

## NOTE

### MOVING BEYOND THOUGHTS AND PRAYERS: A NEW AND IMPROVED FEDERAL ASSAULT WEAPONS BAN

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#### ABSTRACT

*The United States is infamous for its high levels of gun violence and a significant number of mass shootings. Each time the United States experiences a new mass shooting, public debates arise on changing US gun laws. Australia's strict gun laws that were enacted in response to a 1996 mass shooting are often used as an example of what the United States could do. Recently, New Zealand has been added to the discussion because it implemented strict gun laws within a week of mass shootings at two mosques in 2019. Critics opposing similar large-scale changes to gun laws in the United States argue that the United States is too different from these other countries to create successful reforms because of the Second Amendment and a strong gun culture. Yet, the federal government was not always reluctant to reform gun laws in response to mass shootings. The United States tried implementing large-scale change when it passed the Federal Assault Weapons Ban in 1994, but since its expiration in 2004, attempts to enact similar measures have failed. This Note proposes a new federal assault weapons ban that incorporates lessons from Australia, New Zealand, and past attempts for reform in the United States. This Note analyzes how the different approaches to gun control in Australia and New Zealand will likely fare in the United States by discussing each country's gun culture and history with guns, how these*

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*factors shape the various legal challenges to gun control in the United States, and considerations that must be accounted for when constructing a new ban. A new law formulated with these challenges in mind can achieve long-lasting success and make the United States safer.*

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### I. INTRODUCTION

Newtown, Connecticut. Parkland, Florida. Aurora, Colorado. Route 91 Harvest Music Festival. Tree of Life Synagogue. Emanuel African Methodist Episcopal Church. Pulse nightclub. These are all towns, events, and places that have gained notoriety as scenes of mass shootings<sup>1</sup> in the United States.<sup>2</sup> Mass shootings, specifically in schools, are alarmingly frequent in the United States. Critics claim that each time such a tragedy occurs, federal officials respond with thoughts and prayers, and take minimal action to prevent similar events in the future.<sup>3</sup>

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1. There is no official consensus on the definition of “mass shooting,” but this Note will use the definition suggested by Louis Klarevas: “any violent attack that results in four or more individuals incurring gunshot wounds.” LOUIS KLAREVAS, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS 48 (2016).

2. See Mark Follman et al., *US Mass Shootings, 1982-2020: Data from Mother Jones’ Investigation*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/> [https://perma.cc/ES93-FLX4]; see also FED. BUREAU OF INVESTIGATION, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES FROM 2000-2018 15-16, 21, 23, 27, 29, 31 (2018).

3. See Jaclyn Schildkraut & Collin M. Carr, *Mass Shootings, Legislative Responses, and Public Policy: An Endless Cycle of Inaction*, 69 EMORY L.J. 1043, 1045-46 (2020).

The federal government did not always act this way. It enacted the Federal Assault Weapons Ban of 1994 (“AWB”) in response to an increase in mass shootings in the United States.<sup>4</sup> An “assault weapon,” as defined by the AWB, is a semiautomatic weapon that requires the trigger to be pulled for each shot which then automatically loads the next bullet into the chamber.<sup>5</sup> The law was flawed, as it contained many loopholes that allowed people to circumvent its restrictions,<sup>6</sup> but it was still a step in the right direction. Even with its shortcomings, the AWB was effective in achieving its goal of curtailing mass shootings.<sup>7</sup>

Since the AWB’s expiration, whenever the United States has experienced a mass shooting, public discourse focused on what laws should change and the practicality of such reforms.<sup>8</sup> Attention often turns to Australia’s approach,<sup>9</sup> which famously reacted to the 1996 Port Arthur massacre with swift large-scale gun law reform.<sup>10</sup> Recently, New Zealand also became an exemplar of gun reform.<sup>11</sup> Within a week of two mass shootings at two mosques in Christchurch in 2019, New Zealand’s government

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4. CONG. RSCH. SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 3 (2013) [hereinafter CONG. RSCH. SERV.]; see also Meagan Kelly, *How Can You Ban What Doesn’t Exist? Redefining the “Assault Weapon,”* 12 DREXEL L. REV. 331, 346 (2020).

5. See Kelly, *supra* note 4, at 337-38.

6. CONG. RSCH. SERV., *supra* note 4, at 4-5.

7. KLAREVAS, *supra* note 1, at 243. There were nineteen mass shootings with 155 deaths in the decade before the AWB, and thirty-four with 302 deaths in the ten years after the ban expired. During the ten years the ban was in place, there were only twelve mass shootings with eighty-nine deaths, and no mass shootings in the first five years it was in effect. It is plain from this data that a ban on the weapons commonly used in the deadliest shootings can indeed decrease the frequency of mass shootings and their lethality. See *id.*

8. See Michael Luca et al., *The Impact of Mass Shootings on Gun Policy* 2 (Harv. Bus. Sch., Working Paper No. 16-126, 2019).

9. See Jonathan Weg, Note, *We Don’t Come from a Land Down Under: How Adopting Australia’s Gun Laws Would Violate the Second Amendment of the U.S. Constitution*, 24 CARDOZO J. INT’L & COMP. L. 657, 658 (2016).

10. In 1996, there was a mass shooting in Port Arthur, Tasmania where thirty-five people were killed. It spurred the Australian government to quickly implement changes to its gun laws. See discussion *infra* Section II.A.3.

11. See Sandi Sidhu & Helen Regan, *Assault Rifles to be Banned in New Zealand in Aftermath of Massacre, Prime Minister Announces*, CNN (Mar. 21, 2019, 5:36 AM), <https://www.cnn.com/2019/03/20/asia/new-zealand-christchurch-gun-ban-intl/index.html> [https://perma.cc/98SC-KAH4]; see also *A Closer Look at New Zealand’s New Weapons Ban*, FOX NEWS (Mar. 21, 2019), <https://www.foxnews.com/world/a-closer-look-at-new-zealands-new-weapons-ban> [https://perma.cc/JKL6-T3ZQ].

announced a plan to ban the weapons used in the attacks.<sup>12</sup> Gun rights advocates argue that the United States cannot enact similar measures because of its strong gun culture and constitutional protection of the right to bear arms under the Second Amendment.<sup>13</sup> The AWB's previous existence, however, demonstrates the opposite. The challenges posed by the American relationship with guns and the Second Amendment are not insurmountable.

This Note proposes a new federal assault weapons ban that addresses the shortcomings of the AWB by applying lessons from Australia, New Zealand, and states in the United States that have successfully banned the weapons commonly used in mass shootings. This proposed law's narrow and specific goal is to prevent mass shootings, rather than to ban all guns or to stop all gun violence. It recognizes that gun ownership for the sake of self-defense is a constitutional right.<sup>14</sup> The proposed law does not intend to infringe upon that right. Rather, it intends to narrow the right for the sake of public safety. Mass shootings are rare events that comprise only a small percentage of the overall gun-related deaths in the United States, given that other forms of gun violence occur daily.<sup>15</sup> Gun violence in its entirety must be addressed, and this Note suggests that stopping mass shootings can be the first step in a national campaign to end widespread gun violence in the United States.

Part II reviews the histories of gun uses, controls, and cultures in Australia, New Zealand, and the United States. It demonstrates how each country's history shapes its culture, and how the combined effects of history and culture influence gun laws in those countries today on both local and national levels. It also discusses the events in Australia and New Zealand that sparked their widespread reforms and how those reforms

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12. See Sidhu & Regan, *supra* note 11; *A Closer Look at New Zealand's New Weapons Ban*, *supra* note 11.

13. See Katie Beck, *Are Australia's Gun Laws the Solution for the US?*, BBC NEWS (Oct. 4, 2017), <https://www.bbc.com/news/world-australia-35048251> [<https://perma.cc/7WLF-EEVC>]; see also A. Odysseus Patrick, *Australia's Gun Laws are Not a Model for America*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/opinion/australias-gun-laws-america.html> [<https://perma.cc/6XVN-K8SR>].

14. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

15. See Schildkraut & Carr, *supra* note 3, at 1045.

struggled and succeeded. Part III discusses the legal challenges to an assault weapons ban in the United States (including the decision in *District of Columbia v. Heller*), issues of clarity when defining “assault weapon,” and how to handle the banned weapons. Part IV proposes a new ban that is narrowly tailored and combines various aspects of the AWB, the Australia approach, the New Zealand approach, and state laws.

## II. THE HISTORIES AND CULTURES SHAPING FIREARM LAWS

Context is key to understanding what the United States can or cannot adopt from the gun laws of other countries. A country’s history with firearms and its gun culture are strong predictors of the type of firearm regulations that its population will accept.<sup>16</sup> This trend becomes clear when comparing the gun cultures and histories of Australia, New Zealand, and the United States, and how each country has implemented different degrees of gun control. It is appropriate to compare the United States to Australia and New Zealand, because each country’s swift reforms in the wake of mass shootings made them prime examples of an effective way to respond to gun violence.<sup>17</sup> Section II.A discusses Australia’s gun culture, its history with guns, and the Port Arthur massacre—the triggering event for large-scale gun reform in the country. Section II.B discusses New Zealand’s gun culture, its history with guns, and the immediate action after the attacks in Christchurch. Section II.C discusses American gun culture, the history of guns in the United States, and past attempts at gun regulation.

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16. See Mark Finnane, *Gun Control in a Strong State: The Legal Regulation of Firearms in Australia*, LAW & HIST.: J. THE AUSTRAL. & N.Z. L. & HIST. SOC’Y 56, 57-58 (2014).

17. See Weg, *supra* note 9, at 658 (explaining how the options for gun law reforms in the United States are often compared to what Australia did); see also Rhiannon Hoyle & Rob Taylor, *New Zealand Models Guns Clampdown on Australian Experience*, WALL ST. J. (Mar. 21, 2019, 6:52 AM), <https://www.wsj.com/articles/new-zealands-plan-to-clamp-down-on-guns-mirrors-australias-experience-11553165562> [https://perma.cc/5X7J-W6V7] (examining the differences between the United States and New Zealand that create barriers to similar reforms); Nicholas Kristof, *New Zealand Shows the U.S. What Leadership Looks Like*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/new-zealand-gun-control.html> [https://perma.cc/FF7A-BKJB] (explaining how the United States can be inspired by New Zealand and change its gun laws).

## A. Australia

### 1. Gun Culture

Even though Australians have possessed firearms since the country's early history, Australian gun culture does not place the same value on guns as American gun culture does.<sup>18</sup> Unlike in the United States, there is no right to bear arms under the Australian constitution, which greatly impacts the way Australians perceive the use and possession of guns.<sup>19</sup> Australian gun owners understand that owning a gun is a privilege that their government can eliminate.<sup>20</sup> Guns are not a symbol of an individual liberty.<sup>21</sup> Rather they are simply possessions, no different from cars or clothing. Because owning a gun in Australia is a privilege and not a right, the implementation of gun regulations faces fewer challenges, despite resistance from small factions of gun rights enthusiasts.<sup>22</sup>

Australian gun owners, like many US gun owners, associate gun ownership with sportsmanship and an appreciation for the machine's mechanics.<sup>23</sup> Shooting for sport is popular in Australia, and for many Australian gun owners their appreciation of guns is rooted in sport.<sup>24</sup> This distinct passion for guns as a sporting apparatus rather than a weapon is palpable in Australian society given the cultural value placed on sportsmanship.<sup>25</sup> Additionally, many Australian gun owners value guns for their mechanics.<sup>26</sup> Through their ownership, they come to appreciate the intricate dynamics of a gun's construction and utility.<sup>27</sup> For many gun owners, this appreciation for the physical characteristics brings a

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18. See Abigail Kohn, *The Wild West Down Under: Comparing American and Australian Expressions of Gun Enthusiasm*, 16 J. ON FIREARMS & PUB. POL'Y 179, 198-99 (2004).

19. See Finnane, *supra* note 16, at 58.

20. See Kohn, *supra* note 18, at 200.

21. See *id.*

22. Cf. *id.* (explaining that Australian gun owners do not want to resist gun control legislation because they know their ownership is a privilege and not protected by any rights, which means any resistance would not have much power).

23. See *id.* at 192; see also Martin Maccarthy, *Australian Gun Culture, a Rich Web of Meaning*, 10 ASIA-PACIFIC ADVANCES IN CONSUMER RSCH. 391, 394 (2012).

24. Kohn, *supra* note 18, at 192.

25. See *id.* at 192, 199.

26. See Maccarthy, *supra* note 23, at 393.

27. See *id.* at 393-94.

sense of strength and empowerment.<sup>28</sup> Importantly, there is no connection in mainstream Australian gun culture between guns and self-defense, as that is not an acceptable reason for gun ownership under Australian law.<sup>29</sup> Accordingly, even if gun owners feel empowered by their weapons, they are not quick to reveal that sentiment.<sup>30</sup>

Even though the right to bear arms is not specifically protected in Australia, groups resistant to gun control still advocate for its protection. Their influence, however, is nowhere near that of the National Rifle Association (“NRA”) in the United States.<sup>31</sup> Australian groups have been inspired by the NRA with some arguing that guns do not kill people, people kill people.<sup>32</sup> Yet, the legal challenges that gun advocates bring continuously fail because there is no support from a legally cognizable right of gun ownership.<sup>33</sup> Gun rights advocates have argued that the right to bear arms in Australia comes from the 1689 English Bill of Rights, a provision adopted from when Australia was ruled by England.<sup>34</sup> Each time this argument has been employed, Australian courts have rejected it, emphasizing that there is, in fact, no right to bear arms under Australian law.<sup>35</sup>

Notably, most Australians accept gun regulations.<sup>36</sup> While gun owners are not in favor of all gun control laws, many of them recognize that the government can legitimately enact such laws and that they are important for maintaining public safety.<sup>37</sup> The overall belief in Australian culture is that strict gun control is

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28. *See id.* at 393.

29. Kohn, *supra* note 18, at 195. *See also* MacCarthy, *supra* note 23, at 393.

30. *See* MacCarthy, *supra* note 23, at 393; *see also* Ricardo N. Cordova, *The Tree’s Acorns and Gun’s Clips: The Battle Between Gun Control Advocates and the Constitutions of the United States, Ireland, and Australia*, 10 *CHI.-KENT J. INT’L & COMP. L.* 1, 28 (2010).

31. *See* Finnane, *supra* note 16, at 72-75.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.* Martin Essenberg argued that he did have a right to bear arms from the 1689 Bill of Rights, but the High Court of Australia rejected his argument. *Id.*

36. *See Essential Report: Gun Laws*, ESSENTIAL RSCH. (Mar. 27, 2018), <https://essentialvision.com.au/gun-laws-3> [<https://perma.cc/RA9V-95MQ>]. As of 2018, sixty-two percent of Australians approve of Australia’s gun laws, with twenty-five percent believing they are too weak. *Id.*

37. *See* Kohn, *supra* note 18, at 196.



ultimately a social good.<sup>38</sup> Australians' ability to reconcile their appreciation for guns with a tolerance for gun control comes from an enduring trend of gun use and regulation in Australian history.

## 2. Guns Throughout Australian History

Guns are a fixture of Australian history.<sup>39</sup> Firearms were used throughout the colonial period, including in conflicts with indigenous people and settling the Australian frontier.<sup>40</sup> In addition to controlling people, firearms were—and continue to be—used in agriculture to control livestock and to repel predators and vermin.<sup>41</sup> These uses were not connected to an underlying desire to protect Australian freedom from colonial rule because, unlike in the United States, Australia's twentieth century transition from an English colony to an independent nation was largely peaceful.<sup>42</sup> Accordingly, early Australians did not feel the need to arm themselves to fight for independence from English rule.<sup>43</sup>

Despite the ubiquity of firearms during that time, early Australians accepted regulations on their firearms as changing conditions necessitated. Sydney, one of Australia's largest cities, was originally conceived as a penal colony.<sup>44</sup> Sydney's earliest settlers were convicts and the military personnel charged with their supervision.<sup>45</sup> Regulations prohibited specific groups, including convicts, from possessing firearms of any type.<sup>46</sup>

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38. See Philip Alpers & Zareh Ghazarian, *The 'Perfect Storm' of Gun Control: From Policy Inertia to World Leader*, in *SUCCESSFUL PUBLIC POLICY: LESSONS FROM AUSTRALIA AND NEW ZEALAND* 207, 226 (Joannah Luetjens, Michael Mintrom, & Paul Hart eds., 2019).

39. See Kohn, *supra* note 18, at 183; see also Finnane, *supra* note 15, at 61.

40. See Kohn, *supra* note 18, at 183-84, 191. It should be noted, however, that the conflicts with indigenous people in Australia were not as volatile as those between New Zealand's colonists and New Zealand's indigenous population. See Finnane, *supra* note 16, at 65.

41. See Kohn, *supra* note 18, at 183. Australia's National Firearms Agreement of 1996 even includes exceptions to certain parts of the ban for weapons used to control vermin and other dangerous animals, highlighting this important use. Cf. PHILIP ALPERS & AMÉLIE ROSSETTI, *FIREARM LEGISLATION IN AUSTRALIA 21 YEARS AFTER THE NATIONAL FIREARMS AGREEMENT* 7 (2017).

42. See Cordova, *supra* note 30, at 30.

43. See *id.*

44. Finnane, *supra* note 16, at 62.

45. See *id.*

46. *Id.* at 64.

