

# **BROTHERS IN ARMS CONTROL: INTRODUCING AUSTRALIAN-STYLE GUN CONTROL IN THE UNITED STATES**

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*Over the past 14 months the United States has been rocked by three tragic mass shootings. Following last year's massacre at Sandy Hook Elementary School, where a lone gunman slaughtered 20 children and 6 adults, there is unprecedented momentum for the introduction of stricter gun control in the US. However, even in the face of this heartbreaking tragedy, Congress has failed to act. In stark contrast, Australia, when faced with its own tragic mass shooting at Port Arthur in 1996, seized the opportunity to completely reform its gun control laws. Quantitative research reveals that the strict and uniform gun control laws introduced in Australia under the National Firearms Agreement of 1996 have been responsible for significant reductions in gun violence in Australia. In light of the failure of the current American gun control regime and the proven success of the Australian regime, this paper considers the possibility of introducing Australian-style gun control in the US. In so doing, the paper assesses whether the Second Amendment to the United States Constitution, as interpreted in the recent Supreme Court cases of *District of Columbia v Heller* and *McDonald v City of Chicago*, prevents the US from adopting Australian-style gun control laws. The scope of the newly endorsed individual right to keep and bear arms in the US is examined and a test to assess the American constitutionality of Australian-style gun control laws is developed and applied.*

## I INTRODUCTION

Over the past 14 months the United States has been rocked by three tragic mass shootings. First, in July 2012, 12 people were killed and dozens wounded when a man equipped with two handguns, a shotgun and a rifle, opened fire in a packed movie theatre in Aurora, Colorado. Just months later, in December 2012, a man shot his way into Sandy Hook Elementary School in Newtown, Connecticut, with a semi-automatic rifle and slaughtered 20 children and six adults. Finally, in September 2013, a man entered the Washington, D.C. Navy Yard armed with a semi-automatic rifle, a handgun and a shotgun and murdered 12 people and wounded another eight before being shot and killed himself by police. These massacres have highlighted to the world, once again, the laxity of American gun control laws. In reality, however, they represent only the tip of the iceberg when it comes to the American gun violence epidemic, which claims the lives of over 30 000 Americans annually.<sup>1</sup>

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<sup>1</sup> National Center for Injury Prevention and Control, *WISQARS Fatal Injury Reports, National and Regional, 1999-2009* (17 September 2012) Centers for Disease Control and Prevention <[http://www.cdc.gov/injury/wisqars/fatal\\_injury\\_reports.html](http://www.cdc.gov/injury/wisqars/fatal_injury_reports.html)>.

Following the Sandy Hook massacre, there has been unprecedented momentum for the introduction of stricter gun controls in the US.<sup>2</sup> However, even in the aftermath of this heartbreaking tragedy, Congress has failed to act. On 17 April 2013, the Senate rejected President Obama's proposals to strengthen federal gun control laws, while the families of the Sandy Hook victims looked on from the Senate gallery in disbelief. The defeat marked a major setback in the battle for stronger gun controls in the US. A furious President Obama described it as a 'shameful day for Washington'.<sup>3</sup>

It is useful to compare gun control in America with that in Australia because the two countries share many relevant characteristics. Both are liberal democratic nations with federalist systems of government and a history of armed European settlement. Both countries have a well-established gun culture, many firearm enthusiasts, and many feral pests to shoot.<sup>4</sup> They have been brothers in arms for nearly a century, and yet, when it comes to arms control, the two countries differ dramatically. In stark contrast to the US, when faced with its own tragic mass shooting at Port Arthur in 1996, Australia seized the opportunity to completely reform its gun control laws. Quantitative research reveals that the introduction of strict and uniform gun controls in Australia has resulted in substantial reductions in gun violence.<sup>5</sup> In light of the proven success of the Australian gun control regime, it is appropriate to assess the possibility of introducing Australian-style gun controls in the US.

Such an assessment necessitates an examination of the constitutionally entrenched right to keep and bear arms in the US, of which Australia has no equivalent. Prior to 2008, the Second Amendment to the US Constitution was interpreted as protecting only the right of the states to maintain a militia and therefore as having no relevance to gun control. However, in *District of Columbia v Heller*<sup>6</sup> and *McDonald v City of Chicago*,<sup>7</sup> the Supreme Court endorsed a new understanding of the Second Amendment as protecting an individual right to keep and bear arms, thereby altering the landscape for judging the constitutionality of gun control laws.<sup>8</sup> While many scholars have considered the likely effect of these cases on existing gun control laws, far fewer have considered their likely impact on the possibility of introducing stricter gun control in the US, and none has so far considered their potential impact on the possible introduction of gun control laws in the style of those that proved so successful in Australia. It is that unique consideration that forms the subject of this paper.

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<sup>2</sup> Simon Chapman, *Over Our Dead Bodies: Port Arthur and Australia's Fight for Gun Control* (Sydney University Press, 2<sup>nd</sup> ed, 2013) 5.

<sup>3</sup> Mary Bruce and Ann Compton, 'Obama Says Gun Control Defeat Marks "Shameful Day for Washington"', *ABC News* (online), 17 April 2013 <<http://abcnews.go.com/blogs/politics/2013/04/obama-says-gun-control-defeat-marks-shameful-day-for-washington/>>.

<sup>4</sup> Simon Chapman and Philip Alpers, 'Gun-Related Deaths: How Australia Stepped Off "The American Path"' (2013) 158 *Annals of Internal Medicine* 770, 770 <<http://annals.org/article.aspx?articleid=1662330>>.

<sup>5</sup> Joan Ozanne-Smith et al, 'Firearm Related Deaths: the Impact of Regulatory Reform' (2004) 10 *Injury Prevention* 280, 283–6; Simon Chapman et al, 'Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings' (2006) 12 *Injury Prevention* 365, 366–71; Andrew Leigh and Christine Neill, 'Do Gun Buybacks Save Lives? Evidence from Panel Data' (2010) 12 *American Law and Economics Review* 509, 529–54.

<sup>6</sup> 128 S Ct 2783 (2008) ('*Heller*').

<sup>7</sup> 130 S Ct 3020 (2010) ('*McDonald*').

<sup>8</sup> Jon Vernick et al, 'Changing the Constitutional Landscape for Firearms: the US Supreme Court's Recent Second Amendment Decisions' (2011) 101 *American Journal of Public Health* 2021, 2021.

Chapter II begins with an examination of the current American gun control regime. A brief overview of federal and state gun control laws will be provided and the failure of these laws will be demonstrated. Chapter III examines the strict and uniform gun control laws introduced in Australia under the *National Firearms Agreement of 1996* (NFA). The effectiveness of these laws in reducing gun violence will be revealed. Chapter IV is concerned with the Second Amendment and its various interpretations. The endorsement in *Heller* and *McDonald* of an individual right interpretation will be discussed. Chapter V proposes a framework for assessing the constitutionality of gun control laws post-*Heller* and *McDonald*. This framework is then applied to the various laws introduced in Australia under the NFA to assess whether the Second Amendment prevents their adoption in the US. Chapter VI will conclude.

## II GUN CONTROL IN THE UNITED STATES

Gun control in the US is lax, but by no means non-existent. Indeed, it has been estimated that there are currently in excess of 20 000 firearm laws in operation in the US.<sup>9</sup> The vast majority of these laws exist at the state and local levels. There are, however, a number of important overarching federal regulations.

