials were applicants who were found to be fugitives from justice (10 percent). It is always possible that a denial will ultimately result

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145. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, FACT SHEET—FACTS AND FIGURES FOR FISCAL YEAR 2018, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2018> (last updated May 2019).

146. 18 U.S.C. § 922(g).

147. WILLIAM BRIGGS, HOW AMERICA GOT ITS GUNS: A HISTORY OF THE GUN VIOLENCE CRISIS 158 (2017).

148. *Id.*

149. *Id.*

150. *Id.* at 158–59.

151. *Id.* at 159.

152. *Id.*

in a sale either through an appeal or a reapplication.”<sup>153</sup>

Several loopholes plague the existing system. Federal law requires background checks on purchases only from FFLs.<sup>154</sup> Lawfully purchased guns frequently are transferred, creating a flood of unregulated sales in most states.<sup>155</sup> That is why the ATF, of all of the gun-trafficking cases it investigates, approximately half involve a straw purchase.<sup>156</sup> Furthermore, it is estimated that anywhere from 10 to 50 percent of gun sales take place without FFLs, through “loopholes” such as gun shows, Internet sales, and private transactions.<sup>157</sup> The often-heard gun control mantra, “close the loopholes,” refers to these sales.<sup>158</sup>

## II. ANALYSIS

### A. THE LIKELY EFFECTIVENESS OF FOREIGN LEGAL RESPONSES TO MASS SHOOTINGS IN THE U.S.

Solutions do not transcend place and time. Of the roughly eight measures implemented by Australia, Great Britain, and Germany in response to public mass shootings—(1) assault weapons bans (rifle and handgun); (2) requiring a genuine reason to own a gun (e.g., sport shooting, hunting, collecting, occupation); (3) requiring separate permits for every gun purchase as well as a twenty-eight-day waiting period before receiving each gun purchased, (4) mandatory safety training to acquire license; (5) nationwide registration of all firearms; (6) strict storage requirements; (7) requiring all sales through

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153. *Id.*  
*Id.*  
at 160.

155. *Id.* at 158–59.

156. *Trafficking & Straw Purchasing*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/> (last visited May 17, 2019). A straw purchase occurs when a legal buyer knowingly purchases a gun for another person who either cannot lawfully purchase a gun or for various reasons does not want to be associated with the sale.

157. *Universal Background Checks*, GIFFORDS L. CTR., [https://giffords.org/wp-content/uploads/2019/02/Giffords\\_universalbackground-checks\\_2019.pdf](https://giffords.org/wp-content/uploads/2019/02/Giffords_universalbackground-checks_2019.pdf) (last visited May 17, 2019).

158. Chelsea Parsons & Arkadi Gerney, *Executive Action to Strengthen Background Checks by Addressing High-Volume Gun Sellers*, CTR. FOR AM. PROGRESS (Oct. 15, 2015), <https://www.americanprogress.org/issues/guns-crime/reports/2015/10/15/123346/executive-action-to-strengthen-background-checks-by-addressing-high-volume-gun-sellers/>.

licensed firearms dealers—some carry greater promise in addressing shortcoming in existing U.S. gun law than others.

### 1. Measures That Are Likely to Be Effective

*Assault Weapons Ban.* An assault weapons ban likely would have a significant impact for the good. In the mass shootings that occurred between 2000 and 2012, the most powerful weapon brought by the shooter to the attack site was a rifle and shotgun in 26 percent and 8 percent of attacks, respectively.<sup>159</sup> With shooters bringing an assault weapon to approximately 35 percent of mass attacks, it would be difficult to argue that an assault weapons ban would not have some life-saving effect.<sup>160</sup> Assuming handguns were not banned, a ban on assault weapons would at least help *limit* the carnage that may result from a mass shooting.<sup>161</sup> If an assault weapons ban were coupled with a handgun ban, a la Great Britain, for instance, this could have a substantial impact for the good, as “pistols” were used in approximately 60 percent of all mass shootings between 2000 and 2012.<sup>162</sup>