Additional firearm regulations, such as mandatory registration, were important to maintaining order.<sup>47</sup> Widespread firearms use did not affect Australians' willingness to accept controls to preserve stability.<sup>48</sup> By establishing gun control as a norm in Australian culture, these early regulations set the foundation for modern reforms that would strictly limit gun ownership.<sup>49</sup>

Still, not all Australians welcomed regulation. Gun lobbyists fought for limits on gun control in the 20th century.<sup>50</sup> Australia experienced increased gun violence in the 1980s-1990s, and the federal government struggled to find an effective national solution as the power to regulate guns is mainly vested in the states.<sup>51</sup> The federal government funded research to develop policies that could be widely implemented, but the proposed policies encountered resistance from groups opposed to regulation.<sup>52</sup> Moreover, the country experienced a divisive split on gun control. Support for gun control was mainly found in metropolitan areas. In contrast, governments from rural states, where gun use and ownership was more concentrated, rejected any such proposals.<sup>53</sup> Despite this tension between those advocating for gun control and those opposing it, the 1996 Port Arthur massacre ultimately rallied Australian states around the common cause of ending gun violence.

### 3. The Port Arthur Massacre and the National Firearms Agreement of 1996

On April 8, 1996, Martin Bryant used two semiautomatic weapons with high-capacity magazines to kill thirty-five people and injure twenty-three more in Port Arthur, Tasmania.<sup>54</sup> Bryant was not a licensed gun owner, but Tasmanian firearm laws at the

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47. *See id.* at 62.

48. *See id.* at 63-64.

49. *Id.* at 60.

50. *Id.* at 66-67.

51. Alpers & Ghazarian, *supra* note 38, at 208-13.

52. Finnane, *supra* note 16, at 67.

53. Alpers & Ghazarian, *supra* note 38, at 212. When there was a stalemate in the gun control debate at the time, the premier of New South Wales Barrie Unsworth said, "It will take a massacre in Tasmania before we get gun law reform in Australia." Little did he know how true this statement would become a few years later. *Id.*

54. KLAREVAS, *supra* note 1, at 246.

time made it easy for him to acquire these weapons.<sup>55</sup> The attack shocked the nation and quickly prompted calls from the public, politicians, and the media for the government to take action to ensure that a similar event would not occur in the future.<sup>56</sup> The federal government responded within twelve days with the National Firearms Agreement of 1996 (“NFA”).<sup>57</sup> Australia, like the United States, has a federalist system, which limits the ability of the federal government to enact broad gun control regulations, instead delegating that power to each state and territory.<sup>58</sup> Accordingly, the federal government could not enact regulations on the federal level, but it could encourage uniform reforms for all states to adopt.<sup>59</sup> Drafted by the Australasian Police Ministers Council, the NFA proposed ten resolutions for gun control including, *inter alia*, bans on specific firearms and firearm parts, an effective nationwide registration system, and approved “genuine” reasons for possessing a firearm, which are discussed below.<sup>60</sup> The NFA’s terms were drafted as explicitly as possible to minimize doubt as to its scope.<sup>61</sup>

Among the weapons and parts banned from public acquisition and ownership were the semiautomatic weapons and high-capacity magazines used in the Port Arthur massacre.<sup>62</sup> Legitimate uses—such as military, law enforcement, and feral animal extermination—were exempt from the ban.<sup>63</sup> Every state and territory in Australia agreed to the proposals and immediately began reforming their laws accordingly.<sup>64</sup> The Australian government established a buyback program and used

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55. Alpers & Ghazarian, *supra* note 38, at 208.

56. *Id.* at 209, 218-19.

57. See KLAREVAS, *supra* note 1, at 246.

58. See Alpers & Ghazarian, *supra* note 38, at 213.

59. See *id.* (the Australasian Police Ministers council was established to develop proposals for consistent gun laws throughout Australian states and territories).

60. See *id.* at 219-20.

61. See ALPERS & ROSSETTI, *supra* note 41, at 7-8 (the specificity of the proposal’s language shows exactly what is and is not included in the ban).

62. Alpers & Ghazarian, *supra* note 38, at 219 (explaining which weapons were banned); see also KLAREVAS, *supra* note 1, at 246 (detailing how Bryant used two semiautomatic weapons with high-capacity magazines to commit the shooting).

63. ALPERS & ROSSETTI, *supra* note 41.

64. See Alpers & Ghazarian, *supra* note 38, at 219.

funds from a new Medicare tax to buy approximately 650,000 banned weapons from Australian citizens.<sup>65</sup>

It was not difficult for Australian Prime Minister John Howard to garner support for these changes, as the media adamantly emphasized the need for substantial change, which continued to fuel widespread public support.<sup>66</sup> Additionally, Prime Minister Howard worked with politicians from other parties to show the public that gun control was a national concern.<sup>67</sup> Nonetheless, not all Australians approved of these changes, particularly those residing in rural regions.<sup>68</sup> These residents often used guns for lawful purposes on their farmland and felt that they were being attacked and misunderstood by the national government.<sup>69</sup> In response to the NFA, the largest pro-gun rally in Australian history was held in Melbourne weeks after the NFA was announced.<sup>70</sup>

Despite this opposition, each state and territory successfully implemented the proposed reforms.<sup>71</sup> Nevertheless, resistance has persisted over the years as anti-gun control politicians have gained power.<sup>72</sup> Some states have amended the strict laws enacted in 1996 to make them more lenient, but overall, Australia has managed to maintain strong control over gun possession and use.<sup>73</sup> In 1996, there were an estimated 17.59 civilian owned firearms per 100 people, and in 2016, there were 13.70 per 100 people.<sup>74</sup> Most importantly, there has not been a single mass shooting in Australia since April 8, 1996.<sup>75</sup>

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65. KLAREVAS, *supra* note 1, at 246; *see also* Weg, *supra* note 9, at 682-83.

66. *See* Alpers & Ghazarian, *supra* note 38, at 219.

67. *See id.* at 221.

68. *See id.* at 222.

69. *See id.* at 222, 224.

70. *Id.* at 224. Approximately 60,000 people attended the rally. *Id.*

71. *See id.*

72. *See id.* at 223.

73. *See* ALPERS & ROSSETTI, *supra* note 41, at 4; *see also* Alpers & Ghazarian, *supra* note 38, at 226.

74. Philip Alpers & Michael Picard, *Australia — Gun Facts, Figures and the Law*, SYDNEY SCH. PUB. HEALTH, U. SYDNEY, GUNPOLICY.ORG, <https://www.gunpolicy.org/firearms/region/australia> [<https://perma.cc/MN2B-2TJ5>] (last visited Oct. 2, 2020).

75. *The Effects of the 1996 National Firearms Agreement in Australia on Suicide, Violent Crime, and Mass Shootings*, RAND CORP. (Mar. 2, 2020), <https://www.rand.org/research/gun-policy/analysis/essays/1996-national-firearms-agreement.html> [<https://perma.cc/QEG2-U9WW>].

The NFA was successful because the Australian government was prepared to react to a situation that would prompt widespread demand for gun control, as the Port Arthur massacre did.<sup>76</sup> Even though legislators could not garner the necessary support to pass national gun control when violence increased in the 1980s, the research that the government had funded regarding gun violence and countermeasures was key to the quick response.<sup>77</sup> The government was ready with a practical, effective, and comprehensive plan for the profound improvement of gun control for years prior to Port Arthur, but it needed a galvanizing event to prompt a public call for reform.<sup>78</sup> Unlike in the United States, mass shootings were not a common occurrence in Australia, which allowed the shock value and anger following the Port Arthur massacre to have a deep impact on a nation that had not accepted such tragedies as an everyday occurrence.<sup>79</sup>

As demonstrated by its history, Australia has long embraced limited gun use. This history has shaped the Australian attitude about gun use, creating a culture open to gun control when necessary. Such attitudes allowed Australia to become, and to continue to be, an international paradigm for how to respond to gun violence.<sup>80</sup>

## *B. New Zealand*

### *1. Gun Culture*

New Zealanders love guns.<sup>81</sup> New Zealand is ranked number seventeen among the top twenty-five countries with the most heavily armed civilians.<sup>82</sup> This sentiment, however, has not manifested itself in a gun culture like that in the United States.<sup>83</sup> As in Australia, New Zealand does not have a constitutional right

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76. See Alpers & Ghazarian, *supra* note 38, at 217.

77. See *id.* at 216-17; see also Finnane, *supra* note 16, at 68.

78. Alpers & Ghazarian, *supra* note 38, at 218.

79. See Weg, *supra* note 9, at 684.

80. See Alpers & Ghazarian, *supra* note 38, at 211.

81. Cf. AARON KARP, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS, SMALL ARMS SURVEY 4 (2018).

82. *Id.*

83. See Dylan S. McLean, *Guns in the Anglo-American Democracies: Explaining an American Exception*, 53 COMMONWEALTH AND COMP. POL. 233, 240-41 (2015).

to bear arms.<sup>84</sup> New Zealanders mainly use guns for sport, hunting, and rural living, without any cultural belief that guns are necessary for self-defense.<sup>85</sup> Even New Zealand police officers do not carry guns—a rare phenomenon in today’s world.<sup>86</sup> This fact proves to New Zealanders that guns are not necessary for self-defense, and that sentiment influences the country’s gun culture in a unique way.<sup>87</sup> Once the correlation between personal safety and guns is removed, the perception that remains for New Zealanders is that guns are only meant to be used for recreation or for one’s job, if necessary.<sup>88</sup>

Like the United States, New Zealand has active gun lobbies, the largest being the Council of Licensed Firearms Owners (“COLFO”).<sup>89</sup> These lobbies mainly represent gun owners from rural areas.<sup>90</sup> While they do not have as much political power as the NRA,<sup>91</sup> these groups have seen some success influencing lawmakers to oppose gun restrictions, arguing, *inter alia*, that gun

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84. See William K. Hastings, *International Perspectives on Gun Control*, 15 N.Y. L. SCH. J. INT’L & COMP. L. 265, 266 (1995).

85. See *id.* at 265; see also McLean, *supra* note 82, at 240-41.

86. See Hastings, *supra* note 84, at 265. Only eighteen countries have unarmed police forces. See Niall McCarthy, *Where are the World’s Unarmed Police Officers?*, STATISTA (June 23, 2020), <https://www.statista.com/chart/10601/where-are-the-worlds-unarmed-police-officers/> [https://perma.cc/G4Y3-M3X7].

87. See Mclean, *supra* note 83, at 241.

88. See *id.*

89. See Brendan Cole, *Gun Control Efforts Have Stalled, One Year After the Christchurch Mosque Killings*, NEWSWEEK (Mar. 13, 2020, 6:00 AM), <https://www.newsweek.com/2020/03/13/gun-control-efforts-have-stalled-one-year-after-christchurch-mosque-killings-1492069.html> [https://perma.cc/Y6FS-8EFN]; see also *About COLFO*, COLFO, <https://www.colfo.org.nz/about-colfo> [https://perma.cc/5YD3-ZECE] (last visited Jan. 13, 2021).

90. See The World Today, *Gun Lobby Dictates Policy in New Zealand: Philip Alpers*, ABC NEWS (Mar. 18, 2019, 12:26 PM), <https://www.abc.net.au/radio/programs/worldtoday/gun-lobby-dictates-policy-in-new-zealand-philip-alpers/10911646> [https://perma.cc/T9ZJ-QMSC]; see also Rick Noack & Shibani Mahtani, *Why New Zealand Can Do What the U.S. Hasn’t Been Able To: Change Gun Laws in the Face of Tragedy*, WASH. POST (Mar. 18, 2019, 7:18 AM), <https://www.washingtonpost.com/world/2019/03/18/why-new-zealand-can-do-what-us-hasnt-been-able-change-gun-laws-face-tragedy> [https://perma.cc/LG97-H3ZP].

91. See Susanna Every-Palmer et al., *The Christchurch Mosque Shooting, the Media, and Subsequent Gun Control Reform in New Zealand: A Descriptive Analysis*, 27 PSYCHIATRY, PSYCH. & LAW 1, 8 (2020).

control is an “inconvenience” due to the limits on gun ownership and use.<sup>92</sup>

New Zealand has a pervasive gun culture, but that culture does not lend itself to a heated national gun debate because New Zealanders do not believe that guns are necessary for personal safety.<sup>93</sup> A gun culture that values guns for their recreational use, as opposed to their combative utility, is key for creating an environment largely open to reforms when necessary. New Zealand’s history with gun use and control illustrates why this issue is not as contentious as in other countries.

## 2. Guns Throughout New Zealand’s History

Throughout New Zealand’s history with firearms, the government has attempted to implement regulations when firearms threatened public safety, but enforcement has been largely disregarded in times of peace.<sup>94</sup> Firearms were common in New Zealand in the 19th and 20th centuries, but regulations fluctuated in how they were enacted and enforced.<sup>95</sup> During the colonial era, the government imposed strict firearm regulations on the indigenous Māori population because colonists feared violent conflicts.<sup>96</sup> The fear of an armed Māori revolt was so pronounced that selling firearms to the Māori people was punishable by death.<sup>97</sup> Yet, once threats of such conflicts subsided and the Māori people lost interest in possessing their own firearms, these laws were no longer as stringently enforced.<sup>98</sup>

Early 20th century attempts to regulate firearms were largely ignored and unenforced because most of New Zealand was composed of rural open expanses whose inhabitants needed

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92. See *The World Today*, *supra* note 90, 03:40; see also Noack & Mahtani, *supra* note 90; Derek Cheng, *Safety Expert Says Gun Lobby is Fighting for Right Not to be Inconvenienced*, N.Z. HERALD (Feb. 27, 2020, 11:00 AM), [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12311958](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12311958) [<https://perma.cc/C249-JADX>].

93. See Mclean, *supra* note 83, at 241.

94. See THE L. LIBR. OF CONG., FIREARMS-CONTROL LEGISLATION AND POLICY 150 (2013).

95. See *id.*

96. See Finnane, *supra* note 16, at 65.

97. See *id.*

98. See T.M. THORP, REVIEW OF FIREARMS CONTROL IN NEW ZEALAND: REPORT OF AN INDEPENDENT INQUIRY COMMISSIONED BY THE MINISTER OF POLICE 10 (1997).

firearms to protect their land and hunt game.<sup>99</sup> Blatant disregard of regulations was not problematic, though, because by that time, the government was no longer concerned with controlling the Māori's access to guns, making the regulations' purpose a moot point.<sup>100</sup> This pattern of enforcing firearm regulations reoccurred when many World War I soldiers returned home with their weapons.<sup>101</sup> In response, New Zealand's government tried implementing restrictions through the Arms Act 1920, which included a registration requirement.<sup>102</sup> The government was concerned that people would use these weapons in a socialist revolution.<sup>103</sup> While the government was worried about possible civil unrest from political factions, there were not concerns about substantial criminal behavior to justify the burdensome registration requirements.<sup>104</sup> The police force was overwhelmed in its attempts to enforce registration requirements, and farmers and sports shooters pressured the government to reduce the restrictions.<sup>105</sup> Eventually, the government relented and eased enforcement.<sup>106</sup> Enforcement did not necessarily ebb because of resistance, but rather it was relaxed once corresponding threats subsided.<sup>107</sup>

Modern firearms legislation in New Zealand began with the Arms Act 1983. It established a licensing requirement for gun owners and eliminated the registration requirement from the Arms Act 1920 because the requirement was deemed too complicated to enforce.<sup>108</sup> Even though the police did not like

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99. See THE L. LIBR. OF CONG., *supra* note 94, at 150; see also THORP, *supra* note 97, at 10.

100. See THE L. LIBR. OF CONG., *supra* note 94, at 150.

101. See *id.*

102. See *id.*

103. See THORP, *supra* note 98, at 10-11.

104. See *id.* at 11.

105. See *id.*

106. See *id.*

107. See THE L. LIBR. OF CONG., *supra* note 94, at 150.

108. *Id.* at 151. This made New Zealand one of only three countries that did not have a registration requirement, along with the United States and Canada. See Merrit Kennedy, *In New Zealand Mass Shootings are Very Rare*, NPR (Mar. 15, 2019, 5:54 PM), <https://www.npr.org/2019/03/15/703737499/in-new-zealand-mass-shootings-are-very-rare> [<https://perma.cc/6GTU-ZTGL>]; see also Doug Stanglin, *How Gun Laws in a Dozen Countries Compare With New Zealand's New Ban On Semiautomatic Weapons*, USA TODAY (Mar. 24, 2019, 5:11 PM), <https://www.usatoday.com/story/news/2019/03/22/new->



how burdensome the old registration system was, they enforced the new licensing procedures, which required them to determine whether requestors were “fit and proper” to possess a gun.<sup>109</sup> The Arms Act 1983 has been amended twice since its enactment, with each amendment resulting from a public desire for change after an incident associated with gun violence.<sup>110</sup>

Both firearm use and control were common throughout New Zealand’s history, with restrictions as stringent as the government saw fit. Even without strict gun control enforcement, the country has experienced very little gun violence.<sup>111</sup> Gun deaths are rare in New Zealand, with only 167 gun-related deaths in the country between January 2004 and March 2019.<sup>112</sup> One likely explanation for these numbers is that New Zealanders do not associate guns with self-defense. Because of its relatively low levels of gun violence, New Zealand’s government did not see strict gun control as necessary until the veneer of its peaceful society was shattered in 2019.

### 3. The Christchurch Mosque Shootings and the Arms Order 2019

On March 15, 2019, Brenton Tarrant used five licensed weapons, including two semiautomatic firearms, to kill fifty-one people and injure forty-nine more in Al-Noor Mosque and Linwood Islamic Center in Christchurch, New Zealand.<sup>113</sup> Horrified by the atrocity, New Zealand citizens immediately called for government action. 65,000 New Zealanders signed petitions, New Zealand’s Police Association demanded changes to gun laws, retailers took weapons similar to those used in the attacks off their shelves, and gun rights organizations published

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zealand-mosque-shootings-how-12-countries-compare-weapons-ban/3235123002/  
[<https://perma.cc/J3YD-PWZ2>].