### A Federal Gun Control

Under the American federalist system of government, the powers of the federal government are limited to those enumerated in the *United States Constitution*.<sup>10</sup> Those powers not delegated to Congress in the Constitution are reserved to the states.<sup>11</sup> Authority to introduce gun control legislation primarily rests with the states, as the power to enact laws in the interest of public health, safety, and welfare, commonly known as the ‘police power’,<sup>12</sup> was not allocated to Congress in the Constitution. However, Congress does have some power to enact laws regulating firearms under the Commerce Clause of the Constitution,<sup>13</sup> provided there is a sufficient nexus between the law and the regulation of interstate commerce,<sup>14</sup> and the Taxing and Spending Clause,<sup>15</sup> provided the law relates to the imposition and/or collection of taxes.<sup>16</sup> Courts have broadly interpreted the ‘commerce power’, in particular, to allow the federal government to legislate in relation to guns.<sup>17</sup>

Over the years, Congress has used both its ‘commerce power’ and its ‘taxing power’ to introduce a number of federal gun control acts.<sup>18</sup> These federal laws establish minimum

<sup>9</sup> Robert Spitzer, *The Politics of Gun Control* (Paradigm Publishers, 5<sup>th</sup> ed, 2012) 1.

<sup>10</sup> *McCullough v Maryland*, 17 US 316 (1819).

<sup>11</sup> *United States Constitution* amend X.

<sup>12</sup> Spitzer, above n 9, 192 n 6.

<sup>13</sup> *United States Constitution* art 1 § 8 cl 3.

<sup>14</sup> See, eg, *United States v Lopez*, 115 S Ct 1624, 1629–30 (1995), where the Supreme Court invalidated the *Gun-Free Schools Act* 18 USC § 922(q) (1994), holding that the enactment of the law was beyond Congress’ ‘commerce power’ because it did not have a substantial relation to interstate commerce.

<sup>15</sup> *United States Constitution* art 1 § 8 cl 1.

<sup>16</sup> *Department of Revenue of Montana v Kurth Ranch*, 511 US 767 (1994).

<sup>17</sup> See, eg, *Huddleton v United States*, 415 US 814, 833 (1974) where the Supreme Court held that Congress has the power to regulate handguns because they affect interstate commerce; and *Mack v United States*, 856 F Supp 1372, 1379 (1997), where the Federal Court discussed Congress’ ‘raw power to regulate the transfer of handguns’.

<sup>18</sup> A table of these acts and their key provisions is included as Appendix A to this paper.

requirements for firearm sales and possession. Significantly, federal law prohibits the manufacture, sale and possession of fully automatic firearms.<sup>19</sup> Federal law also mandates that anyone engaged in a firearms business must obtain a federal licence,<sup>20</sup> and that only federally licensed dealers can conduct firearms sales across state lines.<sup>21</sup> In addition, federal law prohibits access to firearms by minors,<sup>22</sup> and certain prohibited categories of people such as convicted felons, drug addicts and the mentally ill,<sup>23</sup> and also requires licensed dealers to conduct background checks on all purchasers to ensure that they do not fall into a prohibited category.<sup>24</sup>

While these laws provide a very basic level of national gun control, they are extremely weak. In fact, America's federal gun control laws are the weakest of all industrialised nations worldwide.<sup>25</sup> The laws are riddled with loopholes, which reduce their effectiveness. For example, although licensed dealers are legally obliged to conduct background checks,<sup>26</sup> the relevant records are often incomplete because states do not always report mental health adjudications or criminal convictions to the federal government,<sup>27</sup> meaning disqualified persons have a good chance of successfully purchasing firearms from a licensed dealer.<sup>28</sup> In addition, the background check requirement does not apply to private sales and sales conducted by unlicensed individuals at gun shows and flea markets, which account for approximately 40% of all firearm transactions.<sup>29</sup> This 'gun show loophole' makes it possible for prohibited persons to easily access firearms.

There are also huge gaps in federal gun control law. For example, there is currently no federal prohibition on semi-automatic weapons<sup>30</sup> or high-capacity magazines.<sup>31</sup> A number of specific types of these weapons and magazines were banned for a period of 10 years under the Assault Weapons Ban,<sup>32</sup> but this ban expired in 2004 and has not since been renewed.

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<sup>19</sup> Unless government authority is granted or the weapon was possessed prior to 1986: 18 USC § 922(o).

<sup>20</sup> Ibid § 922(a)(1)(A).

<sup>21</sup> Ibid § 922(a)(3).

<sup>22</sup> Under federal law there is an age limit of 21 for purchase or possession of handguns and 18 for long guns: Ibid § 922(b)(1).

<sup>23</sup> Ibid § 922(d).

<sup>24</sup> Ibid § 922(t)(1)(A).

<sup>25</sup> Laura Cutilletta and Juliet Leftwich, 'Regulating Guns in New York: Existing State Laws and How They Could be Strengthened' (2012) 14 *NYSBA Government, Law and Policy Journal* 27, 27.

<sup>26</sup> 18 USC § 922(t)(1)(A).

<sup>27</sup> Adam Winkler, 'Heller's Catch-22' (2009) 56 *UCLA Law Review* 1551, 1556.

<sup>28</sup> Philip Cook and Jens Ludwig, 'The Limited Impact of the Brady Act: Evaluation and Implications' in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (John Hopkins University Press, 2013) 21, 28.

<sup>29</sup> Garen Wintemute, 'Comprehensive Background Checks for Firearm Sales: Evidence from Gun Shows' in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (John Hopkins University Press, 2013) 95, 96.

<sup>30</sup> Semi-automatic weapons are weapons designed for rapid fire that automatically reload a bullet after each shot is fired, allowing shots to be fired in rapid succession. How many shots can be fired will be determined by the size of the magazine. Unlike a fully automatic firearm, the trigger must be squeezed each time in order to fire a shot.

<sup>31</sup> High-capacity ammunition magazines are ammunition-feeding devices capable of holding more than 10 rounds of ammunition.

<sup>32</sup> *The Violent Crime Control and Law Enforcement Act of 1994* Pub L No 103-322, 108 Stat 1796 (1994).

In the aftermath of the Sandy Hook massacre, President Obama acknowledged the devastating impact of gun violence in the US<sup>33</sup> and made a number of legislative proposals to strengthen federal gun control, including extending the background check requirement to all gun sales and banning military-style assault weapons and high-capacity magazines.<sup>34</sup> However, on 17 April 2013, the Senate rejected these proposals, caving to heavy pressure from the National Rifle Association (NRA), which spent US\$500 000, on the day of the vote alone, campaigning against the proposals.<sup>35</sup> Following the recent Washington Navy Yard shooting, President Obama has made an impassioned appeal to the American people to insist on gun law reform, admitting that change to America's gun laws is unlikely to come from within Washington.<sup>36</sup>

## B *State Gun Control*

In light of the weakness of federal gun control, some states have attempted to strengthen gun control by introducing stricter laws of their own. There is, however, a significant lack of uniformity in state gun control laws. While some states have enacted reasonably restrictive gun control laws, a majority of states have only weak gun control, and some states impose almost no regulation on guns at all.<sup>37</sup>

This lack of uniformity undermines the effectiveness of state gun control laws. The situation in California provides a useful illustration. California has been consistently ranked as the state with the strongest gun control laws in America.<sup>38</sup> Among many other restrictions, in California, assault weapons are banned,<sup>39</sup> gun sales can only be conducted through a licensed dealer,<sup>40</sup> and there is a 10-day waiting period on all firearm purchases.<sup>41</sup> As a result, many people travel to more permissive states to purchase firearms.<sup>42</sup> Garen Wintemute has discovered at some gun shows in Reno, Nevada, a short distance across the California-Nevada border, more than 30% of the vehicles in the car park were from California.<sup>43</sup>

<sup>33</sup> Barack Obama, 'Remarks by the President at Sandy Hook Interfaith Prayer Vigil' (Speech delivered at the Sandy Hook Interfaith Prayer Vigil, Newtown High School, Connecticut, 16 December 2012) <<http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil>>.