*National gun registry.* A nationwide registration of all firearms would probably have a positive impact in terms of reducing the incidence of mass shootings. Gun control advocates argue that a national gun registry would reduce the number of illegal gun owners and sales, and enable fast tracing of firearms used in crimes, thus “increasing legal accountability for violating existing gun laws.”<sup>163</sup> While a national registry might not directly reduce mass shootings, it would increase legal accountability around the sale of guns, encouraging even private sellers to more conscientiously examine the fitness of buyers for owning firearms, which could only serve to help reduce the chances of an individual who shouldn’t own a gun getting a gun.

*Strict storage requirements.* The federal enactment of strict gun storage requirements could help stop future mass

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159. Blair et al., *supra* note 21.

160. Lois Beckett, *Better Gun Laws Could Save Thousands of Lives, Major Non-Partisan US Study Finds*, GUARDIAN (Mar. 2, 2018), <https://www.theguardian.com/us-news/2018/mar/01/gun-control-study-rand-corporation-assault-weapons-ban>.

161. Nick Wing, *Banning High-Capacity Magazines Should Absolutely Be a Winnable Issue*, HUFFPOST (Mar. 14, 2018), [https://www.huffingtonpost.com/entry/high-capacity-magazine-ban\\_us\\_5aa843c9e4b0f7a689cd31ff](https://www.huffingtonpost.com/entry/high-capacity-magazine-ban_us_5aa843c9e4b0f7a689cd31ff).

162. See Blair et al., *supra* note 21.

163. BRIGGS, *supra* note 147, at 185.

shootings.<sup>164</sup> The Sandy Hook shooter used his mother's lawfully owned guns.<sup>165</sup> Tragically, she thought they had been securely stored.<sup>166</sup>

*Universal governmental monitoring of safe storage compliance.* For the same reason as immediately above, granting police special powers to enter the home without notice and check for compliance with gun storage regulations could go a long way in reducing mass shootings.<sup>167</sup>

*Requiring all gun sellers to be licensed* probably would help reduce mass shootings. This effectively would amount to closing background check loopholes. Requiring all sales to go through licensed firearm dealers would equate, in the United States, to requiring that gun sellers at pawnshop, gun shows, online, etc. become FLLs, thus requiring them to conduct background checks for each gun sale. While issues with the efficacy and reliability of the background check system exist,<sup>168</sup> there can be little doubt that closing the background check loophole would help reduce the likelihood of mass shootings.

*Requiring a genuine reason to own a gun* (e.g., sport shooting, hunting, collecting, occupation) would likely have a positive impact in so far as it would require U.S. citizens to demonstrate a legitimate need for a gun.

*Restricting the number of guns that an individual can purchase at one time* may have some positive impact. In mass shootings that occurred between 2000 and 2012, shooters used multiple weapons in roughly one-third of the attacks.<sup>169</sup> In light

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164. Maggie Fox, *Australian Gun Laws Stopped 16 Mass Shootings*, *New Calculations Show*, NBC NEWS (Mar. 12, 2018), <https://www.nbcnews.com/health/health-news/australian-gun-laws-stopped-16-mass-shootings-new-calculations-show-n855946>; see also Ali Rowhani-Rahbar et al., *Effectiveness of Interventions to Promote Safe Firearm Storage*, 38 EPIDEMIO. REVS. 111, 111–12 (2016).

165. Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html> (last updated Feb. 16, 2018).

166. Cf. Josh Voorhees, *What Police Found in Adam Lanza's Home*, SLATE (Mar. 28, 2013), <https://slate.com/news-and-politics/2013/03/adam-lanza-search-warrants-newtown-shooter-had-a-gun-safe-and-more-than-1600-rounds-in-his-house.html>.

167. Ali Rowhani-Rahbar et al., *Interventions to Promote Safe Firearm Storage*, 38 EPIDEMIO. REVS. 111, 111–24 (2016) (showing proper gun storage is a way to reduce firearm injury).