109. See THE L. LIBR. OF CONG., *supra* note 94, at 151, 155-56.

110. See Hastings, *supra* note 84, at 270. The 1992 Amendments were passed in response to the Aramoana massacre. See *id.* New laws were passed in 2019 after the Christchurch attacks. See discussion *infra* Section II.B.3.

111. See Every-Palmer et al., *supra* note 91, at 2.

112. See *id.* (importantly, this statistic excludes suicide deaths).

113. See Cole, *supra* note 89; see also Associated Press, *Death Toll from Christchurch Mosque Attacks Grows to 51 After Turkish Man Dies*, NBC NEWS (May 2, 2019, 9:34 PM), <https://www.nbcnews.com/news/world/death-toll-christchurch-mosque-attacks-grows-51-after-turkish-man-n1001476> [<https://perma.cc/TX5T-ETJH>].

statements claiming they would support legislation to prevent future tragic attacks.<sup>114</sup>

Less than a week after the attack, New Zealand Prime Minister Jacinda Ardern announced the Arms (Military Style Semi-Automatic Firearms) Order 2019 (“Arms Order”).<sup>115</sup> The Arms Order declared that semiautomatic weapons, specifically those used in the Christchurch attacks, would be categorized as military style semiautomatic firearms as defined under the Arms Act 1983.<sup>116</sup> Accordingly, such weapons are “restricted weapons,” and require specialized licenses, heightened safe storage procedures, and specific police permits for importation.<sup>117</sup> The Arms Order immediately went into effect while Prime Minister Ardern and New Zealand’s parliament continued to develop a more detailed law.<sup>118</sup>

On April 1, 2019, Prime Minister Ardern and New Zealand’s parliament introduced the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill (“Arms Amendment”).<sup>119</sup> The goal was to ban the semiautomatic weapons used in the Christchurch shootings to prevent future attacks and improve public safety.<sup>120</sup> The bill broadened the category of semiautomatic

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114. See Sidhu & Regan, *supra* note 11; *New Zealand PM Jacinda Ardern Announces Ban on “Military-Style” Semi-Automatic Weapons*, CBS NEWS (Mar. 21, 2019, 7:58 AM), <https://www.cbsnews.com/news/christchurch-shooting-jacinda-ardern-ban-on-semi-automatic-weapons-and-assault-rifles-2019-03-21> [https://perma.cc/2D86-LQDQ]; *Banning Semi-Automatic Weapons: 65,000 Sign Petition*, RNZ (Mar. 21, 2019, 1:02 PM), <https://www.rnz.co.nz/news/national/385255/banning-semi-automatic-weapons-65-000-sign-petition> [https://perma.cc/K65Z-QCS8]; COLFO, *Changes to Firearms Legislation*, FACEBOOK (Mar. 18, 2019), <https://www.facebook.com/colfonz> [https://perma.cc/6ZP5-P44V]; Press Release, Federated Farmers of New Zealand, *Federated Farmers Supports Toughening Up On Firearms* (Mar. 21, 2019).

115. See Arms (Military Style Semi-Automatic Firearms) Order 2019 (N.Z.).

116. *Id.*

117. See THE L. LIBR. OF CONG., *supra* note 94, at 159-60, 163.

118. See Cole, *supra* note 89; see also Rhiannon Hoyle, *New Zealand to Impose Sweeping Gun Ban After Christchurch Mosque Killings*, WALL ST. J. (Mar. 21, 2019, 2:00 AM), <https://www.wsj.com/articles/new-zealand-to-ban-military-style-semiautomatic-weapons-and-assault-rifles-11553134883> [https://perma.cc/L8Z3-28KY].

119. See Arms (Prohibited Firearms, Magazines, and Parts) 2019 (N.Z.).

120. See *id.* at 1; see also *New Zealand: Legislation Banning Certain Firearms, Magazines, and Parts Passed*, LIBR. CONG. (Apr. 17, 2019), [https://www.loc.gov/law/foreign-news/article/new-zealand-legislation-banning-certain-firearms-magazines-and-parts-passed/#:~:text=17%2C%202019\)%20On%20April%2010,used%20to%20assemble%20prohibited%20firearms](https://www.loc.gov/law/foreign-news/article/new-zealand-legislation-banning-certain-firearms-magazines-and-parts-passed/#:~:text=17%2C%202019)%20On%20April%2010,used%20to%20assemble%20prohibited%20firearms) [https://perma.cc/QSS9-EE5J].

firearms under New Zealand law.<sup>121</sup> It contained exceptions for licensed dealers, animal control, and museum collections.<sup>122</sup> The Arms Amendment became law on April 10, 2019, with only one dissenting vote in New Zealand's parliament.<sup>123</sup> Unlike Australia and the United States, New Zealand has a unitary government, making the national legislature's decisions binding on the states, without concerns that they must be tied to an enumerated federal power.<sup>124</sup> New Zealanders widely supported the Arms Amendment, with sixty one percent popular approval, and an additional nineteen percent of people believing the laws could have been stricter.<sup>125</sup>

In June 2019, the New Zealand government announced a buyback plan for the newly prohibited weapons.<sup>126</sup> Gun owners were given six months to give the government any prohibited weapons they possessed and adhere to the new registration requirements before they would be subject to criminal punishment pursuant to the Arms Amendment.<sup>127</sup> Despite widespread support for gun control in the immediate aftermath of the Christchurch attacks, New Zealand's gun lobbies and gun owners resisted the buyback program.<sup>128</sup> While gun lobbies and gun owners were willing to accept a certain degree of gun control,

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121. See Arms (Prohibited Firearms, Magazines, and Parts) 2019 (N.Z.).

122. *Id.* at 2.

123. See Cole, *supra* note 89; see also *Christchurch Shootings: New Zealand MPs Vote to Change Gun Laws*, BBC (Apr. 10, 2019), <https://www.bbc.com/news/world-asia-47878042> [<https://perma.cc/2JHE-Q73M>].

124. See Constitution Act 1986, pt. 3(15)(1) (N.Z.).

125. See Cole, *supra* note 89; see also Jason Walls, *The Majority of New Zealanders Think the New Gun Laws are About Right, According to a New Poll*, N.Z. HERALD (Apr. 16, 2019, 2:22 AM), <https://www.nzherald.co.nz/nz/the-majority-of-new-zealanders-think-the-new-gun-rules-are-about-right-according-to-a-new-poll/YFGV3MN5WGMEQXCKNHIZ2QXEHY/> [<https://perma.cc/6YY2-3PVX>].

126. See Cole, *supra*, note 89; see also Charlotte Greenfield, *NZ Launches Gun 'Buy-Back' Scheme for Weapons Banned After Christchurch Mosque Attacks*, REUTERS (June 19, 2019, 7:09 PM), <https://www.reuters.com/article/us-newzealand-shooting-guncontrol/nz-launches-gun-buy-back-scheme-for-weapons-banned-after-christchurch-mosque-attacks-idUSKCNITK36Q> [<https://perma.cc/N3A5-W4WZ>].

127. See Cole, *supra*, note 89; see also Matthew Schwartz, *New Zealand Passes Law Banning Most Semi-Automatic Weapons*, NPR (Apr. 10, 2019, 3:59 PM), <https://www.npr.org/2019/04/10/711820023/new-zealand-passes-law-banning-most-semi-automatic-weapons> [<https://perma.cc/SJ48-ETGV>]; Arms (Prohibited Firearms, Magazines, and Parts) 2019 (N.Z.) at 21 (explaining that someone could be subject to five years in prison for possessing a banned weapon).

128. See Cole, *supra*, note 89; see also Schwartz, *supra* note 127.

they resented the buyback program because they perceived it as an excessive government intrusion.<sup>129</sup>

As New Zealand's reforms are relatively new, their impact on gun ownership and violence will likely not become clear for several years.<sup>130</sup> Despite the lack of data, the proponents of the law hope that unlike past regulations, these new laws will be strictly and consistently enforced.<sup>131</sup> Considering how rare mass shootings are in New Zealand and the disbelief New Zealanders showed after the Christchurch attacks, it is likely that the country will vigorously enforce these laws to avoid a similar event in the future.<sup>132</sup>

### *C. United States*

#### 1. Gun Culture

Two factors contribute the most to the strong gun culture in the United States. First, there is a longstanding association between guns and American patriotism. Second, Americans value owning guns for self-defense. The influential gun lobby in the United States emphasizes these factors in their efforts to resist any controls on gun use.

##### a. Guns and American Freedom

The biggest barrier to large-scale gun control in the United States is the country's deep-rooted gun culture.<sup>133</sup> Guns empowered Americans in the country's early history, and the correlation between guns and personal freedom has continued to

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129. See Cole, *supra* note 89; see also Scott Neuman, *New Zealand's Plan to Buy Back Illegal Firearms Angers Gun Advocates*, NPR (June 20, 2019, 5:48 AM), <https://www.npr.org/2019/06/20/734303717/new-zealands-plan-to-buy-back-illegal-firearms-has-angers-gun-advocates> [<https://perma.cc/C5ZR-G93Y>].

130. When the United States' Federal Assault Weapons Ban of 1994 expired in 2004, a study was conducted on its effectiveness, and found that it was too soon to see the ban's impact. See CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003 1-3 (2004).

131. Cf. Every-Palmer et al., *supra* note 91, at 2-3.

132. *Id.*

133. See Nicholas Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem Article and Essay*, 43 WAKE FOREST L. REV. 837, 867 (2008).

influence the way Americans approach gun use and control.<sup>134</sup> Gun ownership and use in the United States is linked to an idealized narrative of fighting for American independence from the tyrannical British Crown. After independence, guns were necessary for settling the vast open countryside. Gun ownership, thus, became closely associated with patriotism.<sup>135</sup> For many American gun owners, then and today, owning and using guns is a symbol of freedom.<sup>136</sup>

American gun owners do not only associate their weapons with freedom, but also with personal safety. The Second Amendment grants Americans the right to bear arms for self-defense.<sup>137</sup> This constitutional right is a key feature of American gun culture and distinguishes the United States' approach to gun control from those of Australia and New Zealand.<sup>138</sup> Self-defense has been a prominent cultural value in the United States since its early formation.<sup>139</sup> American colonists wanted to break from British rule so that they would no longer be subject to the control of a tyrannical monarchy that did not have their best interest in mind.<sup>140</sup> American colonists succeeded in that struggle by using the force of their firearms to defend the liberties they desired.<sup>141</sup>

This distrust of the government persists today with many Americans believing that they cannot rely on government protection in a dangerous situation.<sup>142</sup> Individuals living in cities with high crime rates have reported feeling safer with a gun in their home.<sup>143</sup> Residents in rural areas know that it can take police

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134. See Kohn, *supra* note 18, at 187.

135. See Joseph Blocher, *Has the Constitution Fostered a Pathological Rights Culture? The Right to Bear Arms*, 94 B.U. L. REV. 813, 822-23 (2014).

136. See Kohn, *supra* note 19, at 187.

137. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). Specifically, the Second Amendment states, "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." U.S. CONST. amend. II.

138. See Maccarthy, *supra* note 23, at 393; see also McLean, *supra* note 83, at 241.

139. See ADAM WINKLER, *GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 107 (2011).

140. See *id.*

141. See *id.*

142. See Johnson, *supra* note 133, at 849.

143. Dick Heller brought his handgun home from his job as a security officer because he lived in a high-crime neighborhood. Shelly Parker bought a handgun for protection after she was threatened by drug dealers on her street. See WINKLER, *supra* note 139, at 42-43.

a long time to reach them if there is a threat and believe it is more efficient to handle the situation themselves.<sup>144</sup> In fact, sixty-seven percent of American gun owners cite protection as the main reason for owning a gun.<sup>145</sup>

It is important to note that not all American gun owners are the same in this respect.<sup>146</sup> Some own guns simply for self-defense, but others own them for recreational hunting, collection, ranching, or for a myriad of other purposes.<sup>147</sup> While many gun owners value their constitutional right, many also believe in a certain degree of gun control.<sup>148</sup>

#### b. The Gun Lobby

The deep-rooted associations of guns with personal liberty and self-defense combined with the constitutional sanction of gun ownership shape the rhetoric used by American gun rights advocates.<sup>149</sup> In response to gun reform proposals, regardless of their scope, gun enthusiasts often resort to the refrain that all reforms are broad attacks on the Second Amendment and allowing any reform to pass would be the first step to completely eliminating the constitutional right.<sup>150</sup> When the NRA resists gun control, it often invokes self-defense as an American value protected by the Constitution, framing gun restrictions as an attack on those values.<sup>151</sup> Rural gun owners who do not experience the same gun violence as their urban counterparts are especially resistant to gun restrictions.<sup>152</sup> To these gun owners, such limitations are tantamount to government infringement on their individual rights, which is a grave indiscretion.<sup>153</sup>

Money, along with this rhetoric, is a powerful resource for American gun advocates. Gun rights organizations, specifically

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144. See Johnson, *supra* note 133, at 849-50.

145. See John Gramlich & Katherine Schaeffer, *7 Facts about Guns in the U.S.*, PEW RSCH. CTR. (Oct. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states> [<https://perma.cc/E839-QD5F>].

146. See WINKLER, *supra* note 139, at 87.

147. See *id.*

148. See *id.*

149. Cf. Blocher, *supra* note 135, at 832-33.

150. See *id.* at 820.

151. See WINKLER, *supra* note 139, at 256.

152. See *id.* at 257.

153. See Johnson, *supra* note 133, at 850.

the NRA, are generous donors to politicians who support their agendas and resist gun control legislation, allowing these organizations' values to influence politics and lawmaking.<sup>154</sup> Gun-lobbyists hold substantial influence on the government, as demonstrated by their ability to bring about a funding freeze on federal government research related to gun violence and control that lasted for over twenty years.<sup>155</sup>

## 2. Guns Throughout American History

As in Australia and New Zealand, the history of guns in the United States is crucial to understanding its gun culture.<sup>156</sup> Firearms and laws regarding their use have existed in the United States since before its founding, the same way they have in Australia and New Zealand.<sup>157</sup> Even so, Americans' willingness to accept regulations on their constitutional right to bear arms has changed over time.

### a. Guns During the Early Development of the United States

The patriotic element of American gun culture is closely linked to the country's history with firearms.<sup>158</sup> During the colonial era in America, the British Crown tried to control colonists by confiscating firearms purportedly held in violation of England's 1689 Bill of Rights.<sup>159</sup> This conduct invigorated the colonists in their fight for independence from the British Crown, thereby associating American freedom with the right to bear arms.<sup>160</sup>

The British Crown's treatment of colonists and their guns directly influenced the United States codifying its commitment to protecting firearm ownership and use from undesired government control.<sup>161</sup> The US Constitution granted Congress

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154. See Schildkraut & Carr, *supra* note 3, at 1073-74.

155. See Jonathan M. Metz, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 866 (2018). For more on the freeze on research see discussion *infra* Section IV.B.1.

156. See Finnane, *supra* note 16, at 57-58.

157. See Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 56 (2017).

158. See Kohn, *supra* note 18, at 189.

159. See WINKLER, *supra* note 139, at 102-04.

160. See *id.* at 103.

161. Cf. *id.* at 107.

the power to control state militias, but that alarmed Americans who did not want their new government regulating their firearms in the same way as the overly controlling and powerful monarchy from which they had recently declared independence.<sup>162</sup> The desire to create a country free from overbearing government control also influenced state laws regarding firearms.<sup>163</sup> After the War of Independence, though many state constitutions included the “inalienable right” to bear arms, the founding generation wanted this right to be protected beyond the state level.<sup>164</sup> Out of all the proposed rights to be included in the US Constitution, the right to bear arms received the most support.<sup>165</sup> The Framers of the US Constitution strongly supported codifying a guarantee to gun rights because newly independent Americans did not want to give their national government the ability to disarm them the way the British had attempted to do.<sup>166</sup> Ultimately, the right to bear arms became a part of the nation’s foundational legal fabric through the ratification of the Second Amendment.<sup>167</sup>

The association of firearms with the protection of freedom influenced the continued use of weapons as well as ownership trends. Like those of Australia and New Zealand, America’s early colonial history saw the government using firearm laws to control indigenous populations.<sup>168</sup> The government enacted regulations to restrict Native American access to weapons so that it would be harder for them to resist American aggression.<sup>169</sup> American insecurity regarding the stability and strength of the new country fueled the desire for control.<sup>170</sup> This insecurity inspired a mandatory gun ownership policy for men of fighting age so that they could be ready at any moment to fight Europeans or Native Americans who would threaten the young and vulnerable country.<sup>171</sup>

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162. *See id.*

163. *See id.*

164. *See id.* at 107-08.

165. *See id.* at 108.

166. *See id.* at 110-11.

167. *See id.* at 109.

168. *See Spitzer, supra* note 157, at 57; *see also WINKLER, supra* note 139, at 113.

169. *See Spitzer, supra* note 157.

170. *See WINKLER, supra* note 139, at 113.

171. *See id.* Colonies usually required men to join the militia at age eighteen.