<sup>34</sup> The White House, *Now is the Time: The President's Plan to Protect Children and our Communities by Reducing Gun Violence* (16 January 2013) <[http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_full.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf)>.

<sup>35</sup> Jonathan Weisman, 'Senate Blocks Drive for Gun Control', *New York Times* (online), 17 April 2013 <[http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&_r=0)>.

<sup>36</sup> Michael Shear, 'Honoring Navy Yard Victims, Obama asks: 'Do We Care Enough' to Change?', *New York Times* (online), 22 September 2013 <<http://www.nytimes.com/2013/09/23/us/obama-to-attend-memorial-service-for-victims-of-navy-yard-shooting.html>>.

<sup>37</sup> The table included as Appendix B to this paper highlights this variance.

<sup>38</sup> Legal Community Against Violence, *Gun Laws Matter: A Comparison of State Firearms Laws and Statistics* (14 July 2010) <[http://smartgunlaws.org/wp-content/uploads/2010/07/Gun\\_Laws\\_Matter\\_Brochure.pdf](http://smartgunlaws.org/wp-content/uploads/2010/07/Gun_Laws_Matter_Brochure.pdf)>; Brady Campaign to Prevent Gun Violence, 'Brady Issues 2011 State Scorecard: California Rises Again' (Media Press Release, 16 February 2012) <<http://www.bradycampaign.org/media/press/view/1468/>>.

<sup>39</sup> Cal Penal Code § 30605.

<sup>40</sup> *Ibid* § 27545.

<sup>41</sup> *Ibid* § 26815.

<sup>42</sup> Wintemute, above n 29, 102.

<sup>43</sup> *Ibid*.

Likewise, New York has some of the country's most restrictive gun control laws. Nevertheless, gun violence in New York is rife.<sup>44</sup> Data compiled by the Bureau of Alcohol, Tobacco, Firearms and Explosives reveals that 80-90% of guns used in crimes in New York State come from surrounding states with less restrictive gun laws.<sup>45</sup> The longstanding gun trafficking route from states with weaker gun control into New York is known as the 'Iron Pipeline' and highlights the problem presented by non-uniform gun control laws. As Simon Chapman has observed, 'in a country where the laws are different in every state, the system of gun control is only as strong as the weakest link'.<sup>46</sup>

### C *Gun Violence in the United States*

Despite the plethora of existing regulations, gun control laws in the US are failing to control guns in any meaningful way. The US has the highest rates of gun deaths and injuries of any industrialized nation worldwide.<sup>47</sup> Mass shootings have become a common recurrence in modern American society.<sup>48</sup> Five such tragedies have taken place in the last 14 months alone, claiming the lives of 72 victims.<sup>49</sup> These incidents, however, while highly publicised, are really just the tip of the iceberg. In 2010, the most recent year for which statistics are available, 31 672 Americans died from firearm related injuries.<sup>50</sup> *That is an average of 86 firearm related deaths per day.* In addition, 73 505 Americans were treated in emergency rooms for non-fatal gunshot wounds.<sup>51</sup> In 2007, guns were used to commit over 385 000 crimes,<sup>52</sup> 11 493 homicides (68% of all homicides),<sup>53</sup> and 18 735 suicides (over 50% of all suicides).<sup>54</sup> Given that the primary purpose of any gun control regime is to minimise gun-related crimes, deaths and injuries, a gun control regime that fails to control guns to such an extent certainly cannot be described as successful.

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<sup>44</sup> Spitzer, above n 9, 172.

<sup>45</sup> Ibid.

<sup>46</sup> Chapman, above n 2, 45.

<sup>47</sup> Cutiletta and Leftwich, above n 25, 27.

<sup>48</sup> A mass shooting is defined as the killing four or more victims by gunshot within a few hours: Peter Reuter and Jenny Mouzos, 'Australia: A Massive Buy-Back of Low-Risk Guns' in Jens Ludwig and Phillip Cook (eds) *Evaluating Gun Policy: Effects on Crime and Violence* (Brookings Institute Press, 2003) 121, 127.

<sup>49</sup> In addition to the mass shootings in Aurora, Newtown and Washington, two further mass shootings have occurred over the last 14 months. One in August 2012, when a gunman murdered six worshipers at a Sikh temple in Oak Creek, Wisconsin and another in July 2013, when a gunman murdered 6 people in an apartment building in Miami, Florida.

<sup>50</sup> National Center for Injury Prevention and Control, above n 1.

<sup>51</sup> National Center for Injury Prevention and Control, *WISQARS Non Fatal Injury Reports 2001-2010* (18 October 2010) Centers for Disease Control and Prevention <<http://www.cdc.gov/injury/wisqars/nonfatal.html>>.

<sup>52</sup> US Department of Justice, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2007* (19 September 2012) Bureau of Justice Statistics <<http://bjs.ojp.usdoj.gov/content/glance/tables/gunccrimetab.cfm>>.

<sup>53</sup> National Center for Injury Prevention and Control, *WISQARS Injury Mortality Reports, 1999-2009, for National, Regional, and States* (September 2011) Centers for Disease Control and Prevention

<[http://webappa.cdc.gov/sasweb/ncipc/dataRestriction\\_inj.html](http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html)>.

<sup>54</sup> Ibid.

## D *Reducing Gun Violence*

Whether or not the introduction of strict gun control laws is an effective way to reduce gun violence has been the subject of extensive debate. Gun control opponents vehemently reject the idea that strengthening gun control laws will reduce gun violence. Their most common claim, and a popular gun lobby slogan, is ‘guns don’t kill people, people kill people’, and they will continue to do so regardless of gun regulations. Some theorists, most famously John Lott, have gone as far as to suggest that the presence of more guns actually results in less crime.<sup>55</sup> However, the weight of available evidence reveals that there is an inextricable link between guns and violence in America,<sup>56</sup> and whilst gun control laws are not a panacea for gun violence, the Australian gun control experience, which forms the subject of the next chapter, provides strong evidence that the introduction of strict and uniform gun controls can significantly reduce gun violence.

## III GUN CONTROL IN AUSTRALIA

Although the US and Australia share much in common, when it comes to gun control, Australia has taken a radically different path. In stark contrast to the US, gun control laws in Australia are among the most stringent in the industrialised world,<sup>57</sup> although this was not always the case. Australian gun control laws underwent extensive reform in the late 1990s, primarily in response to our own tragic mass shooting. On 28 April 1996, at the popular Tasmanian tourist site of the Port Arthur Penal Colony, a lone gunman armed with two semi-automatic rifles murdered 35 people and wounded 18 others. The massacre, which shocked and outraged the nation, was the largest mass shooting by a single shooter ever recorded in the world.<sup>58</sup> It focused national and international attention on Australia’s then weak and non-uniform gun control laws,<sup>59</sup> and provided the catalyst for the complete reformation of the Australian gun control regime.

### A *The National Firearms Agreement of 1996*

Just 12 days following the events at Port Arthur, at the behest of the newly elected Prime Minister John Howard, the Australian federal, state and territory governments, through the then Australian Police Ministers Council, entered into the NFA, a 10-point nationwide agreement aimed at strengthening and harmonising firearm laws across Australia. Unlike the US federal government, the Australian Commonwealth government does not have any power to regulate the use, possession and sale of firearms.<sup>60</sup> This power rests with the state and

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<sup>55</sup> John Lott, *More Guns, Less Crime* (University of Chicago Press, 3<sup>rd</sup> ed, 2010).