168. Martha Bellisle, *Gun Background Check System Riddled with Flaws*, PBS: NEWSHOUR (Mar. 10, 2018), <https://www.pbs.org/newshour/nation/gun-background-check-system-riddled-with-flaws>.

169. See Blair et al., *supra* note 21.

of the rate at which shooters bring multiple weapons (roughly 33 percent),<sup>170</sup> coupled with the indelible image of the multiple guns wielded by the Sandy Hook, Orlando, and Las Vegas shooters, to name a few, it would be hard to maintain that restricting the number of guns that an individual can lawfully own or possess could not help save lives. While it may not prevent a mass shooting from taking place, it may curb the amount of harm an individual can cause.

## 2. Measures That Are Unlikely to Be Effective

*Age restrictions.* Restricting gun access based on a purchaser's age would certainly not hurt, but little evidence suggest it would substantially affect the incidence of mass shootings. In a sample of 91 mass shootings in the United States, the average age of the attacker was 34.<sup>171</sup> Notably, in the 91 events, the attacker was aged 21 or older in 86 (or about 85 percent) of the shootings.<sup>172</sup> Only 15 shooters (about 15 percent) were younger than 21.<sup>173</sup>

*Mandatory waiting period.* In theory, enacting a twenty-eight-day wait period for each gun purchase could help reduce mass shootings by helping prevent shootings related to rage, impulse, or sudden emotion.<sup>174</sup> But little evidence suggests that a significant number of mass shootings are so motivated. The Las Vegas killer plotted his attack for months.<sup>175</sup> The Parkland shooter broadcasted his desire to shoot up a school for months.<sup>176</sup>

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170. *Id.*

171. Jaclyn V. Schildkraut, *Mass Murder and the Mass Media: An Examination of the Media Discourse on U.S. Rampage Shootings, 2000-2012* (May 2014) (unpublished Ph.D dissertation, Texas State University) (on file with the Graduate Council of Texas State University).

172. *Id.*

173. *Id.*

174. See Michael Luca et al., *Handgun Waiting Periods Reduce Gun Deaths*, 114 PNAS 12162 (2017); Michael Price, *Gun Waiting Periods Could Save Hundreds of Lives a Year, Study Says*, SCIENCE (Oct. 16, 2017), <http://www.sciencemag.org/news/2017/10/gun-waiting-periods-could-save-hundreds-lives-year-study-says>.

175. Jennifer Medina, *A New Report on the Las Vegas Gunman Was Released. Here Are Some Key Takeaways.*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/las-vegas-attack-shooting-paddock.html>.

176. Joel Rose & Braktkton Booker, *Parkland Shooting Suspect, A History of Red Flags Ignored*, NPR (Mar. 1, 2018), <https://www.npr.org/2018/02/28/589502906/a-clearer-picture-of-parkland-shooting-suspect-comes-into-focus>.

*Mandatory safety training.* While a small portion of all gun deaths in the U.S. relate to accidental firing of weapons,<sup>177</sup> there is no evidence to suggest that lack of safety training plays a role in mass shootings. Training may even function to empower a mass killer.<sup>178</sup> Instead, this legislative response is designed more so to address the specific problem of accidental firearm-related deaths.

## B. THE LIKELIHOOD OF SURVIVING SECOND AMENDMENT CHALLENGES

This section identifies those measures more and less likely to survive second amendment challenges, before focusing on the best arguments on both sides of the more debatable measures.