Limitations on gun access continued to neutralize groups perceived as a threat throughout American history.<sup>172</sup> Before the Civil War, slaves and freed blacks were not allowed to own guns because white Americans were afraid of slave revolts.<sup>173</sup> After the Civil War, the struggle between the North and the South on the issue of gun ownership for freed slaves centered on the individual power that such ownership would grant.<sup>174</sup> A century later, the Black Panther movement embraced the public perception of firearms and their strength as a symbol of personal power by openly displaying their guns to demand recognition and respect from the public.<sup>175</sup>

Though highly valued in early American development, firearms were not used extensively in American expansion into the Western frontier.<sup>176</sup> Popular culture often depicts frontier development as an effort to control the “Wild West”—a lawless dangerous land.<sup>177</sup> In reality, frontier towns were safe places.<sup>178</sup> Western towns prioritized growth and prosperity, and residents understood that gun violence would deter businesses and stifle the local economies.<sup>179</sup> Therefore, these towns enforced strict gun regulations that prohibited people from brandishing their weapons around towns.<sup>180</sup> Instead, it was the settlers travelling the open frontier between towns who needed guns because they were more likely to encounter criminals, animals, or hostile Native American tribes.<sup>181</sup> Still, these encounters were not the epic showdowns in the middle of towns outside the saloons as portrayed in old Western movies.<sup>182</sup> While guns were important for protection when travelling between towns, they were not the driving force in Western development. Rather, it was agricultural

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172. See Spitzer, *supra* note 157, at 57-58. Laws were imposed prohibiting Native Americans from acquiring guns because colonists were afraid of conflicts with Native American tribes. *Id.* at 57-58.

173. See WINKLER, *supra* note 139, at 132.

174. See *id.* at 136.

175. See *id.* at 237.

176. See *id.* at 164-65.

177. See *id.* at 162.

178. See *id.* at 164.

179. See *id.* at 171.

180. See Spitzer, *supra* note 157, at 66.

181. See WINKLER, *supra* note 139, at 165.

182. See *id.*

and commercial development that allowed the frontier to flourish.<sup>183</sup>

b. Modern Gun Control in the United States

The gun regulations previously described were all on the state level, but in the 1930s, the US federal government assumed a more prominent role in gun control.<sup>184</sup> During the 1920s and 1930s, mobsters escalated gun violence using the Tommy Gun, a submachine gun contemplated for use by the Allied forces in World War I.<sup>185</sup> When the manufacturer failed to complete production of the gun before the war ended, it shifted gears and decided to market the product to civilians instead of soldiers.<sup>186</sup> Mobsters, in particular, were attracted to the Tommy Gun because it was so powerful that one shot could cut a person in half.<sup>187</sup> Additionally, the interstate highway system and the growing popularity of automobiles increased access to the Tommy Gun.<sup>188</sup> As criminals could travel in their automobiles using the new highway system, they could easily transport their dangerous weapons, such as the Tommy Gun, across state lines.<sup>189</sup> Without fully developed radio systems, police forces in different states could not quickly warn each other to stop these criminals.<sup>190</sup> Consequently, increased death tolls and the lack of interstate resources to confront criminal behavior across state lines spurred a reaction from federal legislators.<sup>191</sup>

The National Firearms Act of 1934 was the first piece of federal gun control legislation in the United States.<sup>192</sup> The law, relying on Congress's taxing and spending power,<sup>193</sup> imposed a

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183. See Spitzer, *supra* note 157, at 65-66.

184. See WINKLER, *supra* note 139, at 187.

185. See *id.* at 191.

186. See *id.*

187. See *id.*

188. See *id.* at 193-94.

189. See *id.* at 194.

190. See *id.*

191. See *id.* at 193, 196.

192. See Spitzer, *supra* note 157, at 58.

193. U.S. CONST. art. I, § 8, cl. 1. The Taxing and Spending Clause grants Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States." This power affords Congress broad deference to tax and spend the money states are granted in order to maintain the general welfare of the country. See *South Dakota v. Dole*, 483

heavy tax on the manufacture and sale of firearms that were deemed particularly dangerous.<sup>194</sup> The law focused on weapons that were most frequently used by mobsters, such as machine guns and short-barreled rifles, because these weapons caused the most violence.<sup>195</sup> It also imposed a registration requirement for these weapons, mandatory background checks, and substantial fines for purchases by unlicensed buyers.<sup>196</sup> The high taxes alone deterred most people from buying these weapons.<sup>197</sup> Those who were not deterred by the price were often arrested for failing to comply with registration requirements, effectively eliminating the threat of “gangster” weapons.<sup>198</sup> The National Firearms Act had widespread national support—even from the NRA—because the act was presented as an attempt to stop the violent crimes plaguing the country.<sup>199</sup>

There has been other national legislation that tightened and loosened gun control since 1934, but the scope of this Note is limited to an analysis of the Assault Weapons Ban of 1994 (“AWB”). Congress passed the Public Safety and Recreational Firearms Act, otherwise known as the 1994 Federal Assault Weapons Ban, as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>200</sup> The AWB made it “unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.”<sup>201</sup> The act explicitly named and banned certain weapons, such as the Norinco, Action Arms Israeli Military Industries UZI, Beretta Ar70, and Colt AR-15.<sup>202</sup> Additionally, the AWB banned other weapons if they had at least two specified characteristics, such as a telescope stock or pistol grip.<sup>203</sup>

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U.S. 203, 207 (1987). When Congress uses this power to regulate the states, there must be (1) a relationship between the purpose of the funds and conditions Congress attaches, and (2) the conditions must be clear to the states and not unduly coercive. *See id.* at 207, 210.

194. *See Weg, supra* note 9, at 662.

195. *See id.*

196. *See id.*

197. *See WINKLER, supra* note 139, at 203.

198. *See id.*

199. *See id.* at 64, 198.

200. CONG. RSCH. SERV., *supra* note 4, at 3.

201. Violent Crime Control and Law Enforcement Act of 1994, PUB. L. NO. 103-322, § 110102(a), 108 STAT. 1796, 1996 (1994).

202. *See id.* § 110102(b).

203. *See id.*

Despite the long list of prohibitions, the AWB had many loopholes. There was a grandfather clause allowing people to keep banned weapons if the owner lawfully possessed the weapon at the time of enactment and had registered it with law enforcement.<sup>204</sup> Additionally, the law included a non-exhaustive list of approximately 650 sporting weapons that were exempt from the ban.<sup>205</sup> Consequently, any weapon not explicitly named was not necessarily banned, unless it was a “semiautomatic assault weapon,” defined as a semiautomatic rifle that can accept a detachable large-capacity magazine.<sup>206</sup> Most significantly, to secure enough votes for the AWB’s passage, the law’s drafters included a sunset provision holding that the law would expire after ten years, which it ultimately did in 2004.<sup>207</sup>

A new federal ban has not been enacted since the AWB’s expiration, notwithstanding efforts to do so after several tragic mass shootings.<sup>208</sup> For example, on December 14, 2012, Adam Lanza used four semiautomatic guns, twenty-four magazines—including twenty-two high-capacity magazines—and 530 rounds of ammunition, to kill twenty-six people in six minutes at Sandy Hook Elementary School in Newtown, Connecticut.<sup>209</sup> In response, Senator Dianne Feinstein, one of the drafters of the original AWB, introduced the Assault Weapons Ban of 2013.<sup>210</sup> The bill went further than the original AWB, proposing a single characteristic test (instead of the two-characteristic test delineated by its predecessor), imposing limitations on weapon modifications, banning importation of prohibited weapons, and

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204. See Kelly, *supra* note 4, at 347.

205. See CONG. RSCH. SERV., *supra* note 4, at 5.

206. See *id.* For more on the definition of an “assault weapon,” see discussion *infra* Section III.B.

207. See RAND CORP., *The Effects of Bans on the Sale of Assault Weapons and High Capacity Magazines* (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/analysis/ban-assault-weapons.html> [<https://perma.cc/XNT5-9WLH>]. See also Michael Luo & Michael Cooper, *Lessons in Politics and Fine Print in Assault Weapons Ban of ‘90s*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/2012/12/20/us/lessons-in-politics-and-fine-print-in-assault-weapons-ban-of-90s.html> [<https://perma.cc/LZ4X-DVG6>]; Ron Elving, *The U.S. Once Had a Ban on Assault Weapons—Why Did It Expire?*, NPR (Aug. 13, 2019, 1:06 PM), <https://www.npr.org/2019/08/13/750656174/the-u-s-once-had-a-ban-on-assault-weapons-why-did-it-expire> [<https://perma.cc/M49W-HER7>].

208. See Kelly, *supra* note 4, at 335.

209. KLAREVAS, *supra* note 1, at 17-18, 27.

210. See Kelly, *supra* note 4, at 334.

excluding a sunset provision.<sup>211</sup> Ultimately, the bill did not pass for many different reasons. Some Senators believed it would be ineffective and would greatly curtail the rights guaranteed by the Second Amendment.<sup>212</sup> Others feared repercussions from their constituents and did not believe public opinion widely supported such measures.<sup>213</sup>

Despite this bill's defeat on the federal level, on the state level there has been success in enacting and upholding similar bans.<sup>214</sup> Several states, including New York, Connecticut, and Massachusetts, passed or updated their own assault weapons bans following the enactment of the AWB to include similar measures, but these laws do not include sunset provisions and remain in effect today.<sup>215</sup> Just as Australia and New Zealand were prompted to make significant changes to their gun laws after national tragedies, many American states respond to mass shootings with legislation outlawing the specific weapons used in those attacks. For example, because of the Sandy Hook shooting, Connecticut, Maryland, and New York enacted stricter assault weapons bans

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211. See *Assault Weapons Ban of 2013*, U.S. SENATOR FOR CAL. DIANNE FEINSTEIN, <https://www.feinstein.senate.gov/public/index.cfm/assault-weapons-ban-summary> [<https://perma.cc/72VH-P9UJ>] (last visited Dec. 27, 2020).

212. See Richard Simon, *Senate Votes Down Feinstein's Assault Weapons Ban*, L.A. TIMES (Apr. 17, 2013, 12:00 AM), <https://www.latimes.com/politics/la-xpm-2013-apr-17-la-pn-dianne-feinstein-assault-weapons-vote-20130417-story.html> [<https://perma.cc/63WS-A9KP>]; see also Meghan Keneally, *How 15 Democrats Helped Tank the 2013 Assault Weapons Ban*, ABC NEWS (Oct. 5, 2017, 1:18 PM), <https://abcnews.go.com/Politics/15-democrats-helped-tank-2013-assault-weapons-ban/story?id=50275295> [<https://perma.cc/V5UY-USPX>]; Greg Henderson, *Assault Weapons Ban Is Gun Debate's First Casualty*, NPR (Mar. 19, 2013, 3:59 PM), <https://www.npr.org/sections/itsallpolitics/2013/03/19/174759440/assault-weapons-ban-is-gun-debates-first-casualty> [<https://perma.cc/5GCK-38TT>]. For more on the conflict between the Second Amendment and gun control, see the discussion *infra* Section III.A.

213. See Simon, *supra*, note 212; see also Keneally, *supra* note 212. For more on the discussion regarding how politicians' supporters influence their policy decisions, see discussion *infra* Section IV.B.3.

214. California, Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, New Jersey, and New York all have assault weapons bans. See *Hardware & Ammunition: Assault Weapons*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons> [<https://perma.cc/6EEC-B3ZS>] (last visited Oct. 7, 2020).

215. See *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 248 (2d Cir. 2015); *Worman v. Healey*, 922 F.3d 26, 31 (1st Cir. 2019).

that outlawed the type of weapons Lanza used in the shooting.<sup>216</sup> Gun rights activists challenged these laws and argued that the Second Amendment protected these weapons.<sup>217</sup> Nonetheless, the laws survived with federal courts holding that they did not violate the Second Amendment.<sup>218</sup>

Despite attempts at reform, gun ownership remains a popular endeavor in the United States. The estimated rate of civilian firearm ownership in the United States is 120.5 guns for every 100 residents.<sup>219</sup> As of 2017, thirty percent of Americans reported owning a gun.<sup>220</sup> Civilian-owned guns in the United States make up forty-six percent of all civilian-owned guns in the world.<sup>221</sup> These numbers do not account for the reported increases in gun sales since the onset of the COVID-19 pandemic.<sup>222</sup> American gun ownership is far above that of Australia and New Zealand. As of 2016, there were 13.7 guns for every 100 people in Australia.<sup>223</sup> As of 2017, New Zealand had 26.3 guns for every 100 residents.<sup>224</sup>

The United States has a rich history with guns, both in terms of their use and control.<sup>225</sup> As with those of Australia and New Zealand, this history informs American gun culture and the

216. *New York State Rifle & Pistol Ass'n*, 804 F.3d at 249-51; *see also* *Kolbe v. Hogan*, 849 F.3d 114, 120 (4th Cir. 2017).

217. *See, e.g., New York State Rifle & Pistol Ass'n*, 804 F.3d 242.

218. *See New York State Rifle & Pistol Ass'n*, 804 F.3d at 252-53 (holding that both laws were constitutional except for “New York’s seven-round limit, and Connecticut’s prohibition on the non-semiautomatic Remington 7615”); *see also Kolbe*, 849 F.3d at 146 (finding that the banned weapons are not even protected under the Second Amendment, therefore, the law is constitutional). For more on this see discussion *infra* Section III.A.2.

219. KARP, *supra* note 81.

220. Gramlich & Schaeffer, *supra* note 144.

221. Jonathan Masters, *US Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Aug. 6, 2019), <https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons> [https://perma.cc/UXM6-GSAT]. This is significant because the United States only accounts for five percent of the world’s overall population. *See id.*

222. *See* Phillip B. Levine & Robin McKnight, *Three Million More Guns: The Spring 2020 Spike in Firearms Sales*, BROOKINGS INST., (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales> [https://perma.cc/SW9D-JFU6]; *see also* The Daily, *The Field: The Specter of Political Violence*, N.Y. TIMES, at 04:15 (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/podcasts/the-daily/political-violence-washington-north-carolina.html> [https://perma.cc/U5R8-L9KD].

223. Alpers & Picard, *supra* note 74.

224. KARP, *supra* note 81.

225. *See* Spitzer, *supra* note 157, at 56.

government's approach to gun reform today.<sup>226</sup> Considering American gun culture and the failure to implement lasting gun control laws in the past, it may seem challenging to implement reforms as Australia and New Zealand have. Nonetheless, gun laws with a narrow and focused purpose can succeed both legally and culturally in the United States.

### III. LEGAL CHALLENGES TO GUN CONTROL IN THE UNITED STATES

As explained above, Americans' love for and commitment to guns runs deep.<sup>227</sup> Despite the ubiquity of guns and the emphasis on individual rights in the United States, reasonable gun control measures remain a possibility.<sup>228</sup> The political division on the issue often falls along partisan lines, but Americans across the political spectrum favor stronger gun control laws.<sup>229</sup>

The many legal challenges that arise when regulating a constitutional right, especially one as controversial as the Second Amendment right to bear arms, compound the obstacle of the American gun culture. This Part analyzes those challenges and proposes how to overcome them. Section III.A discusses the landmark case *District of Columbia v. Heller*<sup>230</sup> and how lower courts apply the decision in legal challenges to state and local gun laws. Section III.B discusses the confusion around defining "assault weapon," and how that complicates gun control enforcement. Section III.C discusses problems that may arise when trying to manage prohibited weapons once a ban is enacted.

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226. See Finnane, *supra* note 16, at 57-58.

227. See discussion *supra* Section II.C.1.

228. See *U.S. Support for Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds; Let Dreamers Stay, 80 Percent of Voters Say*, QUINNIPIAC UNIV. (Feb. 20, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2521> [<https://perma.cc/8WXQ-SH62>]. This poll was released shortly after the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, and found that sixty percent of Americans support stricter gun control laws.

229. See *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support*, PEW RESEARCH CENTER (Oct. 18, 2018), <https://www.pewresearch.org/politics/2018/10/18/gun-policy-remains-divisive-but-several-proposals-still-draw-bipartisan-support/> [<https://perma.cc/6E92-DCKK>].

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

A. *The Second Amendment and District of Columbia v. Heller*

The most unique and challenging aspect of gun laws in the United States is the Second Amendment. The Second Amendment states, “[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>231</sup> The legal debate around the proper interpretation of the Second Amendment asks whether it provides a narrow right in order to maintain a militia or if it allows for a broad right for every individual to be able to possess and use a gun.<sup>232</sup>

1. Supreme Court Jurisprudence

The Supreme Court has had few opportunities to opine on issues arising under the Second Amendment.<sup>233</sup> For decades, courts interpreted the Second Amendment according to *United States v. Miller*.<sup>234</sup> In *Miller*, Jack Miller and Frank Layton were indicted for violating the National Firearms Act when they crossed state lines with a sawed-off shot gun.<sup>235</sup> They argued that the federal law violated their Second Amendment rights.<sup>236</sup> The Supreme Court held that prohibiting the possession of a sawed-off shot gun did not violate the Second Amendment because the weapon did not have a “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>237</sup> The Court explained that only weapons “in common use” were

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231. U.S. CONST. amend. II. The United States, Mexico, and Guatemala are the only countries in the world that include a right to bear arms in their constitutions, and the United States is the only country whose right is not restricted in its constitution. See Brennan Weiss & James Pasley, *Only 3 Countries in the World Protect the Right to Bear Arms in Their Constitutions: the US, Mexico, Guatemala*, BUS. INSIDER (Aug. 6, 2019, 2:42 PM), <https://www.businessinsider.com/2nd-amendment-countries-constitutional-right-bear-arms-2017-10#only-15-constitutions-in-nine-countries-ever-included-an-explicit-right-to-bear-arms-according-to-the-new-york-times-1> [<https://perma.cc/WV8L-FCLW>]; see also Zachary Elkins, *Rewrite the Second Amendment*, N.Y. TIMES (Apr. 4, 2013), <https://www.nytimes.com/2013/04/05/opinion/rewrite-the-second-amendment.html?ref=opinion> [<https://perma.cc/NLT8-QKUT>].

232. See Andrew R. Gould, Comment, *The Hidden Second Amendment Framework within “District of Columbia v. Heller”*, 62 VAND. L. REV. 1535, 1536 (2009).

233. See WINKLER, *supra* note 139, at 213.

234. See *id.* at 216.

235. *United States v. Miller*, 307 U.S. 174, 175 (1939).

236. *Id.* at 176.