<sup>56</sup> Spitzer, above n 9, 83.

<sup>57</sup> Jeanine Baker and Samara McPhedran, ‘Gun Laws and Sudden Death: Did the Australian Firearms Legislation of 1996 Make a Difference?’ (2007) 47 *British Journal of Criminology* 455, 455.

<sup>58</sup> Rebecca Peters, ‘Rational Firearm Regulation: Evidence-based Gun Laws in Australia’ in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (John Hopkins University Press, 2013) 195, 195. The death toll at Port Arthur was not exceeded in any mass shooting until the massacre at the youth camp on Utoeya Island, Norway, in 2011, where a lone gunman killed 77 people.

<sup>59</sup> Chapman, above n 2, 45.

<sup>60</sup> The Commonwealth government does, however, have constitutional power to legislate and regulate in relation to the importation of firearms, under the trade and commerce power: *Australian Constitution* s 51(i). Under the NFA, the Commonwealth government agreed to use this power to increase controls over

territory governments. Therefore, in order to ensure a uniform national approach to gun control, all states and territories had to agree to amend their respective firearms legislation, which they did under the NFA. Implementation of the NFA was both rapid and uniform.<sup>61</sup> By May 1997, all states and territories had passed legislation to meet their obligations under the agreement,<sup>62</sup> with only minor differences among states and territories in regulation and statute.<sup>63</sup> The laws enacted under the NFA can be summarised into four broad categories.

### 1 *Prohibitions on Automatic and Semi-Automatic Long Arms*

A key component of the NFA was the introduction of legislation banning the importation, sale, ownership, possession, manufacture and use of automatic and semi-automatic rifles and shotguns.<sup>64</sup> To encourage compliance with these new prohibitions, the states conducted a large-scale buyback program, funded by the federal government through a temporary increase in the Medicare levy.<sup>65</sup> Under this program, owners and dealers were granted a 12-month amnesty to surrender newly prohibited weapons for market value compensation. Within one year, 643 726 prohibited firearms had been bought back and destroyed.<sup>66</sup> In addition, substantial numbers of non-prohibited but unlicensed firearms were surrendered for no monetary compensation.<sup>67</sup> Cumulatively it is estimated that 20% of the total stock of Australian firearms was removed.<sup>68</sup>

### 2 *Owner Licensing and Firearms Registration Requirements*

A second significant component of the NFA was the introduction of a uniform owner licensing and firearms registration system to replace the various state regimes.<sup>69</sup> Under this uniform system, all firearm owners are required to obtain a licence. In order to do so, an applicant must demonstrate a 'genuine reason' for owning, possessing or using a firearm. 'Genuine reason' includes sporting, recreational and occupational shooting, but specifically excludes personal protection. In addition, as a precondition to obtaining a licence, all first

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the importation of automatic and semi-automatic long arms and their parts, which it did under the *Customs Legislation Amendment (Criminal Sanctions and Other Measures) Act 2000* (Cth) and the *Customs (Prohibited Imports) Amendment Regulations 2000 (No 7)* (Cth). Also, while the Commonwealth government does not have the power to regulate the sale of guns within states, it does have the constitutional power to regulate interstate trade under *Australian Constitution* s 51(i) and could conceivably use this power to validly regulate the interstate trade of guns, as the US federal government has done.

<sup>61</sup> Reuter and Mouzos, above n 48, 129.

<sup>62</sup> The relevant firearms legislation in each state is: *Firearms Act 1996* (NSW); *Firearms Act 1996* (Vic); *Weapons Act 1990* (Qld); *Firearms Act 1973* (WA); *Firearms Act 1977* (SA); *Firearms Act 1996* (Tas); *Firearms Act 1996* (ACT); *Firearms Act 1997* (NT). The relevant firearms regulations in each state are: *Firearms (General) Regulation 1997* (NSW); *Firearms Regulations 2008* (Vic); *Weapons Regulation 1996* (Qld); *Firearms Regulations 1974* (WA); *Firearms Regulations 2008* (SA); *Firearms Regulations 2006* (Tas); *Firearms Regulation 2008* (ACT); *Firearms Regulations 1997* (NT).

<sup>63</sup> Reuter and Mouzos, above n 48, 129.

<sup>64</sup> Except for military, police or other government purposes or for occupational categories of shooters licensed for a specified purpose (eg, extermination of feral animals). See, eg, *Firearms Act 1996* (NSW) s 7, sch 1.

<sup>65</sup> Reuter and Mouzos, above n 48, 129.

<sup>66</sup> *Ibid* 130.

<sup>67</sup> Leigh and Neill, above n 5, 519.

<sup>68</sup> Reuter and Mouzos, above n 48, 130.

<sup>69</sup> See, eg, *Firearms Act 1996* (NSW) pt 2 div 2, pt 3.

time applicants are required to complete an accredited safety-training course. Licences may be refused or cancelled for general reasons, such as if the person is not of good character;<sup>70</sup> specific reasons, such as if the person has been the subject of a Domestic Violence Order;<sup>71</sup> or reasons of mental or physical unfitness. All firearms and licences are required to be registered on the National Register of Firearms.

### 3 *Safe Storage Requirements*

Another important feature of the NFA was the introduction of a uniform standard for the security and storage of firearms.<sup>72</sup> This standard requires shotguns and rifles to be stored in a locked receptacle constructed of thick, hard wood or steel, fixed to the floor or wall,<sup>73</sup> while handguns are required to be stored in a thick, locked steel safe, bolted to the structure of a building. In addition, all ammunition must be stored in locked containers separate from any firearms. Failure to store firearms in the manner required is an offence and a matter that will lead to licence cancellation and firearm confiscation.

### 4 *Firearm Dealer and Sales Regulations*

Finally, under the NFA, a number of provisions were introduced to regulate firearms dealers and sales. These provisions mandate that firearms can only be sold by or through a licensed dealer, who is obliged to ensure that the purchaser is appropriately licensed and to maintain records of all sales transactions and provide them to the National Register of Firearms.<sup>74</sup> In addition, mail order sales can only be conducted between licensed firearms dealers.<sup>75</sup>

## B *Did the NFA work?*

Quantitative research reveals that the reforms introduced under the NFA have been responsible for substantial reductions in the Australian firearm death rate and have also put an end to mass shootings. In the 17 years since the NFA was implemented, a number of major studies have been conducted into its impact on gun violence. An early study conducted by Ozanne-Smith et al, explored trends in rates of firearm related deaths in the state of Victoria compared with the rest of Australia between 1979 and 2000.<sup>76</sup> These authors found ‘dramatic

<sup>70</sup> Other reasons include: conviction for an offence involving violence within the last five years; contravention of a firearm law; unsafe storage; no longer genuine reason; not in the public interest due to (defined circumstances); not notifying of change of address; license obtained by deception.

<sup>71</sup> Other reasons include: where applicant/licence holder has been subject of an Apprehended Violence Order, restraining order, or conviction for assault with a weapon/aggravated assault within the past five years.

<sup>72</sup> See, eg, *Firearms Act 1996* (NSW) pt 4.

<sup>73</sup> Provided it weighs less than 150 kilograms, otherwise it need not be fixed.

<sup>74</sup> See, eg, *Firearms Act 1996* (NSW) pt 5.

<sup>75</sup> *Ibid* ss 52–3.