### 1. Measures Likely to Survive Second Amendment Challenges

*Assault weapons bans (automatic and semi-automatic).* Renewing the federal ban on assault weapons would likely survive Second Amendment challenges based on the observation that the 1994 Assault Weapons Ban (or the “Brady Bill”) survived intact throughout the entirety of its ten-year life (it automatically “sunsetting” in 2004).<sup>179</sup> Surely the gun lobby would challenge the ban anew, especially in light of the favorable 2008 *Heller* and 2010 *McDonald* decisions, arguing that one use of assault weapons is self-defense, and even that self-defense may, under certain circumstances, call for assault weapons.<sup>180</sup> But gun control advocates have a strong counter by directly applying *Heller*’s reasoning regarding handguns to assault weapons. *Heller* held that a ban on handguns violates the Second Amendment right to keep and bear arms in self-defense based, at least in part, on the fact that handguns are the class of arms

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177. Kurtis Lee, *Amid Rising Gun Violence, Accidental Shooting Deaths Have Plummeted. Why?*, L.A. TIMES (Jan 1, 2018), <https://www.latimes.com/nation/la-na-accidental-gun-deaths-20180101-story.html>.

178. See Vanessa Terrades & Shahabudeen K. Khan, *Will it Ever End? Preventing Mass Shootings in Florida & the U.S.*, 51 SUFFOLK U. L. REV. 505, 523 (2018).

179. See 18 U.S.C. §§ 921–922 (repealed 2004); James B. Jacobs, *Why Ban “Assault Weapons”?*, 37 CARDOZO L. REV. 681, 697 (2015).

180. Terrades & Khan, *supra* note 178 (demonstrating that the NRA would challenge weapon bans).

most commonly used for protection purposes.<sup>181</sup> If handguns are the class of arms most commonly used for protection purposes, then assault weapons are not. Therefore, banning assault weapons does not ban handguns, and thus does not impede an individual's right to bear arms in self-defense.

*National Firearms Registry.* As described above, federal law at one point required a national registry of all firearms sold, and subsequent legislation forbade such a national registry.<sup>182</sup> Congressional legislation reinstating the federal registry requirement would likely survive Second Amendment challenges because such a registry does not alter or impede an individual's right to keep and bear arms.<sup>183</sup> Today, eight states including the District of Columbia require registration of handguns and two states require registration of long guns.<sup>184</sup>

*Large caliber restrictions for young people.* A federal change in the age required for gun ownership would probably survive constitutional challenges. Federal law presently establishes eighteen as the minimum age requirement.<sup>185</sup> Congress could increase the minimum age from eighteen to twenty-one pursuant to the same authority by which it established eighteen as the minimum age in the first place.<sup>186</sup>

## 2. Measures Unlikely to Survive Second Amendment Challenges

*Requiring genuine reason to own gun (e.g., sport shooting, hunting, collecting, occupation).* This measure would be invalidated as quickly as it was enacted because it conflicts directly with *Heller*. The individual's right to keep and bear arms for self-defense purposes, established by *Heller*, cannot be read to require the demonstration of a "genuine reason" for

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

182. Bureau of Alcohol, Tobacco, Firearms, & Explosives, National Firearms Act, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (last updated Feb. 14, 2019).

183. David Kopel, *D.C. Gun Registration Law Ruled Partly Unconstitutional*, WASH. POST: VOLOKH CONSPIRACY (Sep. 18, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/18/d-c-gun-registration-law-ruled-unconstitutional>.

184. BRIGGS, *supra* note 147, at 185.

185. 18 U.S.C. § 922(b)(1).

186. See generally Michal John Garcia, *Can the Government Prohibit 18-Year-Olds from Purchasing Firearms?*, CONG. RES. SERV. (Mar. 13, 2018), <https://fas.org/sgp/crs/misc/LSB10098.pdf>.

ownership.<sup>187</sup> Say you want to defend yourself and you have said enough. Requiring any further proof would plainly offend the Second Amendment. The Court's clarification in *McDonald* that the right to defend one's self is a "fundamental" one necessarily establishes that the right is permanent, not temporary, and thus cannot be subject to a demonstration requirement.<sup>188</sup>

*Universal Governmental Monitoring of Safe Storage Compliance (Germany)*. Legislation expanding police power to enforce a storage requirement or otherwise exercise greater freedom in stopping and investigating individuals for gun-related violations cannot be earnestly regarded as constitutional in the United States. The constitutionality of such legislation would likely be challenged on multiple grounds<sup>189</sup> and ultimately found to violate the Fourth Amendment right against unreasonable searches and seizures, especially as it relates to prohibitions against warrantless searches.<sup>190</sup>