237. *Id.* at 178-79.



appropriate for maintaining the militia, and a sawed-off shot gun did not qualify.<sup>238</sup> Though the decision did not explicitly state that the purpose of the Second Amendment is limited to maintaining a militia and that it does not provide an individual right to self-defense, that is how the US judiciary interpreted and applied it until 2008, the next time the Supreme Court heard a Second Amendment case.<sup>239</sup>

In *District of Columbia v. Heller*, the Supreme Court considered the issue of whether a District of Columbia (“DC”) law prohibiting civilians from owning handguns violated the Second Amendment.<sup>240</sup> The Court explained that the Second Amendment has two parts: a prefatory clause and an operative clause.<sup>241</sup> “A well regulated Militia, being necessary to the security of a free State,” is an introduction of purpose, rather than a limitation on the right’s scope.<sup>242</sup> The operative clause, “the right of the people to keep and bear Arms, shall not be infringed,” protects an individual right.<sup>243</sup> The Court held that the Second Amendment guarantees a right to possess and use firearms for traditionally lawful purposes, including self-defense.<sup>244</sup> The Court, however, explicitly stated that this right, like many constitutional rights, is limited.<sup>245</sup> Citing *Miller*, the Court held that weapons “in common use” by law-abiding citizens are protected by the Second Amendment, while “dangerous and unusual weapons,” such as military weapons and those weapons that are not traditionally used for lawful purposes, are not protected.<sup>246</sup>

Turning to the DC law, the Court held that handguns are protected under the Second Amendment because they are the most common choice for self-defense among Americans.<sup>247</sup> Accordingly, the Court struck down the DC law as unconstitutional, effectively prohibiting future federal laws from

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238. *See id.* at 179.

239. *See* WINKLER, *supra* note 139, at 216-17.

240. *District of Columbia v. Heller*, 554 U.S. 570, 574-75 (2008).

241. *Id.* at 577.

242. *Id.*

243. *Id.* at 595.

244. *Id.* at 628-29.

245. *Id.* at 595.

246. *Id.* at 625, 627.

247. *Id.* at 628-29.

limiting civilian use and ownership of handguns.<sup>248</sup> By explicitly recognizing an individual right to bear arms for self-defense, *Heller* immediately became a landmark decision in Second Amendment jurisprudence.<sup>249</sup> Two years later, this right was applied to state laws through the Fourteenth Amendment when the Court found that a Chicago law banning handguns violated the right to self-defense protected by the Bill of Rights.<sup>250</sup>

## 2. Applying *Heller* to State Law Challenges

Since *Heller* was decided, gun rights advocates flocked to courts with challenges to state and local gun laws.<sup>251</sup> One issue quickly became clear: *Heller* did not set forth an explicit framework for analyzing Second Amendment challenges, leaving lower courts to develop their own standards.<sup>252</sup> The most common approach has been a two-pronged test.<sup>253</sup> First, a court must decide whether weapons regulated by the law at issue are within the scope of Second Amendment protection by applying the “common use” and “dangerous and unusual weapons” standards.<sup>254</sup> Second, if they are protected, a court then determines whether to apply strict or intermediate scrutiny.<sup>255</sup> When the regulation in question controls guns outside the home, courts often choose to apply intermediate scrutiny because the interest in public safety outweighs the interest in self-defense in the home, which is the core protection of the Second Amendment.<sup>256</sup> Accordingly, courts analyzing assault weapons bans, which aim to protect public safety, often apply intermediate scrutiny, assessing whether the law is substantially related to an important governmental interest.<sup>257</sup>

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248. *Id.* at 635.

249. See WINKLER, *supra* note 139, at 298.

250. McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010).

251. See Gould, *supra* note 232, at 1537.

252. See CONG. RSCH. SERV., *supra* note 4, at 12.

253. See New York State Rifle & Pistol Ass’n, Inc. v. Cuomo, 804 F.3d 242, 252-54 (2d Cir. 2015) (explaining the two-part test that is also used in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and DC Circuits).

254. For a definition of these terms see discussion *infra* Section III.A.2.

255. United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010).

256. United States v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir. 2011).

257. See New York State Rifle & Pistol Ass’n, Inc. v. Cuomo, 804 F.3d 242, 257-62 (2d Cir. 2015).

When using this framework to analyze assault weapons bans, many courts applying the first prong find that laws banning assault weapons do not violate the Second Amendment because the banned weapons are akin to military weapons, such as the M16 rifle.<sup>258</sup> *Heller* explicitly excluded such weapons from Second Amendment protection as they are not commonly used by law-abiding citizens.<sup>259</sup> In the wake of the Sandy Hook shooting, Maryland passed the Firearm Safety Act of 2013, banning assault weapons and detachable high-capacity magazines.<sup>260</sup> The Fourth Circuit held that assault weapons, specifically the AR-15, are not afforded Second Amendment protection because they are “most useful for military service,” an attribute that *Heller* explicitly excluded from Second Amendment protection.<sup>261</sup> Accordingly, the court ruled that the Maryland law was constitutional.<sup>262</sup>

Alternatively, several courts have held that ownership of banned weapons and attachments, such as the AR-15 and large-capacity magazines, are protected by the Second Amendment, yet laws imposing these bans can still pass constitutional muster under an intermediate scrutiny analysis, the second prong of *Heller*.<sup>263</sup> After the Sandy Hook shooting, New York and Connecticut passed the Secure Ammunition and Firearms Enforcement Act and An Act Concerning Gun Violence Prevention and Children’s Safety, respectively, which strengthened existing assault weapons bans in each state.<sup>264</sup> When applying the first prong, the Second Circuit recognized that the banned weapons were dangerous, but it also recognized that they are widely owned and used by Americans, making it difficult for the court to decide whether they are “commonly used” and “typically possessed by law-abiding citizens for lawful purposes.”<sup>265</sup> The Second Circuit ultimately deferred on the first prong of

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258. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 136-37 (4th Cir. 2017); *Commonwealth v. Cassidy*, 479 Mass. 527, 702 (2018); *People v. Zondorak*, 220 Cal. App. 4th 829, 836 (Cal. Ct. App. 2013); *People v. James*, 174 Cal. App. 4th 662, 676 (Cal. Ct. App. 2009). See also *Schildkraut & Carr*, *supra* note 3, at 1054 (explaining that the original manufacturers of the AR-15 did not create it for civilian use).

259. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

260. See *Kolbe*, 849 F.3d at 120.

261. See *id.* at 136-37.

262. See *id.* at 137.

263. See, e.g., *New York State Rifle & Pistol Ass’n*, 804 F.3d at 255, 262-63.

264. See *id.* at 249-50.

265. See *id.* at 255-57.

*Heller*, deciding that the weapons are within the Second Amendment's scope, and proceeded to the second prong of the test.<sup>266</sup>

Similarly, Massachusetts has an assault weapons ban that was modeled after the AWB and remains in effect today.<sup>267</sup> In 2016, the Massachusetts Attorney General issued clarifications regarding the law's application to duplicates of the banned weapons.<sup>268</sup> When gun advocates brought a challenge to court, the First Circuit considered whether the banned semiautomatic weapons and high-capacity magazines are within the Second Amendment's scope.<sup>269</sup> The opposing parties presented conflicting, but compelling, arguments as to whether the weapons are "commonly used."<sup>270</sup> The court decided to defer on the first prong, as the Second Circuit did, and proceed to the second prong.<sup>271</sup>

As demonstrated above, the conflict courts face regarding the first prong results from conflicting standards for measuring whether a weapon is in "common use." Weapons often targeted by assault weapons bans, specifically AR-15s, can be considered in "common use" because they are widely owned and used by Americans for hunting and self-defense.<sup>272</sup> Yet, the millions of assault weapons that Americans own account for only a small percentage of the guns that exist in the United States, which complicates the "common use" categorization.<sup>273</sup>

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266. *See id.* at 257.

267. *See Worman v. Healey*, 922 F.3d 26, 31 (1st Cir. 2019).

268. *See id.*

269. *See id.* at 34-35.

270. *See id.* at 35.

271. *See id.* at 36.

272. As of 2016, approximately six million Americans owned an AR-15, and that number was quickly increasing. KLAREVAS, *supra* note 1, at 197. The NRA calls the AR-15 "America's favorite rifle," exemplifying how it is widely owned and used. *See Schildkraut & Carr, supra* note 3, at 1054. Many gun owners believe that the AR-15 is a great choice for hunting and self-defense. *See* Jon Schuppe, *America's Rifle: Why So Many People Love the AR-15*, NBC NEWS (Dec. 27, 2017), <https://www.nbcnews.com/news/us-news/america-s-rifle-why-so-many-people-love-ar-15-n831171> [<https://perma.cc/A9JH-YVJY>]; *see also* Mark Overstreet, *The Top 10 Reasons You Should Own an AR-15*, FEDERALIST (Dec. 12, 2018), <https://thefederalist.com/2018/12/12/top-10-reasons-ar-15/#:~:text=AR%2D15s%20can%20be%20configured,accuracy%2C%20some%20to%20emphasize%20durability> [<https://perma.cc/8PB3-GF7T>].

273. *See Worman*, 922 F.3d at 35.

Although many courts assume that weapons banned by a law at issue may be in common use, the laws instituting the bans can still be upheld.<sup>274</sup> For example, the Second Circuit upheld the New York and Connecticut laws because the prohibited weapons were disproportionately used in crimes resulting in large-scale death and injury, such as mass shootings.<sup>275</sup> The Second Circuit found that the government has an important interest in maintaining public safety and prohibiting the use of these guns substantially relates to that important governmental interest.<sup>276</sup> Similarly, the First Circuit held that the Massachusetts ban was constitutional.<sup>277</sup> The banned weapons and attachments were used in seven mass shootings in the decade before the case at hand and the court heard expert testimony explaining how these weapons caused significantly more damage than other weapons.<sup>278</sup> The court reasoned that upholding the ban was crucial for maintaining public safety.<sup>279</sup> As these cases demonstrate, a key determinant of whether a Second Amendment challenge will succeed against a particular weapons ban is the type of gun regulated by the law at issue.<sup>280</sup>

### *B. Defining “Assault Weapon”*

#### 1. The Origin of the Term

The term “assault weapon” triggers strong emotions on both sides of the gun control debate, but the gun industry does not recognize any guns as “assault weapons.”<sup>281</sup> Josh Sugarmann, an advocate for increased gun control and regulation, originally promoted this term to mislead people unfamiliar with guns.<sup>282</sup>

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274. See, e.g., *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 262-63 (2d Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114, 140 (4th Cir. 2017).

275. See *New York State Rifle & Pistol Ass’n*, 804 F.3d at 262-63. The court did hold that parts of each law could not be upheld, specifically “New York’s seven-round limit, and Connecticut’s prohibition on the non-semiautomatic Remington 7615 . . . .” *Id.* at 252-53.

276. See *id.*

277. See *Worman*, 922 F.3d, at 41.

278. See *id.* at 39-40.

279. See *id.* at 40.

280. See *Gould*, *supra* note 232, at 1556.

281. See *Kelly*, *supra* note 4, at 334-35.

282. See *WINKLER*, *supra* note 139, at 37.

The name was inspired by a German lightweight military rifle from World War II called the *Sturmgewehr*, or storm rifle, and led the uninformed American public to associate “assault weapons” with military weapons.<sup>283</sup> Given this allusion many people unfamiliar with the mechanics of guns think of “assault weapons” as machine guns because that is what they perceive military weapons to be.<sup>284</sup>

In reality, machine guns, which are illegal in the United States, are automatic weapons that fire continuously provided the user holds down the trigger, while “assault weapons” are semiautomatic weapons that require the user to pull down the trigger for each shot which then automatically loads the next bullet into the chamber.<sup>285</sup> Technologically, most guns are semiautomatic weapons.<sup>286</sup> Yet, the uninformed public perceives “assault weapons” as contemplated by Sugarmann to be much more threatening than a basic handgun because they look similar to the automatic weapons used by the military.<sup>287</sup> Sugarmann likely knew that most people would not understand the mechanical difference but would see the physical similarities and believe that “assault weapons” are the same as weapons of war, making them too dangerous for civilian use.<sup>288</sup> Therefore, “assault weapon” is a political term, rather than a term of art.<sup>289</sup>

## 2. Definitional Issues in Bans

Nonetheless, “assault weapons” are often at the center of the gun control debate, but without a proper and consistent definition in the law, legislation meant to ban these “dangerous” weapons will often be riddled with loopholes, making them ineffective.<sup>290</sup> A common definition for “assault weapon,” and the

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283. *See id.* at 36.

284. *See id.* at 37.

285. *See Kelly, supra* note 4, at 337-38.

286. *See WINKLER, supra* note 139, at 37. Seventy percent of handguns and many rifles commonly used for hunting and sport shooting have semiautomatic shooting capabilities. *Id.*

287. *See Kelly, supra* note 4, at 338.

288. *See WINKLER, supra* note 139, at 37-38; *see also* discussion *infra* Section III.B.3.

289. *See* Nicholas Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 *HASTINGS L.J.* 1285, 1290 (2009).

290. *See Kelly, supra* note 4, at 345-46.

one used in the Federal Assault Weapons Ban of 1994 (“AWB”), is a semiautomatic rifle that can accept a detachable large-capacity magazine.<sup>291</sup> Many of the semiautomatic rifles banned in the AWB are described therein by reference to physical features, such as certain grips or flash suppressors.<sup>292</sup>

The problem with this approach and similar definitions is that they focus on cosmetics as opposed to the mechanics that truly affect lethality.<sup>293</sup> When analyzing how weapons bans can combat mass shootings, it is important to look at the lethality of the weapons, meaning, the mechanics that amplify their killing potential.<sup>294</sup> While some of the features highlighted in weapons bans, such as a pistol grip, may make weapons easier to use, they do not greatly enhance a user’s shooting abilities or affect the gun’s rate of fire for the purpose of committing a mass shooting.<sup>295</sup> When a ban focuses on cosmetic features, it is easier to circumvent the ban’s limitations. For example, after the passage of the AWB, gun manufacturers slightly adjusted their products’ designs so that they passed the two-feature test but continued to function the same way.<sup>296</sup> Colt, a large gun manufacturer, removed flash hiders, threaded barrels, and bayonet lugs from its Match Target H-Bar rifle, but the gun continued to function just as the banned AR-15 does and could accept the same high-capacity magazines.<sup>297</sup> The weapons may have looked different, but their inner-mechanics and the potential for lethality remained the same.<sup>298</sup>

At the same time, such definitions can be overbroad and ban weapons that are in common use.<sup>299</sup> Semiautomatic weapon

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291. See Johnson, *Supply Restrictions*, *supra* note 289, at 1290.

292. See Kelly, *supra* note 4, at 346.

293. See *id.* at 349.

294. See KLAREVAS, *supra* note 1, at 220-21; see also *Lethal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/lethal> [<https://perma.cc/9RLB-GT2Q>] (last visited, Nov. 29, 2020) (defining “lethal” as “capable of causing death”).

295. See Kelly, *supra* note 4, at 353; see also Dylan Matthews, *Caliber, Cartridges, and Bump Stocks: Guns, Explained for Non-Gun People*, VOX (Sept. 4, 2019, 9:34 AM), <https://www.vox.com/the-highlight/2019/7/31/17475072/guns-explained-assault-weapons-bans-guide-to-guns> [<https://perma.cc/9X3D-N2PC>].

296. See Kelly, *supra* note 4, at 349; see also WINKLER, *supra* note 139, at 39.

297. See KOPER, *supra* note 130, at 11.

298. See Kelly, *supra* note 4, at 349; see also WINKLER, *supra* note 139, at 39.

299. See Kelly, *supra* note 4, at 346.

technology has existed since at least the early 20th century.<sup>300</sup> A study by the Harvard School of Public Health found that when the AWB was being debated in 1994, over sixty percent of American gun owners owned a gun that met this definition of a semiautomatic weapon.<sup>301</sup> Functionally, most guns have multi-shooting capability just as semiautomatic weapons do.<sup>302</sup> Accordingly, bans with a definition focused on the semiautomatic nature of a weapon can result in the prohibition of guns that are in common use, while the weapons that are especially useful in mass shootings remain unregulated.<sup>303</sup>

### 3. Alternative Approaches to Definitions in Bans

Instead of using a definition that focuses on appearances, a better method is to use a definition that focuses on the designs and inner mechanics that make guns more effective for perpetrating mass shootings.<sup>304</sup> While the semiautomatic nature of “assault weapons” may not be unique, certain design aspects make some semiautomatic weapons more dangerous than others. Firearms made with polymer are lightweight, making them easier to carry and shoot.<sup>305</sup> Additionally, when a gun is lightweight, a shooter can better handle the extra weight of a high-capacity magazine, giving the weapon more ammunition.<sup>306</sup> The light weight of certain semiautomatic weapons, such as the AR-15, was an intentional design feature to make them better suited for military use.<sup>307</sup> These lightweight weapons were used in many infamous mass shootings in the United States, such as the Sandy Hook and Aurora shootings.<sup>308</sup>

Additionally, weapons that can accept a high-capacity magazine are more lethal because a shooter does not need to reload often, allowing more bullets to be shot in one interval and limiting opportunities for bystanders to stop the shooter in a

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300. See Johnson, *Supply Restrictions*, *supra* note 289, at 1294.