<sup>76</sup> Ozanne-Smith et al, above n 5, 280. The Victorian government had previously reformed its gun control laws in 1988 following the 1987 Queen and Hoddle Street massacres in which 15 people perished to restrict access to semi-automatic long arms. Ozanne-Smith et al analysed mortality data on firearm related deaths, using ABS population data to calculate rates and a Poisson regression model to compare relative rates of firearm related deaths in Victoria and the rest of Australia over three periods of legislative reform (before the Victorian reforms, after the Victorian reforms, and after the national reforms).

declines in rates of firearm related deaths ... in the context of strong legislative reform'.<sup>77</sup> Similarly, in 2006, Chapman analysed changes and compared trends in firearm death rates and mass shootings pre- and post-gun law reforms.<sup>78</sup> These authors found accelerated declines in firearm deaths, particularly suicides, after 1996 and no evidence of method substitution.<sup>79</sup> They also found that, while in the 18 years preceding the NFA there were 13 mass shootings, in the decade following its implementation there were none.<sup>80</sup> Likewise, in the seven years since the study was published, no mass shootings have occurred in Australia.

The most comprehensive study into the effects of the reforms,<sup>81</sup> conducted by Leigh and Neill in 2010, found a 65% decline in the firearm homicide rate and a 59% decline in the firearm suicide rate in the decade following the implementation of the NFA, with no parallel increase in rates of non-firearm related homicides or suicides.<sup>82</sup> These authors also demonstrated a strong causal relationship between the NFA and these declines.<sup>83</sup> Their research showed that the NFA was responsible for a 36% decline in the firearm homicide rate and a 74% decline in the firearm suicide rate.<sup>84</sup>

Current data reveals that the Australian firearm death rate has today been reduced to 1/100 000, which is less than half of the 1996 rate and one tenth of the current US rate.<sup>85</sup> Likewise, the Australian firearm homicide rate, which was already one fifteenth of the US rate prior to Port Arthur, has been reduced to one twenty-seventh of that rate today.<sup>86</sup> Cumulatively, these studies provide strong evidence that the introduction of strict and uniform gun control laws coupled with the removal of substantial numbers of high-risk guns from the community has significantly reduced gun violence in Australia.

However, it is not universally accepted that the NFA has been successful in reducing firearm-related deaths. Two countervailing studies have concluded that the reforms have had little or no impact on gun violence. In 2007, Baker and McPhedran used a time-series approach to test whether post-1996 trends in firearm death differed from forecasts based on pre-1996 trends.<sup>87</sup> They discovered no difference between observed and forecast rates for firearm

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<sup>77</sup> Ibid 285.

<sup>78</sup> Chapman et al, above n 5, 365. These authors used negative binomial regression to analyse changes in firearm death rates in Australia from 1979–2003.

<sup>79</sup> Ibid 366–8.

<sup>80</sup> Ibid 370.

<sup>81</sup> This study is the most comprehensive because rather than using a simple time-series variation, as most other studies in the area have done, the Leigh and Neill study used panel data to exploit variation both across states and over time. Further the results of the Leigh and Neill study are robust to a variety of specification checks.

<sup>82</sup> Leigh and Neill, above n 5, 518.

<sup>83</sup> Ibid 523–38. Leigh and Neill found that the largest falls in firearm deaths occurred in states where more firearms were bought back, which provides strong evidence of a causal chain between the NFA and subsequent reductions in firearm related deaths rates.

<sup>84</sup> Ibid 533. The decline caused by the NFA in the firearm suicide rate is higher than the overall decline because the study explored variation across Australian states and the rate of the buyback differed from state to state.

<sup>85</sup> Peters, above n 58, 202.

<sup>86</sup> Philip Alpers, 'The Big Melt: How One Democracy Changed after Scrapping a Third of Its Firearms' in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (John Hopkins University Press, 2013) 205, 208.

<sup>87</sup> Baker and McPhedran, above n 57, 455. The authors used an AutoRegressive Integrated Moving Average (ARIMA) time series approach to predict future firearm death rates based on pre-1996 trends. These predicted rates were then compared to the observed rates in order to assess whether the decline in firearm related deaths was influenced by the introduction of the NFA reforms.

homicide.<sup>88</sup> The authors found that the only category of firearm death that may have been influenced by the NFA was firearm suicide, but that societal factors could also have influenced observed changes.<sup>89</sup> Baker and McPhedran concluded: ‘the policy has made no difference. There was a trend of declining deaths [prior to the NFA] that has continued’.<sup>90</sup>

In 2008, Lee and Suardi re-analysed the same data, using an alternative time-series approach testing for unknown structural breaks as a means of identifying the impact of the NFA.<sup>91</sup> The authors found no evidence of a structural break around the time of the NFA and concluded, therefore, that the reforms had not had any significant effects on firearm homicides or suicides.<sup>92</sup>

Since their publication, both of these studies have been heavily criticised and shown to be deeply methodologically flawed.<sup>93</sup> In an article entitled ‘How to Find Nothing’, David Hemenway of the Harvard School of Public Health explained how limitations in the research design of these studies made it impossible for the authors to reject the hypothesis that the NFA had no effect.<sup>94</sup> Therefore, on balance, it seems reasonable to reject the findings of these studies in favour of those that demonstrated a clear correlation between the NFA and subsequent declines in gun violence in Australia.

#### IV THE RIGHT TO KEEP AND BEAR ARMS

A very significant difference between Australia and the US is that Australia does not have a constitutionally entrenched Bill of Rights, nor is there a constitutionally protected right to keep and bear arms in Australia, as there is in the US. Thus there exists a potential constitutional barrier to the introduction of stricter gun control laws in the US, of which Australia has no equivalent. An analysis of the possibility of introducing Australian-style gun

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<sup>88</sup> Samara McPhedran and Jeanine Baker, ‘Enhancing Evidence-Based Policy: Principles and Practice from a Case Study of Australian Firearms Legislation’ (2008) 20 *Current Issues in Criminal Justice* 163, 168.

<sup>89</sup> Baker and McPhedran, above n 57, 461–4.

<sup>90</sup> Jeanine Baker, quoted in Matthew Moore, ‘Buyback has no effect on murder rate’, *Sydney Morning Herald* (online), 24 October 2006 <<http://www.smh.com.au/news/national/buyback-has-no-effect-on-murder-rate/2006/10/23/1161455665717.html>>.

<sup>91</sup> Wang-Sheng Lee and Sandy Suardi, ‘The Australian Firearm Buyback and its Effect on Gun Deaths’ (Working Paper No 17/08, Melbourne Institute, August 2008) 2–3. This approach involves testing for a structural break in a time series for the relevant data, in this case data relating to firearm death rates. If a structural break were found to coincide with the introduction of the NFA reforms, this would indicate that the NFA had an effect. Conversely if no structural break was found or if a structural break was found at a different time, this would indicate that the NFA had not had an effect.

<sup>92</sup> *Ibid* 23.

<sup>93</sup> David Hemenway, ‘How to Find Nothing’ (2009) 30 *Journal of Public Health Policy* 260; Christine Neill and Andrew Leigh, ‘Weak Tests and Strong Conclusions: A Re-Analysis of Gun Deaths and the Australian Firearms Buyback’ (Discussion Paper No 555, The Australian National University Centre for Economic Policy Research, June 2007) 1–13.

<sup>94</sup> Hemenway, above n 93, 260–8. Hemenway identified a number of flaws in the Baker and McPhedran study, including their unexplained selection of 1979 as the start year for their analysis, which skewed their results, and their unjustified assumption that the historical downward trend in firearm deaths would continue unabated, which meant that without the NFA firearm deaths would have been negative by 2015, and which therefore made it almost impossible for the intervention to be an improvement on the counterfactual. As regards the Lee and Suardi study, Hemenway explains that where policies have even modest lags, the structural break test can easily miss the effect, and such a test can also miss the effect of a policy that is implemented over a number of years, as the NFA was (1996–1997).

control in the US therefore necessitates an examination of the American right to keep and bear arms.