*Restricting the number of guns one can buy*. This measure would likely be challenged on the ground that it squarely impedes the Second Amendment right to keep and bear arms for self-defense by pre-determining for the individual what qualifies as self-defense. Respondents have a strong counter that restricting the number of weapons does not impede the Second Amendment by distinguishing *Heller* and *McDonald*, observing that, there, the court invalidated ordinances that effectively banned the possession *any* firearm.<sup>191</sup> A proscription on the *number* of firearms does not prevent the individual from possession *a* firearm. Yet, the challenger probably has the stronger response. Observing that the Second Amendment's prefatory clause references a "militia," it can be argued that the plain meaning of the prefatory clause at the time of ratification surely encompassed the amassing of more than one weapon—indeed, as many as was required to maintain a "militia"—was

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187. See *District of Columbia v. Heller*, 554 U.S. 570, 576–95 (2008).

188. *McDonald v. Chicago*, 561 U.S. 742, 763–70 (2010).

189. See *Heller*, 554 U.S. at 570 (relying on Second Amendment textual and historical grounds to argue the city cannot enforce its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense).

190. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.").

191. See generally *McDonald*, 561 U.S. at 742; *Heller*, 554 U.S. at 570–71.

encompassed by the Second Amendment right.<sup>192</sup> As such, restrictions on the number of guns are unlikely to survive Second Amendment scrutiny, unless (a) the Court adopts the “interest-balancing” approach proposed by Breyer and (b) finds a strong and proportionate governmental interest in restricting the number of guns so as to justify the burden on the protected interest.

*Handgun Ban.* A handgun ban would presumably be invalidated on the same grounds as the handgun ban in *Heller* was invalidated: for impeding the right to self-defense.<sup>193</sup>

### 3. Highly Debatable Measures and the Best Arguments on Both Sides

#### *a. Twenty-eight-day wait period for each purchase*

It is unclear whether federal legislation instituting a mandatory wait period between the purchase of a gun and the receipt of that gun would survive Second Amendment challenges. While a wait period may not ostensibly touch an individual’s *right* to keep and bear arms, it is not difficult to imagine that the situation may eventually arise where one individual, in dire need of a firearm for self-defense purposes, is unable to timely obtain one due to the federally-mandated wait-period and, unable to defend himself, is killed as a consequence. Such an individual might challenge the constitutionality of a federal wait-period, arguing that it impedes his right to bear arms during the entirety of the wait period.

Proponents of the wait period may counter by justifying the measure in the name of public safety.<sup>194</sup> These proponents may, relying on Justice Breyer’s dissent in *Heller*, urge the Court to adopt an “interest-balancing” test, which would require the court to “ask[] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests. Any answer would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior

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192. See Doug Pennington, *Two Guns Per Person*, SLATE (Oct. 13, 2017, 1:08 PM), <https://slate.com/news-and-politics/2017/10/a-two-guns-per-person-limit-would-protect-americans-lives-and-liberty.html>.

193. See generally *Heller*, 554 U.S. 570.

194. See Luca et al., *supra* note 174; Price, *supra* note 174.

less restrictive alternative.”<sup>195</sup>

If adopted, a twenty-eight-day wait period would likely fail the interest-balancing test unless compelling evidence be shown that lack of such a wait period bears a substantial risk to public safety. Based on the conclusion above regarding the low efficacy of wait periods, it is more likely than not that this measure would be struck down as an unconstitutional burden on the Second Amendment right to bear arms.