301. See *id.* at 1295.

302. See *id.* at 1302.

303. See *id.* at 1304; see also Kelly, *supra* note 4, at 346.

304. See Kelly, *supra* note 4, at 354.

305. See KLAREVAS, *supra* note 1, at 207.

306. See Kelly, *supra* note 4, at 360.

307. See *id.* at 208-09.

308. See KLAREVAS, *supra* note 1, at 24, 213.



moment of weakness.<sup>309</sup> In 2011, Jared Loughner shot Congresswoman Gabrielle Giffords at an event in Arizona using a Glock 19 handgun with a thirty-three bullet high-capacity magazine.<sup>310</sup> When Loughner paused to reload his ammunition, a bystander was able to stop him from continuing the shooting.<sup>311</sup> Similarly, in the Sandy Hook shooting, when Lanza stopped to reload his weapons, students were able to run away from him.<sup>312</sup> When a shooter is forced to reload more often, there are more crucial opportunities for people to escape or to stop the shooter, which can make a significant difference in the ultimate death toll of an event.<sup>313</sup>

Furthermore, although seemingly counterintuitive, a gun that has a slower barrel twist can be more lethal in a mass shooting. Barrel twist rates are measured by the inches twisted per rotation, meaning the fewer inches required to achieve one rotation, the faster the barrel twist rate will be.<sup>314</sup> When a gun's barrel has a faster twist rate, a bullet fired maintains its trajectory better, but when the barrel has a slower twist rate, the bullet is more likely to lose its course.<sup>315</sup> When bullets lose their course on their way to a target, they can cause more damage upon impact by making a larger indentation in the flesh because of the odd angle.<sup>316</sup>

Additionally, smaller caliber ammunition tends to add to the death and injury tolls in a mass shooting by increasing a gun's rate of fire.<sup>317</sup> Smaller bullets travel faster and hit targets with more

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309. *See id.* at 211.

310. *See id.* at 208-09.

311. *See id.* at 210.

312. *See id.*

313. *See id.*

314. *See Kelly, supra* note 4, at 358.

315. *See id.* at 360-61; *see also Understanding Barrel Twist Rate*, GUN DIGEST (Sept. 27, 2017), <https://gundigest.com/gun-videos/video-understanding-barrel-twist-rate> [<https://perma.cc/Q3UP-8PEN>].

316. *See* UNIV. UTAH ECCLES. HEALTH SCI. LIBR., *Ballistics*, INTERNET PATHOLOGY LAB'Y FOR MED. EDUC., <https://webpath.med.utah.edu/TUTORIAL/GUNS/GUNBLST.html> [<https://perma.cc/229N-JJ42>] (last visited Nov. 20, 2020); *see also* Peter M. Rhee et al., *Gunshot Wounds: A Review of Ballistics, Bullets, Weapons, and Myths*, 80 J. TRAUMA & ACUTE CARE SURGERY 853, 863 (2016); WEAPON SYS. TECH. INFO. ANALYSIS CTR., WSTIAC QUARTERLY, VOL. 8, NO. 1 - SMALL CALIBER LETHALITY: 5.56MM PERFORMANCE IN CLOSE QUARTERS BATTLE 6 (2008).

317. *See Kelly, supra* note 4, at 360.

force.<sup>318</sup> More of them can also be shot in one time period.<sup>319</sup> Small caliber bullets were used in many of the deadliest shootings in recent history, including those at Sandy Hook, Aurora, Virginia Tech, Marjory Stoneman Douglas High School, and Pulse nightclub.<sup>320</sup> Together, these characteristics make certain semiautomatic weapons, like the AR-15, efficient for killing many people at once.<sup>321</sup> Indeed, the AR-15 has been used in at least eleven mass shootings in the past thirty-five years.<sup>322</sup>

Successful assault weapons bans often include lists of specific weapons that are commonly used in mass shootings.<sup>323</sup> It may be that many mass shootings feature similar weapons not because they are the best weapons for that purpose, but rather because the perpetrators are copycat shooters.<sup>324</sup> When a large-scale mass shooting occurs, the media often details how the shooter prepared for and ultimately perpetrated the event.<sup>325</sup> This attention can inspire others to perform similar attacks using the

318. See *id.* See also Alex Yablon, *The Simple Physics that Makes Some Bullets Deadlier Than Others*, TRACE (June 21, 2017), <https://www.thetrace.org/2017/06/physics-deadly-bullets-assault-rifles/> [<https://perma.cc/3N8R-FE8W>].

319. See Kelly, *supra* note 4, at 360.

320. See JANET L. KAMINSKI LEDUC, WEAPONS USED IN MASS SHOOTINGS (2013), <https://www.cga.ct.gov/2013/rpt/2013-r-0057.htm> [<https://perma.cc/UHW4-9XC8>]; see also Will Drabold & Alex Fitzparick, *The Florida School Shooter Used an AR-15 Rifle. Here's What to Know About the Gun*, TIME (Jan. 15, 2019), <https://time.com/5160267/gun-used-florida-school-shooting-ar-15/> [<https://perma.cc/GYC3-SMDL>]; Edmund DeMarche, *What Happened at Parkland: The Stoneman Douglas High School Shooting*, FOX NEWS (Feb. 14, 2020), <https://www.foxnews.com/us/what-happened-at-parkland-the-stoneman-douglas-high-school-shooting> [<https://perma.cc/2K6N-BC7Q>]; Will Drabold, *What to Know About the Type of Gun Used in the Orlando Shooting*, TIME (June 13, 2016), <https://time.com/4366658/orlando-shooting-gun-control/> [<https://perma.cc/4GJT-TRH9>]; Jeff Weiner et al., *Pulse Nightclub Shooting: FBI Lab Test of Bullets from Victims Inconclusive, Report Shows*, ORLANDO SENTINEL (Feb. 28, 2019), <https://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-ne-pulse-fbi-report-20190228-story.html>.

321. See KLAREVAS, *supra* note 1, at 201.

322. Cf. William Cummings & Bart Jansen, *Why the AR-15 Keeps Appearing at America's Deadliest Mass Shootings*, USA TODAY (Feb. 15, 2018, 6:59 PM), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/> [<https://perma.cc/WC6P-89G8>]; see also Zusha Elinson & Joseph De Avila, *AR-15 Model Rifle Again Used in a Mass Shooting*, WALL ST. J. (Feb. 15, 2018, 7:44 PM), <https://www.wsj.com/articles/ar-15-model-rifle-again-used-in-a-mass-shooting-1518741842> [<https://perma.cc/XG92-VBP5>].

323. See, e.g., Conn. Gen. Stat. Ann. § 53-202a(1)(A)-(D) (West 2013).

324. See James N. Meindl & Jonathan W. Ivy, *Mass Shootings: The Role of the Media in Promoting Generalized Imitation*, 107 AM. J. PUB. HEALTH 368, 369 (2017).

325. See *id.*

same weapons.<sup>326</sup> This trend means that bans listing specific weapons and physical characteristics, without necessarily focusing on the inner mechanics and lethality factors of the weapons, may still be an effective approach to prevent mass shootings because shooters may simply gravitate towards weapons that they saw someone else use.<sup>327</sup>

### *C. Handling the Banned Weapons*

The AWB and many state laws include grandfather clauses that allow people to keep otherwise prohibited guns if they owned them before the law took effect, so long as they were registered with law enforcement once the law took effect.<sup>328</sup> When people learned that Congress was considering the AWB, many individuals bought weapons that they thought might be banned, allowing them to opportunistically gain the protection of the grandfather clause.<sup>329</sup> Consequently, given this planning, the ban did not result in a full eradication of the ownership of targeted weapons. Thus, individuals who want to cause harm with these weapons may still have access to them.

One proposal for resolving this issue is to confiscate the banned weapons. Ordinarily, government takings of private property implicate the Takings Clause of the Fifth Amendment which states, “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use, without just compensation.”<sup>330</sup> This clause requires that the government show a legitimate public purpose for taking property and for it to adequately compensate the owners of property so taken.<sup>331</sup> Yet, when prohibitions are

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326. *See id.*

327. For an example of state laws that list specific weapons used in shootings, see Act of Jan. 15, 2013, ch. 1, 2013 N.Y. Laws 1, *amended by* Act of Mar. 29, 2013, ch. 57, pt. FF, 2013 N.Y. Laws 290, 389; 2013 Conn. Pub. Act 13–3, *as amended by* 2013 Conn. Pub. Act 13–220; Md. Code Ann., Crim. Law § 4-301 (West 2018). *See also* Cummings & Jansen, *supra* note 322; Maggie Fox, *Mass Killings Inspire Copycats, Study Finds*, NBC (July 2, 2015, 9:26 PM), <https://www.nbcnews.com/health/health-news/yes-mass-killings-inspire-copycats-study-finds-n386141> [<https://perma.cc/TPJ2-XM2E>].

328. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-202d(f) (West 2013); CAL. PENAL CODE § 30945 (West 2012); N.Y. PENAL LAW § 265.00(f) (McKinney 2020); *see also* CONG. RSCH. SERV., *supra* note 4, at 4-5.

329. *See* Johnson, *supra* note 133, at 865.

330. U.S. CONST. amend. V.

331. *See* Weg, *supra* note 9, at 682.

placed on certain property in an effort to promote public safety, compensation is not required.<sup>332</sup> The Takings Clause does not apply to the government's police power, which allows the government to ban possession of certain items to maintain public safety.<sup>333</sup> For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") is not required to compensate individuals when it seizes illegal firearms because Congress conferred this police power to ATF for the purpose of promoting public safety.<sup>334</sup>

Though the federal government has the authority to confiscate illegal weapons, there are several practical barriers to such a plan. First, the United States does not have an existing national firearm registration system that tracks gun ownership. Accordingly, the federal government's knowledge, regarding who possesses the weapons that would need to be confiscated, is limited.<sup>335</sup> A handful of states have their own registration systems, but each has varying requirements. For example, Hawaii<sup>336</sup> and the District of Columbia<sup>337</sup> require registration of all firearms, but New York only requires the registration of handguns and assault weapons.<sup>338</sup> New Zealand encountered a similar tracking issue when it implemented its buyback program. The country established a modern national registration system only after the 2019 Christchurch attacks, thereby leaving open the possibility that a substantial number of guns are unaccounted for.<sup>339</sup>

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332. See *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

333. See *id.*

334. See *Akins v. United States*, 82 Fed. Cl. 619, 623 (2008).

335. See Weg, *supra* note 9, at 680; see also Mike McLively, *Gun Violence Prevention 2.0: A New Framework for Addressing America's Enduring Epidemic*, 60 WASH. U. J. L. & POL'Y 235, 254 (2019).

336. HAW. REV. STAT. ANN. § 134-3 (West 2020).

337. D.C. CODE ANN. § 7-2502.01 (West 2017).

338. N.Y. PENAL LAW § 400.00 (McKinney 2019).

339. See Kat Lonsdorf, *New Zealanders Hand in More Than 50,000 Weapons as the Country's Buyback Program Ends*, NPR (Dec. 21, 2019, 3:46 PM), <https://www.npr.org/2019/12/21/790466492/new-zealanders-hand-in-more-than-50-000-weapons-as-the-countrys-buyback-program>. [<https://perma.cc/F5AW-DU85>]; see also Emanuel Stoakes, *New Zealand is Trying to Buyback the Military-Style Weapons It Banned in April. It's Not So Easy*, WASH. POST (June 30, 2019, 5:35 PM), [https://www.washingtonpost.com/world/asia\\_pacific/new-zealand-is-trying-to-buy-back-the-assault-style-weapons-it-banned-in-april-its-not-so-easy/2019/06/30/c3e49844-9365-11e9-956a-88c291ab5c38\\_story.html](https://www.washingtonpost.com/world/asia_pacific/new-zealand-is-trying-to-buy-back-the-assault-style-weapons-it-banned-in-april-its-not-so-easy/2019/06/30/c3e49844-9365-11e9-956a-88c291ab5c38_story.html) [<https://perma.cc/7PZL-M22D>].

Without a national registration system, retailer information on gun sales may shed light on gun ownership numbers in the United States. Retailers must have a Federal Firearms License (“FFL”) to sell guns to consumers.<sup>340</sup> FFLs require retailers to conduct background checks on potential buyers by first, calling the National Instant Check System for any red flags, and second, recording with the System whether the purchase is approved.<sup>341</sup> This data, however, only accounts for a fraction of gun sale records in the United States because private sales between individuals do not have the same recording requirements.<sup>342</sup>

The government could simply ask gun owners to identify themselves, but compliance would be unlikely if identification meant confiscation.<sup>343</sup> Some American cities have introduced voluntary buyback programs, which rely on gun owners’ willing compliance with the government’s request for certain weapons to be surrendered.<sup>344</sup> Still, when the scheme is voluntary, people who

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340. See Johnson, *supra* note 133, at 875.

341. See *id.* at 875-76.

342. See *id.*

343. See *id.* at 848.

344. For example, Los Angeles has an annual initiative called Gun Buyback, which collected 16,483 guns between 2009 and 2018 in exchange for gift cards. See Press Release, Office of Los Angeles Mayor Eric Garcetti, Mayor Garcetti Announces that Gun Buybacks Took Close to 500 Weapons off the Street (May 16, 2018) (on file with author). San Francisco has an annual buyback of its own and collected over 225 weapons in 2020. See *San Francisco Police Buyback Campaign Collects More than 225 Guns*, CBS SF BAY AREA (Dec. 13, 2020, 6:48 AM), <https://sanfrancisco.cbslocal.com/2020/12/13/safer-streets-san-francisco-police-buyback-campaign-collects-more-than-200-weapons/> [<https://perma.cc/2XYW-XCMH>]; see also Bay City News, *Gun Buybacks in San Francisco Gets 228 Weapons Off Streets*, NBC BAY AREA (Dec. 12, 2020, 10:46 PM), <https://www.nbcbayarea.com/news/local/san-francisco/gun-buyback-in-san-francisco-gets-228-weapons-off-streets/2421984/> [<https://perma.cc/UT5A-M9NU>]. Newark, New Jersey conducted a privately funded buyback program in 2019 and collected 332 weapons. See *Newark Gun Buyback Event Nets 332 Firearms, Pays Out \$41k*, NBC N.Y. (Apr. 4, 2019, 12:50 AM), <https://www.nbcnewyork.com/local/gun-buyback-newark-new-jersey/1766085/> [<https://perma.cc/9G3D-9H5X>]; see also *Newark Gun Buyback Event Nets 32 Firearms, Pays Out \$41k*, NORTHJERSEY.COM (Apr. 3, 2019, 7:09 PM), <https://www.northjersey.com/story/news/essex/2019/04/03/newark-nj-gun-buyback-event-nets-332-firearms-pays-out-41-000/3359002002/> [<https://perma.cc/54AU-5CMX>]. In 2018, a buyback program in Detroit collected 126 guns in exchange for gift cards. See Sarah Rahal, *Guns Turned in at Buy Back Became Art*, DETROIT NEWS (July 14, 2018, 4:23 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2018/07/14/wayne-co-sheriff-buys-back-guns-art/781451002/> [<https://perma.cc/6LUM-JJB8>]; see also *Wayne County Gun Buyback Seeks to Get Weapons Off Streets*, ASSOCIATED PRESS (July 10, 2018), <https://apnews.com/article/a5776a1b3cf54b3693d98a6a73aca773>

deeply value their guns and resent government regulation of their individual rights resist partaking in such programs.<sup>345</sup> Additionally, these schemes have often proven ineffective because participants may only sell guns that are not useful for mass shootings and use the money to instead acquire more lethal weapons.<sup>346</sup> If gun owners do not comply, locating these gun owners would be problematic without registration records, and with approximately 120,756,048 households in the United States, it would cost the government substantial time and resources to identify gun owners.<sup>347</sup> Without an efficient and feasible way to locate guns and identify their owners in the United States, the government would need to go door-to-door asking people if they

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[<https://perma.cc/ECU8-FPRV>]. A 2018 buyback program in Baltimore collected over 1,000 guns and paid participants in cash. See Jessica Anderson, *Baltimore Police: \$163,000 Spent on Gun Buyback That Yielded Over 1,000 Firearms—and a Rocket Launcher*, *BALT. SUN* (Dec. 21, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-gun-buyback-cost-20181221-story.html> [<https://perma.cc/9NDW-BC8V>]; see also *2018 Baltimore Police Gun Buyback Program*, *WMAR BALTIMORE* (Dec. 19, 2018, 5:39 AM), <https://www.wmar2news.com/news/region/baltimore-city/2018-baltimore-police-gun-payback-program> [<https://perma.cc/5J3H-GXHS>]. In 2018, Boston conducted a buyback program that collected fifty-four weapons in exchange for Target gift cards. See Jordan Frias, *Boston Police Collect 54 Firearms in Gun Buyback Program*, *BOS. HERALD* (Dec. 16, 2018, 8:37 AM), <https://www.bostonherald.com/2018/12/15/hub-police-collect-54-firearms-in-gun-buyback-program/> [<https://perma.cc/33CS-4DPG>]; see also Alyssa Lukpat, *Boston Officials Offering \$100 Gift Cards at Anonymous Gun Buyback Saturday*, *BOS. GLOBE* (Dec. 11, 2019, 2:33 PM), <https://www.bostonglobe.com/2019/12/11/metro/boston-officials-offering-100-gift-cards-anonymous-gun-buyback-saturday/> [<https://perma.cc/P99N-LXZ2>]. The New Jersey state legislature is currently considering a new law that would update its buyback program protocols and require the Attorney General to establish three buyback programs every year in the state. See S.B. 1545, 219 Leg., 1st Sess. (NJ 2020).

345. See Weg, *supra* note 9, at 687.

346. See Lacey Wallace, *Could a Weapons Buyback Program Solve Gun Violence in America?*, *NEWSWEEK* (Aug. 5, 2019, 12:16 PM), <https://www.newsweek.com/gun-buyback-america-australia-1452635> [<https://perma.cc/F3HT-KKPX>]; see also Louis Casiano, *Gun Buyback Participant Turns in Firearm to Get Cash for 'Better Weapon'*, *FOX NEWS* (Dec. 20, 2018), <https://www.foxnews.com/us/woman-turns-in-gun-at-baltimore-gun-buyback-program-to-upgrade-to-better-weapon> [<https://perma.cc/6UGX-R8K6>].