### A *The Second Amendment*

The Second Amendment to the US Constitution provides: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed’. There are two basic theories about the meaning of this Amendment – the collective right theory and the individual right theory. Proponents of the collective right theory endorse the view that the Second Amendment protects only the right of the states to maintain a militia without interference from the federal government, while advocates of the individual right theory argue that the Amendment protects an individual right to keep and bear arms unrelated to any militia.

### B *Second Amendment Interpretation pre-Heller and McDonald*

Prior to *Heller*, there was little disagreement among courts regarding the meaning of the Second Amendment.<sup>95</sup> The collective right view was unanimously endorsed by federal appellate courts,<sup>96</sup> and by a myriad of state courts.<sup>97</sup> In *United States v Miller*,<sup>98</sup> the only case prior to *Heller* in which the Supreme Court extensively discussed the meaning of the Second Amendment, the Court endorsed the collective right view. In *Miller*, two men had been indicted for transporting an unregistered sawed-off shotgun across state lines, in contravention of the *National Firearms Act of 1934*. The men challenged the constitutionality of this Act, claiming it violated their Second Amendment right. The Court, however, unanimously upheld the indictment, concluding that the Amendment only protects the right to keep and bear arms that have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’.<sup>99</sup> In so holding, the Court insisted that the Second Amendment must be interpreted and applied in accordance with its ‘obvious purpose’ of assuring the continuation of an effective militia.<sup>100</sup>

If this collective right view still represented the accepted understanding of the Second Amendment among courts today, then the Amendment would pose no barrier to the introduction of Australian-style gun control laws in the US. This is because such laws regulate civilian gun use and would not burden the right of states to maintain a militia. However, in two recent landmark cases the Supreme Court reversed course and endorsed the alternative individual right understanding of the Second Amendment.

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<sup>95</sup> Vernick et al, above n 8, 2022.

<sup>96</sup> With the exception in 2001 of the Fifth Circuit Court of Appeals in *United States v Emerson*, 270 F 3d 203 (5<sup>th</sup> Cir, 2001), where the Court endorsed the individual right interpretation of the Second Amendment but ultimately upheld the gun control law in question, concluding that the right could be subject to reasonable, narrowly tailored exceptions.

<sup>97</sup> Michael Habib, ‘The Future of Gun Control Laws Post-*McDonald* and *Heller* and the Death of One-Gun-Per-Month Legislation’ (2010) 44 *Connecticut Law Review* 1339, 1347.

<sup>98</sup> 307 US 174 (1939) (*Miller*’).

<sup>99</sup> *Ibid* 178.

<sup>100</sup> *Ibid*.

C *District of Columbia v Heller*

The first landmark decision came in *Heller*, where the Supreme Court, for the first time, endorsed the individual right interpretation of the Second Amendment and overturned a gun regulation as a violation of that Amendment. The case was concerned with a series of District of Columbia laws that effectively amounted to a ban on handguns. Formally, the District only prohibited the possession of unregistered handguns.<sup>101</sup> However, another provision of the DC code prevented the registration of handguns.<sup>102</sup> In addition, the district required that all lawfully owned firearms be kept ‘unloaded and disassembled or bound by trigger lock or similar device’ unless located in a place of business or used for lawful recreational activities within the District.<sup>103</sup> However, there was no place within the city limits where one could lawfully hunt or shoot recreationally.<sup>104</sup>

The respondent, Dick Heller, a DC police officer whose application to register a handgun to keep at home for self-defence had been rejected, challenged the constitutionality of the District’s laws on Second Amendment grounds. At first instance, his complaint was dismissed.<sup>105</sup> However, the Court of Appeals reversed this decision, holding that the Second Amendment does protect an individual right to keep and bear arms and that the District’s laws violated this right.<sup>106</sup> On appeal, the Supreme Court affirmed the judgment of the Court of Appeals.<sup>107</sup>

In reaching this decision, the Supreme Court, for the first time since *Miller*, addressed in detail the meaning of the Second Amendment. Scalia J, writing for the 5:4 majority, employed an originalist method<sup>108</sup> to provide an interpretation rooted in the Amendment’s text and history.<sup>109</sup> Beginning with a textual analysis, Scalia J divided the Amendment into two parts: a prefatory clause, which reads: ‘A well-regulated Militia, being necessary to the security of a free State’, and an operative clause, which reads: ‘The right of the people to

<sup>101</sup> DC Code Ann § 7-2502.01(a) (2008).

<sup>102</sup> *Ibid* § 7-5202.02(a)(4).

<sup>103</sup> *Ibid* § 7-2507.02.

<sup>104</sup> Winkler, above n 27, 1554.

<sup>105</sup> *Parker v District of Columbia*, 311 F Supp 2d 103, 109 (2004).

<sup>106</sup> *Parker v District of Columbia*, 478 F 3d 370, 395, 399–401 (2007).

<sup>107</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2822 (2008).

<sup>108</sup> The originalist method of constitutional interpretation, at least according to Scalia J’s conception, involves interpreting a constitutional provision based on textual and historical evidence, in order to provide an interpretation that reflects the way in which the provision would have been understood at the time of its adoption: Kyle Hatt, ‘Gun-Shy Originalism: The Second Amendment’s Original Purpose in *District of Columbia v Heller*’ (2011) 44 *Suffolk University Law Review* 505, 510. Scalia J has for many years strongly advocated for the use of originalism as the preferred method of constitutional interpretation, arguing that originalism is more compatible with the nature and purpose of a Constitution in a democratic system than other non-originalist methods and further that it is not the role of the court to evolve the constitution in accordance with current societal values: Antonin Scalia, ‘Originalism: the Lesser Evil’ (1989) 57 *Cincinnati Law Review* 849. Other ‘originalists’ regard Scalia J’s conception of originalism as extreme. In Australia, leading scholar Jeffrey Goldsworthy has advocated for a form of ‘moderate originalism’, whereby courts interpret constitutional provisions in accordance with publicly available evidence as to the founders’ intentions in enacting those provisions, and not their intentions as to how those provisions ought to be applied. Where disputes cannot be resolved by resort to the founders’ intentions, then it may be legitimate, according to ‘moderate originalism’, to apply judicial creativity: Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ in Tony Blackshield and George Williams (eds), *Australian Constitutional Law and Theory* (Federation Press, 5<sup>th</sup> ed, 2010) 314, 314.