*b. Mandatory safety training to acquire license*

Mandatory safety training would likely not face any serious challenge on Second Amendment grounds, for such measure presumably would not impede individuals from the full benefit of their Second Amendment right, and would advance that enjoyment in a way that enhances public safety. Assuming any challenge possessed the requisite legal standing, this measure may be challenged on the ground that Congress lacks authority to enact laws for the general public safety, a power traditionally understood as left to the states.<sup>196</sup> If so, Congress may be hard-pressed to justify a mandatory safety training requirement under the Commerce Power or Taxing Power, the two powers under which it has traditionally justified firearm-related legislation.<sup>197</sup>

## CONCLUSION

America is the country that put a man on the moon;<sup>198</sup> that brought end to two world wars;<sup>199</sup> that implemented the

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195. *Heller*, 554 U.S. at 689–90 (2008) (Breyer, J., dissenting).

196. See generally *Federal Powers to Regulate Guns*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/federal-law/other-laws/federal-powers/> (last visited Mar. 7, 2019).

197. *United States v. Lim*, 444 F.3d 910, 910 (2006) (holding that “provision of National Firearms Act, prohibiting the possession of an unregistered firearm, was legitimate exercise of Congress’s taxation power”); *United States v. Peters*, 403 F.3d 1263 (2005) (holding that “Congress acted within its commerce power in enacting statute prohibiting the knowing sale of any firearm or ammunition to a convicted felon.”).

198. *Apollo 11 and the World*, SMITHSONIAN (July 15, 2009), <https://airandspace.si.edu/stories/editorial/apollo-11-and-world>.

199. *World War I Ends*, HISTORY, <https://www.history.com/this-day-in-history/world-war-i-ends> (last updated Feb. 20, 2019) (“[T]he infusion of American troops and resources into the western front finally tipped the scale in the Allies’ favor.”); *World War II*, HISTORY, <https://www.history.com/>

Marshall Plan, rescuing Europe from economic ruin;<sup>200</sup> and that has underwritten the longest period of global peace and security in modern world history.<sup>201</sup> Yet for all its military and economic might, it is outperformed by virtually every other developed nation in protecting its citizens from the scourge of gun violence, especially mass shootings.<sup>202</sup> While other countries too have suffered deadly mass shooting episodes, these countries, unlike the United States, have responded forcefully with legislative solutions which successfully reduced the incidence of mass shootings thereafter. While many have suggested that the United States consider adopting these or similar legislative solutions, an earnest evaluation of their practical and legal viability reveals a conundrum: many of the solutions fail the test of efficacy—that is, they are unlikely to meaningfully address the critical shortcomings of U.S. gun law today—while those measures that likely would limit the frequency and deadliness of mass shootings are unlikely to survive Second Amendment challenges.

The implications of this conundrum cannot be overstated. In March 2018, for the first time in American history, a Justice of the U.S. Supreme Court openly and publicly advocated for “the repeal of the Second Amendment.”<sup>203</sup> The drive to meaningfully reduce the horrors of Newtown, Orlando, Las Vegas, and Parkland may be on a collision course with our Constitution.

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topics/world-war-ii/world-war-ii-history (last updated June 11, 2019) (“[T]he U.S. Pacific Fleet won the Battle of Midway in June 1942, which proved to be a turning point in the war.”).

200. Amy Garrett, *Helping Europe Help Itself: The Marshall Plan*, 95 FOREIGN SERV. J. 26, 26–30 (2018).

201. *America’s Role in the World: Hearing Before the H. Comm. on Armed Servs.*, 115th Cong. 52 (2017) (statement of Madeleine K. Albright and Stephen J. Hadley) (“The international order America built and led has not been perfect, but it has coincided with a period of security and prosperity unmatched in human history.”); Michael Cohen, *Peace in the Post-Cold War World*, ATLANTIC (Dec. 15, 2011), <https://www.theatlantic.com/international/archive/2011/12/peace-in-the-post-cold-war-world/249863>.

202. German Lopez, *How Gun Control Works in America, Compared with 4 Other Rich Countries*, VOX (Mar. 14, 2018, 9:48 AM), <https://www.vox.com/policy-and-politics/2015/12/4/9850572/gun-control-us-japan-switzerland-uk-canada>.

203. John Paul Stevens, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.