347. *Quick Facts, US CENSUS BUREAU*, <https://www.census.gov/quickfacts/fact/table/US/HSD410219> [<https://perma.cc/DKG3-KM4P>] (last visited, Dec. 27, 2020). The cost of locating gun owners by investigating each household in the United States can be compared to administering the census, which cost the US government US\$15.6 billion in 2020. US GOV'T ACCOUNTABILITY OFFICE, *HIGH-RISK SERIES: SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS* 62 (2019).

possess a banned weapon, which would be expensive, time-intensive, and impractical.<sup>348</sup>

Regardless of the plan the government implements, it is likely to encounter some pushback from states resisting through the constitutional protection presented by the Tenth Amendment. The Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>349</sup> Under the Anti-Commandeering Doctrine, which is derived from the Tenth Amendment, the federal government cannot force states to implement a federal regulatory agenda.<sup>350</sup> The federal government cannot direct states to create certain policies or regulations to reflect federal plans because state sovereignty guarantees that state-level officials can control their own policymaking.<sup>351</sup> Past attempts by the federal government to dictate legislative decisions to states have been met with resistance.<sup>352</sup> Similar resistance could be expected if the federal government enacted a nationwide plan for acquiring banned weapons and wanted state officials to execute that plan, rather than using federal resources. Accordingly, if the federal government were to implement a national buyback program, it would need to find an effective method for carrying out the program without interfering with state rights.

A mandatory nationwide buyback program that is structured to conform with constitutional limits could address the issues with the lack of resources to track gun ownership in the United States and the inadequacies of voluntary buyback programs.<sup>353</sup> Such a plan may achieve the goal of eliminating the weapons most often used in mass shootings, but it would be expensive and would likely

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348. See Weg, *supra* note 9, at 680; see also Johnson *supra* note 133, at 869.

349. U.S. CONST. amend. X.

350. See *New York v. United States*, 505 U.S. 144, 188 (1992).

351. See *id.*

352. See, e.g., *Printz v. United States*, 521 U.S. 898, 902-04 (1997). Chief Law Enforcement Officers from Arizona and Montana sued the federal government when it enacted the Brady Act, which required state officials to conduct background checks for gun sales while the federal government set up its own background check system. See *id.* The plaintiffs argued that it was unconstitutional for Congress to impose this obligation on state officials. See *id.*

353. See Weg, *supra* note 9, at 680.

incur harsh public backlash.<sup>354</sup> A delicate balancing act would be crucial when attempting to implement such a plan.

Beyond the cultural and political challenges to a federal assault weapons ban, there are several legal obstacles that must be resolved. The issues presented in Part III must be considered in developing a successful assault weapons ban. A new assault weapons ban would need to acknowledge the faults that plagued the AWB as well any potential constitutional hurdles.

#### *IV. A MORE NUANCED APPROACH TO ENACTING A FEDERAL ASSAULT WEAPONS BAN*

An effective federal assault weapons ban needs clear definitions, enduring effects, and policy-framing that impresses on all Americans its role in public safety. Section IV.A explains that the definitions and specified weapons in the ban must be oriented towards those weapons that are commonly used in mass shootings. Further, it discusses how the law's conditions must be specific enough to avoid loopholes that defeat its purpose. Section IV.B discusses how policymakers should frame the law so that Americans perceive the country as safer and better if there were stricter gun laws which could prevent deadly mass shootings.

##### *A. The Law's Provisions*

###### *1. Defining the Banned Weapons*

A law instituting a federal ban must provide clear definitions of banned weapons in its statutory language so that it preempts any undesired interpretations. Because the goal of such a ban is to prevent mass shootings, at minimum, the listed weapons should be those used in the country's deadliest incidents. When Australia and New Zealand implemented their bans, the laws clearly emphasized the weapons used in the attacks that prompted the respective legislation, demonstrating that the banned weapons were not selected arbitrarily, but rather were

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354. *See id.*



banned to fulfill the specific purpose of preventing future attacks.<sup>355</sup>

Like the AWB, a new law should focus on lightweight polymer semiautomatic rifles that either include high-capacity magazines or are capable of accepting such attachments.<sup>356</sup> The ban should be more granular than the AWB by including limits on weight, barrel twist rate, and ammunition.<sup>357</sup> The weight limit could be guided by the AR-15's weight, as it is a weapon commonly used in mass shootings.<sup>358</sup> Accordingly, the ban should prohibit polymer semiautomatic rifles that weigh six and a half pounds or less without an attached high-capacity magazine, and ones that weigh seven and a half pounds or less with an attached high-capacity magazine.<sup>359</sup> Similarly, the barrel twist limit can be guided by the mechanics of the AR-15, in that a barrel twist faster than one rotation every ten seconds should be prohibited.<sup>360</sup> Finally, ammunition .223 caliber or smaller should be included in the ban because semiautomatic weapons using that ammunition have been used in especially lethal attacks in recent history, such as the shootings in Sandy Hook and Aurora.<sup>361</sup> Each of these characteristics contributes to lethality, but when combined, these features are especially effective for achieving large-scale injury and death in mass shootings. Accordingly, polymer semiautomatic rifles, with high-capacity magazines attached or capable of accepting such attachments, that include at least one other feature described above, should be included in the ban.

These specifications go beyond cosmetic features and focus on the design aspects and mechanics that make the weapons dangerous in the mass shooting context.<sup>362</sup> The ban focuses on rifles because they have been the gun of choice in some of the

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355. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

356. See KLAREVAS, *supra* note 1, at 224-25. These weapons are not necessarily the ones always chosen by perpetrators of mass shootings, but when they are chosen, the death and injury rates are exponentially higher. See *id.*

357. See Kelly, *supra* note 4, at 357-58.

358. See *id.*

359. See *id.*

360. See *id.*

361. See Leduc, *supra* note 320.

362. See KLAREVAS, *supra* note 1, at 221; see also Schildkraut & Carr, *supra* note 3, at 1053-54; Kelly, *supra* note 4, at 358.

deadliest mass shootings in recent years.<sup>363</sup> This approach would also address the problem of copycat shooters because it would eliminate the weapons commonly used in mass shootings, and the media would no longer have a reason to focus on these particularly dangerous weapons.<sup>364</sup> The limitations under this type of ban would make it more difficult for gun manufacturers to make simple adjustments to their products and to circumvent the ban while continuing to sell guns with the same functions. When there are limits on mechanics, any changes the gun manufacturer would make to adhere to this ban would greatly affect the functionality and effectiveness of the weapons in the context of mass shootings. By banning weapons based on the features that make them more lethal rather than based on the features that make them look more threatening, the law would better achieve the goal of stemming the tide of mass shootings in the United States.

Additionally, the ban should specifically name those weapons that are disproportionately common in mass shootings in the United States, such as the AR-15.<sup>365</sup> Past state law challenges show that such a ban would pass constitutional muster.<sup>366</sup> The argument that these weapons, specifically the AR-15, are military weapons not in common use for lawful purposes has seen much success in the courts.<sup>367</sup> As the AR-15 was originally developed to model the M16, a military weapon, many courts have accepted that it should be qualified as a military weapon for purposes of the Second Amendment's scope.<sup>368</sup> Moreover, even if a court finds that these weapons are protected by the Second Amendment, the ban would pass the intermediate scrutiny standard of review because banning such weapons achieves the

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363. See KLAREVAS, *supra* note 1, at 224; see also Schildkraut & Carr, *supra* note 3, at 1054.

364. See Meindl & Ivy, *supra* note 324.

365. The AR-15 was used in the Aurora and Sandy Hook shootings. See KLAREVAS, *supra* note 1, at 194. It was also used in the Parkland, Las Vegas, Pulse, Dayton, and Pittsburgh shootings. See Cummings & Jansen, *supra* note 322; see also Elinson & De Avila, *supra* note 322.

366. See discussion *supra* Section III.A.

367. See discussion *supra* Section III.A.

368. See discussion *supra* Section III.A. See also, KLAREVAS, *supra* note 1, at 196 (explaining that the AR-15's technology was originally developed to be a lightweight version of the M16).

important state interest of maintaining public safety.<sup>369</sup> Admittedly, these predictions are based on frameworks and decisions from lower courts, and the Supreme Court has yet to demonstrate how it would apply *Heller* to such a challenge. Important to note, ten appellate courts have adopted the two-prong test, making it likely that the Supreme Court may adopt a similar approach.<sup>370</sup>

A new federal assault weapons ban should include several exemptions. As done in Australia and New Zealand, the law should include exceptions for those individuals who demonstrate a need for these weapons in their jobs.<sup>371</sup> Additionally, the ban should not include handguns, because they are of common use for lawful purposes and protected under the Second Amendment, as *Heller* makes clear.<sup>372</sup>

By following these guidelines, such a ban would be specific enough to prevent gun manufacturers from manipulating its terms. Furthermore, common weapons that are not disproportionately used in mass shootings would not be banned based on over-inclusive definitions. At the same time, such a law would remain inclusive enough to combat mass shootings by eliminating the weapons most often used to perpetrate such events.

## 2. Sunset Provision

To succeed, the new law must not have a sunset provision that causes the bill to expire after a short period of time. Although the AWB was effective while it was in place, any progress in preventing mass shootings was quickly upended once the law expired.<sup>373</sup> If a new ban has any chance of curtailing mass shootings in the United States, it must be long-lasting. American gun culture is too strong for its ideology to completely change in a short ten-year span. To fully stop mass shootings, the United States needs a ban that realistically works within the framework of

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369. See discussion *supra* Section III.A.

370. Cf. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (explaining the two-part test that is also used in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and DC Circuits).

371. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

372. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

373. See KLAREVAS, *supra* note 1, at 243.

American gun culture by maintaining the ban long-term instead of hoping that adherents to American gun culture will lose interest in these weapons after ten years without them.

The original AWB's sunset provision was included as a compromise to gain enough votes for the bill to pass,<sup>374</sup> but it is important that future lawmakers do not make a similar concession. State bans without such provisions have demonstrated to be successful in addressing gun violence.<sup>375</sup> Including a sunset provision can be detrimental to a future ban's success. Mass shooting statistics in the years before, after, and during the AWB demonstrate how the ban decreases the number of mass shootings and their fatality rates.<sup>376</sup> Once the AWB expired in 2004, sales of the weapons that the AWB prohibited increased greatly, resulting in a significant rise in civilian ownership rates of the weapons the AWB intended to remove from civilian hands.<sup>377</sup> There is little reason to enact this new ban if ten years from its passage the United States will return to the same place it was when the AWB expired in 2004.

### 3. Buyback Program

Buyback programs were central aspects of the legal reforms in Australia and New Zealand.<sup>378</sup> It is crucial to implement a buyback program instead of incorporating a grandfather clause into the new ban. A grandfather clause would defeat the law's purpose because individuals who want to commit mass shootings with these weapons will still have access to them.<sup>379</sup>

To avoid commandeering state resources, federal agents would need to run the program. For example, ATF may be the appropriate agency to be tasked with administering a federal assault weapons buyback program. ATF has already demonstrated its ability to do so. In 2018, ATF was charged with collecting bump

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374. See Luo & Cooper, *supra* note 207; see also Elving, *supra* note 207.

375. See Schildkraut & Carr, *supra* note 3, at 1069-70 (the discussed state bans do not include sunset provisions).

376. See KLAREVAS, *supra* note 1, at 243. See discussion *supra* Part I.

377. James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 *CARDOZO L. REV.* 681, 699 (2015). For more on the differences before, during, and after the AWB's enactment, see *supra* note 7.

378. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

379. See KLAREVAS, *supra* note 1, at 257.

stocks immediately after they were banned.<sup>380</sup> ATF should administer the program through its field offices around the country so that it is more accessible to participants, and willing local authorities can share necessary resources.

Without an effective method for tracking how many guns there are in the country and who owns them, the federal government would need to trust the public to adhere to the new ban. The value that Americans place on guns, however, makes it likely that many people will not want to comply.<sup>381</sup> To mitigate noncompliance, the government can implement a tax benefit for those who participate in the buyback program.<sup>382</sup>

There is not a Takings Clause issue requiring compensation under this plan because these weapons disproportionately contribute to the deadliest mass shootings in the United States, and banning them would prevent such tragedies, thereby promoting public safety.<sup>383</sup> Nevertheless, the federal government should pay fair market price for the banned weapons to incentivize participation, as New Zealand did.<sup>384</sup> Under this plan, the Department of Justice's budget, ATF's parent agency, can fund the buyback program instead of a tax that would burden people and potentially create public backlash.<sup>385</sup>

### *B. Garnering Public Support*

Given the strength of American gun culture, gaining public approval will be a substantial hurdle to passing a new federal ban. The United States is a large and diverse country whose citizens have differing views and values, which can make national

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380. *Bump Stocks*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES (Feb. 21, 2019), <https://www.atf.gov/rules-and-regulations/bump-stocks> [https://perma.cc/C5DH-BWL7].

381. See Johnson *supra* note 133, at 848-49.

382. California Assembly Member Phil Tang proposed a tax benefit in 2013 to incentivize increased participation in voluntary gun buyback programs in the state. See Press Release, Assembly Member Phil Tang, Gun Buyback Bill Advances (Apr. 16, 2013) (on file with author).

383. See *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 262-63 (2d Cir. 2015).

384. See generally Cole, *supra* note 89; see also Neuman, *supra* note 129.

385. President Trump requested US\$31.7 billion for the Department of Justice's 2021 budget, including US\$638.8 million to counter mass violence. See Press Release, The United States Department of Justice, Department of Justice FY 2021 Budget Request (Feb. 10, 2020) (on file with author).

legislation on a divisive issue, such as gun control, hard to achieve.<sup>386</sup> Legislators will not vote for the law if their constituents—and donors—do not approve, which in turn contributes to the difficulties of passing gun control on the national level.<sup>387</sup> Yet a challenging process does not automatically lead to the conclusion that the process is an impossible one.

### 1. Government Funded Policy Research

Public support for gun control tends to spike immediately after a mass shooting, but it can just as quickly wane.<sup>388</sup> After a weekend with two mass shootings in 2019, polls showed that seventy percent of Americans supported a new federal assault weapons ban.<sup>389</sup> Australia and New Zealand saw similar increases in support after the attacks that triggered their respective reforms.<sup>390</sup> Their governments used that support to their advantage. The governments of Australia and New Zealand swiftly announced legislative responses when there was widespread media attention in the immediate aftermath of the attacks in each country.<sup>391</sup>

Australia and New Zealand's responses in implementing these reforms serves as guidance for how the United States should proceed. Without the limits of federalism, New Zealand was able to act quickly to impose a uniform solution for the entire country and did not need to wait for states to implement the policies.<sup>392</sup>

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386. Even though the majority of Americans want gun reform, there is no uniform agreement on what the reforms should be, with the opinions falling along party lines. See *generally* *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support*, PEW RSCH. CTR. (Oct. 18, 2018), <https://www.pewresearch.org/politics/2018/10/18/gun-policy-remains-divisive-but-several-proposals-still-draw-bipartisan-support/> [https://perma.cc/RH5C-RU4P]. The differences in political ideologies lead to many stalemates in American policymaking as people on opposite sides of the aisle do not trust each other. See *generally* *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/> [https://perma.cc/5APL-RVSC].

387. See Schildkraut & Carr, *supra* note 3, at 1074.

388. See *id.* at 1052.

389. See Steven Shepard, *Poll: Most Americans Support Assault Weapons Ban, Despite Trump Saying 'No Appetite'*, POLITICO (Aug. 7, 2019, 5:00 PM), <https://www.politico.com/story/2019/08/07/poll-most-voters-support-assault-weapons-ban-1452586> [https://perma.cc/KHJ3-P7CQ].

390. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

391. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

392. See discussion *supra* Section II.A.3; see also discussion *supra* Section II.B.3.

Australia, which has a federalist system like the United States, was able to influence instant action on the state level because years of gun control research prepared the national government to act.<sup>393</sup>

Despite a comparatively higher frequency of mass shootings, the United States does not expend much funding on research relating to gun control.<sup>394</sup> This is largely due to a funding freeze that lasted for over twenty years. The 1996 US government omnibus spending bill included a condition known as the Dickey Amendment, which stipulated that funding to the Centers for Disease Control and Prevention (“CDC”) could no longer be used for gun research.<sup>395</sup> The Dickey Amendment, for which the NRA strongly advocated, was included in spending bills for more than two decades.<sup>396</sup> In March 2018, the government spending bill again included the Dickey Amendment, but clarified that the CDC could only use its funds to study gun violence, not gun control.<sup>397</sup> The Dickey Amendment’s funding freeze did not end until December 2019, when the budget bill allotted US\$25 million for gun control research to be split between the CDC and the National Institute of Health (“NIH”).<sup>398</sup>

Legislators took a step in the right direction by effectively repealing the Dickey Amendment. Now that the federal government has the funding to research gun control, it must take research more seriously and focus on realistic and effective policies that consider the legal and cultural constraints on gun control in the United States. There have been commendable efforts in recent years. The US government researched the effects

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393. See Alpers & Ghazarian, *supra* note 38, at 217.

394. See *Gun Policy in America: An Overview*, RAND CORP. (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/key-findings/gun-policy-in-america.html> [<https://perma.cc/Y9FZ-2EY2>].