<sup>109</sup> Hatt, above n 108.

keep and bear Arms, shall not be infringed'.<sup>110</sup> After addressing each of the textual elements of the operative clause in combination with the historical background of the Amendment, Scalia J concluded that its purpose was to confer an 'individual right to possess and carry weapons in case of confrontation'.<sup>111</sup> Scalia J then conducted a similar analysis of the prefatory clause, concluding that its purpose was to prevent the elimination of the militia.<sup>112</sup> This prefatory clause, however, was held not to limit or expand the scope of the operative clause,<sup>113</sup> but simply to announce the purpose for which the right was codified.<sup>114</sup> On this basis, the majority held that the Second Amendment protects an individual right to keep and bear arms unconnected with militia service.<sup>115</sup>

Having endorsed this interpretation, the majority concluded that the District's handgun ban violated the Second Amendment, as it prohibited an entire class of 'arms' overwhelmingly chosen by Americans for the purpose of self-defence in the home.<sup>116</sup> Similarly, the District's requirement that all lawfully owned firearms be rendered and kept inoperable was said to make it 'impossible for citizens to use them for the core lawful purpose of self-defence' and was hence also declared unconstitutional.<sup>117</sup>

#### D *McDonald v City of Chicago*

The individual right interpretation was shortly thereafter affirmed in the second landmark case of *McDonald*. The facts of *McDonald* were very similar to those of *Heller*. Otis McDonald and several other Chicago residents, who wished to keep handguns in their homes for self-defence, challenged a Chicago law that effectively amounted to a handgun ban because it prohibited the possession of unregistered handguns,<sup>118</sup> whilst at the same time preventing the registration of most handguns.<sup>119</sup> The case was combined with another challenge against a similar law in Oak Park, Illinois.<sup>120</sup> The petitioners sought a declaration that these laws were unconstitutional. Both the District Court and the Court of Appeals rejected the petitioners' arguments and upheld the laws.<sup>121</sup> However, by a 5:4 majority, the Supreme Court reversed the judgment and affirmed *Heller's* holding that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defence.<sup>122</sup>

<sup>110</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2789 (2008).

<sup>111</sup> *Ibid* 2797.

<sup>112</sup> *Ibid* 2799–801.

<sup>113</sup> *Ibid* 2789.

<sup>114</sup> *Ibid* 2801.

<sup>115</sup> *Ibid* 2802–12.

<sup>116</sup> *Ibid* 2817.

<sup>117</sup> *Ibid* 2818.

<sup>118</sup> Chicago Ill Mun Code § 8-20-040(a).

<sup>119</sup> *Ibid* § 8-20-050(c).

<sup>120</sup> Oak Park Ill Mun Code §§ 27-2-1 (2007).

<sup>121</sup> *NRA Inc v Village of Oak Park*, 617 F Supp 2d 752 (ND Ill, 2008); *NRA Inc v City of Chicago*, 567 F 3d 856 (7<sup>th</sup> Cir, 2009).

<sup>122</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3050 (2010). Many commentators have criticised the individual right interpretation endorsed in *Heller* and *McDonald*. See, eg, Winkler, above n 27, 1559–77; Hatt, above n 108, 516–22; Allen Rostron, 'Protecting Gun Rights and Improving Gun Control After *District of Columbia v Heller*' (2009) 13 *Lewis & Clark Law Review* 383, 385–94; and Spitzer, above n 9, 45; who all scathingly criticize what they see as faux originalism and/or flawed reasoning in Scalia J's majority opinion. It is not, however, the purpose of this paper to assess the validity of the Court's decisions in these cases. Rather, the paper accepts the majority opinion as an authoritative statement of the current state of the law pertaining to the Second Amendment, and the matter to be assessed is the

This case was landmark, not only because it affirmed the individual right interpretation, but also because it extended the Second Amendment to apply to the states. Originally, the Bill of Rights only applied to the Federal Government,<sup>123</sup> and prior to *McDonald*, the Supreme Court had, on a number of occasions, confirmed that the Second Amendment did not extend to the states.<sup>124</sup> However, subsequent to these cases, the Supreme Court began a process, known as ‘selective incorporation’,<sup>125</sup> whereby the Court uses the wording of the Fourteenth Amendment Due Process Clause to extend particular rights to apply to the states.<sup>126</sup> In *McDonald*, the Court was required, for the first time, to address the issue of whether the Second Amendment should be incorporated.<sup>127</sup> The majority held that because history revealed that the right to keep and bear arms was ‘deeply rooted in [the] Nation’s history and tradition’,<sup>128</sup> and was considered fundamental to the American scheme of ordered liberty,<sup>129</sup> it must therefore be incorporated to apply to the states.<sup>130</sup>

### E *The Scope of the Individual Right*

At first blush, the *Heller* and *McDonald* decisions may appear to be a major setback for gun control advocates and a tremendous victory for gun rights proponents.<sup>131</sup> However, the impact of these decisions has been lessened substantially as a result of the limited scope that the Court afforded to the right. The Court in *Heller* recognised that the Second Amendment right is not unlimited.<sup>132</sup> The majority made clear that laws that amount to a complete ban on handguns, in the home, for self-defence, are unconstitutional,<sup>133</sup> but at the same time assured that the right is ‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose’.<sup>134</sup> Specifically, the Court guaranteed that:

‘Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’<sup>135</sup>

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implications of the endorsement of this interpretation by the nation’s highest court on the possibility of introducing stricter gun control laws.

<sup>123</sup> *McDonald v City of Chicago*, 130 St Ct 3020, 3028 (2010).

<sup>124</sup> *United States v Cruikshank*, 92 US 542, 559 (1876); *Presser v Illinois*, 116 US 252, 265 (1886); *Miller v Texas*, 153 US 535, 538 (1894).

<sup>125</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3034 (2010).

<sup>126</sup> Spitzer, above n 9, 32–3.

<sup>127</sup> The Court was not required to address this issue in *Heller* because the District of Columbia is a federal enclave, not a state, and is therefore bound by the Bill of Rights.

<sup>128</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3036 (2010). In *Washington v Glucksberg*, 521 US 702, 721 (1997), the Supreme Court held that in order for a right to be incorporated under the Fourteenth Amendment Due Process Clause, it must be ‘deeply rooted in this Nation’s history and tradition.’

<sup>129</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3042 (2010). In *Duncan v Louisiana*, 391 US 145, 149 (1968), it was held that in order to be incorporated, a right must be shown to be ‘fundamental to the American scheme of justice’.

<sup>130</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3050 (2010).

<sup>131</sup> Rostron, above n 122, 384.

<sup>132</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2816 (2008).

<sup>133</sup> *Ibid* 2818.

<sup>134</sup> *Ibid* 2816.

<sup>135</sup> *Ibid* 2816–7.

Such laws were said to remain ‘presumptively lawful’.<sup>136</sup> The Court assured that these measures were identified only as examples and that the list was not exhaustive.<sup>137</sup> In addition, the Court recognised that the sorts of weapons protected by the Second Amendment are limited to those ‘in common use at the time’,<sup>138</sup> and the protection does not extend to ‘dangerous and unusual weapons’.<sup>139</sup> Further, the Court made clear that their analysis did not suggest the invalidity of all laws regulating the storage of firearms to prevent accidents,<sup>140</sup> although the DC safe storage law, which required that weapons be rendered inoperable, was invalidated because it made it ‘impossible’ for citizens to use their lawfully owned firearms for self-defence.<sup>141</sup> Thus, the Court implied that safe storage laws that do not make it ‘impossible’ to use firearms for self-defence would be constitutional.

The Court in *McDonald* reiterated that the right to bear arms is not absolute and may be subject to limitation by the state.<sup>142</sup> Incorporation, they assured, ‘does not imperil every law regulating firearms’, nor does it cast doubt on the ‘longstanding regulatory measures’ identified as presumptively lawful in *Heller*.<sup>143</sup> The *McDonald* majority went one step further, specifically allowing for the continuation of state and local experimentation with ‘reasonable firearms regulations’.<sup>144</sup>

Due to the inclusion of what is popularly referred to as the ‘laundry list’ of presumptively lawful regulatory measures, critics have labelled *Heller* as a compromise,<sup>145</sup> a paradox<sup>146</sup> and a Catch-22.<sup>147</sup> At the same time as declaring an individual right to keep and bear arms, the *Heller* court ‘suggested that nearly all gun control laws currently on the books are constitutionally permissible’,<sup>148</sup> thereby minimising the decision’s impact.<sup>149</sup> This has led many scholars to conclude that *Heller* will have relatively little effect on the constitutionality of existing gun laws.<sup>150</sup> So far, the case law supports their conclusions. Since *Heller*, hundreds of challenges to a wide variety of gun control laws have been heard in lower courts,<sup>151</sup> but the challenged laws have almost always survived.<sup>152</sup>

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<sup>136</sup> Ibid 2817 n 26.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid 2817, quoting *United States v Miller*, 307 US 174, 179 (1939).