395. See *id.*

396. See Metz, *supra* note 155, at 866.

397. See *id.*

398. See Jennifer Scholtes & Caitlin Emma, *Congress Debuts \$1.37T Spending Deal that Sidesteps Border Fight*, POLITICO (Dec. 16, 2019, 1:26 PM), <https://www.politico.com/amp/news/2019/12/16/congress-spending-deal-sidesteps-border-fight-086211> [<https://perma.cc/V43R-QDBL>]; see also Andrew Duehren, *Senate Passes Spending Bills to Avert Government Shutdown*, WALL ST. J. (Dec. 19, 2019, 4:59 PM), <https://www.wsj.com/articles/senate-passes-first-of-two-spending-packages-to-avert-government-shutdown-11576779298> [<https://perma.cc/8DD5-PPN5>].

of gun control in the wake of the Sandy Hook shooting.<sup>399</sup> The CDC and the NIH announced various grants to fund research on gun violence prevention.<sup>400</sup> Still, these efforts are not enough. Importantly, the federal government cannot allow the NRA to limit its research as it did with the Dickey Amendment. The US federal government has made significant improvements in its research, but the momentum cannot stop here. Rather, it must grow so that more funding will be allocated to researching the proper gun control measures that can prevent gun violence, specifically mass shootings.

If the federal government conducts the necessary research to understand its options for gun control, it can take advantage of its findings when support for change is highest and successfully implement effective reforms, as Australia did. The United States must take an informed approach so to avoid the problems New Zealand now faces. While New Zealand acted quickly, it was not prepared with a plan the way Australia was, and it is now forced to adjust in real time, which delays the process of fully implementing new laws.<sup>401</sup> Preemptive research proves critical in allowing the United States to be prepared in future efforts to implement reform.

## 2. Various State Solutions Versus One National Solution

Critics of a federal approach argue that gun regulation should be left to the states because laws on the federal level cannot appropriately respond to the diverse views of Americans across the country. These critics fail to recognize that such delegation creates disjointed gun control policies. For example, after the Sandy Hook shooting, there was significant action on the state level to craft different gun laws.<sup>402</sup> Though several states

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399. See, e.g., CONG. RSCH. SERV., *supra* note 4. This report was produced two months after the Sandy Hook shooting. See KLAREVAS, *supra* note 1, at 17.

400. See *Violence Prevention: Funded Research*, CDC (Sept. 22, 2020), <https://www.cdc.gov/violenceprevention/firearms/funded-research.html> [<https://perma.cc/XQ4Q-9U2S>]; see also William T. Riley, *NIH Awards Grants for Firearm Injury and Mortality Prevention Research*, NIH (Sept. 30, 2020), <https://obssr.od.nih.gov/nih-awards-grants-for-firearm-injury-and-mortality-prevention-research/> [<https://perma.cc/QJS6-GX9L>].

401. See discussion *supra* Section II.B.3.

402. See Weg, *supra* note 9, at 666.



tightened their gun laws,<sup>403</sup> two-thirds of states instead eased their firearm restrictions.<sup>404</sup>

When every state has its own laws, an individual who is restricted from buying a gun in their home state may be able to take advantage of more lenient gun laws in another.<sup>405</sup> For example, even though California has the strictest gun laws in the United States, there could still be mass shootings in the state because individuals can buy guns in states with more lenient laws and bring them back for use in California.<sup>406</sup> This piecemeal policy approach does not help achieve the goal of wholly eliminating mass shootings in the United States.

Australia saw similar challenges to a national solution. Before the Port Arthur massacre, many states and territories refused to consider gun law reform and would not allow federal involvement in a state issue.<sup>407</sup> Once the Port Arthur massacre occurred, Prime Minister Howard was able to unite national and state politicians across party lines with the conviction that gun violence was a national issue requiring a national solution.<sup>408</sup> Likewise, mass shootings are a national issue in the United States. They are not concentrated in one region. They take place at concerts in Nevada, synagogues in Pennsylvania, colleges in Virginia, churches in South Carolina, Walmarts in Texas, bars in Ohio, elementary schools in Connecticut, high schools in Florida, and movie theaters in Colorado.<sup>409</sup> Accordingly, instead of a state-by-state approach, there must be a uniform standard for the entire nation.

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403. See *New York State Rifle & Pistol Ass'n, Inc v. Cuomo*, 804 F.3d 242, 249-51 (2d Cir. 2015); see also *Kolbe v. Hogan*, 849 F.3d 114, 120 (4th Cir. 2017).

404. See Weg, *supra* note 9, at 666.

405. See, e.g., Robert Salonga, *California Gun Laws: Analysis Measures the Impact on Mass Shootings*, MERCURY NEWS (Aug. 11, 2019, 6:00 AM), <https://www.mercurynews.com/2019/08/11/analysis-impact-of-key-california-gun-laws/> []; Jill Cowan et al., *Student Kills 2 at California High School*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/14/us/santa-clarita-shooting.html> [<https://perma.cc/D7HH-XJGG>].

406. See Salonga, *supra* note 405; see also Cowan, *supra* note 405.

407. See Alpers & Ghazarian, *supra* note 38, at 212.

408. See *id.* at 221-22.

409. See Follman et al., *supra* note 2; see also FED. BUREAU OF INVESTIGATION, *supra* note 2.

### 3. A Bipartisan Front

Politicians must unite, despite their differing political beliefs, to realize a federal law banning assault weapons. At present, the lack of national unity from politicians remains an obstacle to any proposal. Different states have shown varying levels of affinity for gun reform. Residents from states that already have assault weapons bans, such as New York, California, Connecticut, and Maryland, are more likely to support a federal ban.<sup>410</sup> Residents from many other states, however, such as those that eased their gun regulations after Sandy Hook, or those with a history of resisting federal gun control, would likely oppose the law.<sup>411</sup> The voting records and NRA ratings of the Senators and Congressman from states that resist gun control indicate that many of them would also oppose any such law.<sup>412</sup>

Today, the United States is extremely polarized, with people from opposite ends of the ideological and political spectrum viewing each other with increased animosity.<sup>413</sup> If prominent political leaders from opposing parties can come together on the issue of decreasing mass shootings, it could change the tone of the gun control conversation. These leaders could stand united and propose a narrow solution that would not substantially hinder Second Amendment rights, while emphasizing that most Americans support changes to gun laws. Perhaps that context

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410. See Alpers & Ghazarian, *supra* note 38, at 212. Metropolitan areas in Australia that previously supported gun control were more likely to support national reforms. See *id.*

411. Cf. Jack Nicas & Joe Palazzolo, *Pro-Gun Laws Gain Ground*, WALL ST. J. (Apr. 4, 2013, 9:34 AM), <https://www.wsj.com/articles/SB10001424127887324883604578398843653264474> [https://perma.cc/3SFJ-NVWP]. Ten states, including Arkansas, South Dakota, and Kentucky, passed various forms of legislation in the months following the Sandy Hook shooting that eased restrictions on guns. See also Weg, *supra* note 9, at 668. In the past, some states have tried and failed to use a nullification argument to resist federal gun control. See *id.*

412. See Danielle Kurtzleben, *Chart: How Have Your Members of Congress Voted on Gun Bills?*, NPR (Feb 19, 2018, 5:00 AM), <https://www.npr.org/2018/02/19/566731477/chart-how-have-your-members-of-congress-voted-on-gun-bills> [https://perma.cc/9D2E-KK3G]; see also NRA Grades Archive, EVERYTOWN FOR GUN SAFETY (June 14, 2018), <https://everytown.org/nra-grades-archive/> [https://perma.cc/S3EA-8KN6].

413. See *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/> [https://perma.cc/2RAL-HKQE].

would allow a new federal ban to see success in the United States as it did in Australia when a unified front was presented to the public.<sup>414</sup>

#### 4. Recognizing Resistance

This proposal plans for the various obstacles gun control legislation often faces, but no amount of planning can fully eliminate resistance from groups who vigorously oppose reform. The NRA's past responses to federal attempts at gun control indicate that it would resist any such proposals for a federal-level approach. The Dickey Amendment demonstrated that the NRA does not want the federal government addressing gun control.<sup>415</sup> The NRA holds the view that the weapons targeted by such a ban are not a threat to safety and that they are protected by the Second Amendment under *Heller*.<sup>416</sup> The NRA will also contest that the buyback program is simply confiscation by another name and may incite resistance among gun owners who do not want the government taking their personal possessions.<sup>417</sup>

Furthermore, the gun industry tends to ignore calls for reform.<sup>418</sup> Still, recent conduct suggests that gun manufacturers are willing to yield to public opinion regarding the danger of certain weapons and may be more receptive of this plan. For example, Colt, which manufactured the original AR-15, announced in 2019 that it would stop producing the rifle for civilian use.<sup>419</sup> Though other manufacturers will continue

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414. See Alpers & Ghazarian, *supra* note 38, at 221.

415. See discussion *supra* Section IV.B.1.

416. Cf. Press Release, NRA-ILA, "Assault Weapons," "Large" Magazines (Sept. 2019) (on file with author).

417. Cf. Press Release, NRA-ILA, Confiscation or "Mandatory Buyback"? (Oct. 21, 2019) (on file with author).

418. See Mallika Mitra, *Colt Will No Longer Make AR-15s for Civilians, But Gun Control Advocates Might Not Have Much to Celebrate*, CNBC (Sept. 20, 2019, 4:00 PM), <https://www.cnn.com/2019/09/20/colt-will-stop-making-ar-15s-for-civilian-sale-but-people-still-have-other-options.html> [<https://perma.cc/9QRT-VA58>]; see also Michael Posner, *In the Wake of Mass Shootings, It's Time to Focus on Gun Manufacturers*, FORBES (Aug. 5, 2019, 5:24 PM), <https://www.forbes.com/sites/michaelposner/2019/08/05/in-the-wake-of-mass-shootings-its-time-to-focus-on-gun-manufacturers/?sh=5fc85a9b2186> [<https://perma.cc/E3DN-LALV>].

419. See Alexander Gladstone, *Colt Defense to Stop Producing AR-15 Rifles for Civilians*, WALL ST. J. (Sept. 19, 2019, 5:25 PM), <https://www.wsj.com/articles/colt-defense-to-stop-producing-ar-15-rifles-for-civilians-11568922519> [<https://perma.cc/76Z4-RWXX>]; see also Abby Vesoulis, *Colt Says Its Decision to Stop Making AR-15 Rifles for Civilians is Driven*

producing similar guns,<sup>420</sup> this is a significant step towards reducing gun violence. Experts believe Colt made this decision because of the negative association between the AR-15 and widely publicized mass shootings.<sup>421</sup> Moreover, in recent years, many retailers have removed from their shelves guns that are often used in mass shootings, indicating that they may be amicable to a plan outlawing those weapons.<sup>422</sup>

Additionally, individual states may bring challenges to federal action based on claims of state sovereignty. States have resisted attempts by the federal government to regulate guns in the past by passing laws that instead loosen gun restrictions.<sup>423</sup> Several states, such as Alaska and Kansas, have responded to federal gun regulations by passing their own laws based on the theory of nullification, claiming that they are not required to abide by federal gun laws.<sup>424</sup> These states argue that they should make the final decision regarding the constitutional limits of gun laws, not the Supreme Court.<sup>425</sup> Such arguments have failed in the

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by Customers. *Experts Aren't So Sure*, TIME (Sept. 20, 2019, 9:29 AM), <https://time.com/5681534/colt-suspends-ar-15-rifle-production-civilians/> [<https://perma.cc/KPL4-7RMX>].

420. See Gladstone, *supra* note 419; see also Vesoulis, *supra* note 419.

421. See Gladstone, *supra* note 419; see also Vesoulis, *supra* note 419.

422. Cf. Austen Hufford et al., *Dick's Sporting Goods Stops Selling Assault-Style Weapons, Raises Age for Gun Buyers*, WALL ST. J. (Feb. 28, 2018, 5:12 PM), <https://www.wsj.com/articles/dicks-raises-age-for-gun-buyers-will-stop-selling-assault-weapons-1519824569> [<https://perma.cc/2W5D-AUUT>]; see also Hiroko Tabuchi, *Walmart to End Sales of Assault-Style Rifles in US Stores*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/business/walmart-to-end-sales-of-assault-rifles-in-us-stores.html> [<https://perma.cc/CG8M-YQAX>]. Not only has Dick's Sporting Goods removed guns from its shelves, but it also destroyed the guns instead of returning them to the retailer. See Ryan W. Miller, *Dick's Sporting Goods Sawed \$5M Worth of Guns into Scrap. It's Not the Only Company Limiting Sales*, USA TODAY (Oct. 9, 2019, 5:40 AM), <https://www.usatoday.com/story/money/2019/10/08/dicks-sporting-goods-walmart-kroger-gun-ammo-sales-limits/3908609002/> [<https://perma.cc/TYT2-9KZ7>]; see also Laura M. Holson, *Dick's Sporting Goods Destroyed \$5 Million Worth of Guns*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/business/dicks-sporting-goods-destroying-guns-rifles.html> [<https://perma.cc/HND3-36SX>].

423. See *supra* note 411 and accompanying text.

424. See Lois Beckett, *Nullification: How States are Making It a Felony to Enforce Federal Gun Laws*, PROPUBLICA (May 2, 2013, 2:01 PM), <https://www.propublica.org/article/nullification-how-states-are-making-it-a-felony-to-enforce-federal-gun-laws> [<https://perma.cc/RZH3-44TZ>]; see also Masters, *supra* note 220.

425. See Beckett, *supra* note 424; see also Emma Roller, *Idaho Has Declared It Won't Obey New Federal Gun Laws*, NAT'L J. (Mar. 25, 2014), <https://www.nationaljournal.com/s/60236> [<https://perma.cc/YH95-WEVZ>].

past because the Supremacy Clause dictates that state law cannot conflict with the US Constitution and federal law. Therefore, any nullification statutes that try to counteract federal gun laws enacted through Congress's enumerated powers are unconstitutional.<sup>426</sup> Nonetheless, the same opposition would likely be shown towards the type of reform proposed herein.

If a law modeled after this proposal was enacted, there would be resistance from many groups. Still, given the importance of the proposal, lawmakers and courts reviewing such a ban should put the important public interest of creating a safer society above the concerns voiced by certain groups. Implementing a new federal assault weapons ban would not be an easy feat, but that does not mean it should not be done. A new federal assault weapons ban should not aim to take away all guns or deconstruct the American values linked to guns. Rather it should aim to ban a narrow category of weapons with particular mechanics that threaten the general well-being of the country in order to make the United States a safer place.

## V. CONCLUSION

In the days following the Port Arthur massacre, Australians felt a common sentiment—they did not want their country to be like the United States. They did not want this event to establish a society complacent in the face of mass shootings.<sup>427</sup> New Zealanders felt instant shock after Christchurch and immediately acted to prevent any similar events in the future.<sup>428</sup> On February 14, 2018, Nikolas Cruz used an AR-15 to kill seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida.<sup>429</sup> Surviving students called for changes to gun laws and quickly

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426. See Weg, *supra* note 9, at 668; see also Beckett, *supra* note 424.

427. See Alpers & Ghazarian, *supra* note 38, at 209.

428. See Every-Palmer et al., *supra* note 91, at 3.

429. See Nicole Chavez & Steve Almasy, *What Happened, Moment by Moment, in the Florida School Massacre*, CNN (Mar. 8, 2018, 9:17 PM), <https://www.cnn.com/2018/02/15/us/florida-school-shooting-timeline/index.html> [https://perma.cc/4DLJ-T2N8]; see also Edmund DeMarche, *What Happened at Parkland: The Stoneman Douglas High School Shooting*, FOX NEWS (Feb. 14, 2020), <https://www.foxnews.com/us/what-happened-at-parkland-the-stoneman-douglas-high-school-shooting> [https://perma.cc/698K-HKHN].

ignited a national movement.<sup>430</sup> Though there was much action on the state level, the federal government failed to pass any substantial gun control legislation.<sup>431</sup> The United States is one of the most powerful and influential countries in the world, yet the American approach to guns is seen as something to avoid, not to emulate.<sup>432</sup> That stigma does not need to be permanently attached to the American identity. The US federal government can do more than send thoughts and prayers, while retaining the freedom and individualism that is so strongly valued in American culture. The changes that the United States can make may not be as drastic as those made in Australia and New Zealand, but that does not mean that a limited change with a specific focus could not have a positive impact.

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430. See Heather Seidel et al., *How Parkland Survivors Started a Gun-Control Movement*, WALL ST. J. (Feb. 28, 2018, 2:33 PM), <https://www.wsj.com/articles/how-parkland-survivors-started-a-gun-control-movement-1519846399> [<https://perma.cc/95UT-3HMU>]; see also Dakin Andone, *Parkland Survivors Turned Into Activists and Inspired a Wave of New Gun Safety Laws*, CNN (Feb. 11, 2019, 4:08 AM), <https://www.cnn.com/2019/02/11/us/parkland-change-gun-control-legislation/index.html> [<https://perma.cc/D92N-LJNG>].

431. Margaret Kramer & Jennifer Harlan, *Parkland Shooting: Where Gun Control and School Safety Stand Today*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/parkland-shooting.html> [<https://perma.cc/EU8G-72VY>]; see also Rick Hampson, *After Parkland Shooting: A Day-By-Day Fight Over Guns in America*, USA TODAY (Dec. 26, 2018, 8:32 AM), <https://www.usatoday.com/story/news/2018/12/26/parkland-school-shooting-10-months-gun-control-united-states/2310683002/> [<https://perma.cc/W98E-QYR5>].

432. See, e.g., Alpers & Ghazarian, *supra* note 38, at 209 (after Port Arthur, Australians expressed that they did not want to have high levels of gun violence the United States does). See *Overall Best Countries Ranking*, U.S. NEWS & WORLD REP. (2020), <https://www.usnews.com/news/best-countries/united-states> [<https://perma.cc/83BR-C64Q>] (U.S. News and World Report produces an evaluation of the best countries every year and the United States was ranked number seven overall in 2020).