<sup>139</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2817 (2008).

<sup>140</sup> Ibid 2820.

<sup>141</sup> Ibid 2818.

<sup>142</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3047 (2010).

<sup>143</sup> Ibid.

<sup>144</sup> Ibid 3046.

<sup>145</sup> Mark Tushnet, ‘*Heller* and the Perils of Compromise’ (2009) 13 *Lewis & Clark Law Review* 419, 419.

<sup>146</sup> Dennis Henigan, ‘The *Heller* Paradox’ (2009) 56 *UCLA Law Review* 1171, 1171.

<sup>147</sup> Winkler, above n 27, 1551–3.

<sup>148</sup> Ibid 1561.

<sup>149</sup> Rostron, above n 122, 394.

<sup>150</sup> See, eg, Mark Tushnet, ‘Permissible Gun Regulations After *Heller*: Speculations About Method and Outcome’ (2009) 56 *UCLA Law Review* 1425; Winkler, above n 27; Sanford Levinson, ‘For Whom is the *Heller* Decision Important and Why?’ (2009) 13 *Lewis & Clark Law Review* 315; Henigan, above n 146; Sarah Perkins, ‘*District of Columbia v Heller*: The Second Amendment Shoots One Down’ (2010) 70 *Louisiana Law Review* 1062.

<sup>151</sup> Lawrence Rosenthal and Adam Winkler, ‘The Scope of Regulatory Authority under the Second Amendment’ in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (John Hopkins University Press, 2013) 225, 226.

<sup>152</sup> Stephen Kiehl, ‘In Search of a Standard: Gun Regulations After *Heller* and *McDonald*’ (2011) 70 *Maryland Law Review* 1131, 1141–2.

While the endorsement of an individual right interpretation may not have imperilled existing gun control laws, given the failure of existing laws to control guns in America, the more pressing question seems to be: what impact will these decisions have on the possibility of introducing stricter gun control? In order to answer that question it is first necessary to determine the appropriate test for assessing the constitutionality of US gun control laws.

#### F *Standards of Scrutiny*

As the Second Amendment right is not absolute, there will be instances where, although a governmental regulation infringes that right, it is nevertheless constitutional because the infringement is justified. In determining whether infringements of constitutional rights are justified, American courts have traditionally employed a doctrinal framework of fixed standards of review, where each right is protected by one of three standards — rationality review, intermediate scrutiny or strict scrutiny — each of which imposes a greater burden of justification on the government than the last.<sup>153</sup> The Court in *Heller* and *McDonald* declined to specify the appropriate standard to be applied in Second Amendment cases. It is, however, possible to ascertain the appropriate standard based on the Court's reasoning in these cases.

Rationality review, the lowest standard of scrutiny, is the minimal protection given to constitutional rights.<sup>154</sup> Under this standard, if a particular law bears a 'rational relationship' to a 'legitimate government purpose' then it is constitutional.<sup>155</sup> Whilst the Court in *Heller* declined to say exactly what standard of scrutiny should apply, they specifically dismissed rationality review, saying this test 'could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right ... [including] the right to keep and bear arms'.<sup>156</sup> This is because if all that was required to overcome the right was a rational basis, 'the Second Amendment would be redundant'.<sup>157</sup> The *Heller* majority thus made clear that some form of heightened scrutiny should apply.

Strict scrutiny is the highest level of protection afforded to constitutional rights.<sup>158</sup> Under this standard, a court will permit the restriction of a constitutional right only when the restriction is 'narrowly tailored to achieve a compelling government interest',<sup>159</sup> meaning that the regulation must present the least restrictive alternative available.<sup>160</sup> Some scholars and courts have advocated for the adoption of strict scrutiny as the standard to be applied to the Second Amendment right, arguing that, as the right is fundamental, courts ought to afford it that level of scrutiny.<sup>161</sup> However, as Stephen Kiehl explains, strict scrutiny is too stringent a level of review for gun regulations for three important reasons.<sup>162</sup>

<sup>153</sup> Stephen Gardbaum, 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 387, 391.

<sup>154</sup> Perkins, above n 150, 1075.

<sup>155</sup> *Heller v Doe*, 509 US 312, 320 (1993). The 'legitimate government purpose' need not even be the actual purpose that the government had in mind when enacting the statute, as long as it is plausible that the law could achieve any legitimate government purpose then the law will be constitutional: *United States Railroad Retirement Board v Fritz*, 449 US 166, 179 (1980).

<sup>156</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2817 n 27 (2008).

<sup>157</sup> *Ibid.*

<sup>158</sup> Perkins, above n 150, 1076.

<sup>159</sup> *Abrams v Johnson*, 521 US 74, 82 (1997).

<sup>160</sup> *Grutter v Bolinger*, 539 US 306, 327 (2003).

<sup>161</sup> See, for example, Hatt, above n 108, 520–1; *United States v Montalvo*, 581 F 3d 1147 (9<sup>th</sup> Cir, 2009); *United States v Engstrum*, 609 F Supp 2d 1227, 1231 (D Utah, 2009).

<sup>162</sup> Kiehl, above n 152, 1156.

Firstly, as previously explained, *Heller* and *McDonald* recognised a host of presumptively lawful gun regulations, which courts and scholars agree would likely fail a strict scrutiny test.<sup>163</sup> While such laws do serve the compelling government interests of reducing crime and protecting public safety, they would not satisfy the strict scrutiny requirement for narrow tailoring.<sup>164</sup> By recognising this list of presumptively lawful gun regulations, the Supreme Court in *Heller* thus implicitly rejected strict scrutiny.<sup>165</sup> Secondly, the Second Amendment is more similar in its nature and language to those rights that receive intermediate scrutiny than it is to those that receive strict scrutiny.<sup>166</sup> Significantly, the Second Amendment lacks the absolute language of the First,<sup>167</sup> which begins ‘Congress shall make no law’.<sup>168</sup> The language of the Second Amendment, by contrast, suggests space for some restrictions.<sup>169</sup> Thirdly, the Court in *McDonald* endorsed the continuation of ‘state and local experimentation with reasonable firearms regulations’.<sup>170</sup> Such a statement presupposes a more flexible standard of review than strict scrutiny.<sup>171</sup> Therefore, it is apparent that strict scrutiny is not the appropriate standard of review for gun control laws.

The appropriate standard is intermediate scrutiny, which falls between rationality review and strict scrutiny, requiring that a law be ‘substantially related’ to an ‘important government interest’.<sup>172</sup> A law will satisfy this test provided it is ‘not substantially broader than necessary to achieve the government’s interest’.<sup>173</sup> This standard is appropriate because while it provides a heightened level of review, requiring more than just a rational basis to justify a particular law, intermediate scrutiny does not imperil the presumptively lawful regulations identified in *Heller*.<sup>174</sup> Further, intermediate scrutiny provides a more flexible standard of review, which allows for the continued experimentation with reasonable gun regulations endorsed in *McDonald*.<sup>175</sup> It is concluded, therefore, that although the Supreme Court declined to explicitly allocate a standard of review for evaluating gun regulations, based on the Court’s reasoning, it is evident that the correct standard is intermediate scrutiny.

## V INTRODUCING AUSTRALIAN-STYLE GUN CONTROL IN THE UNITED STATES

### A *A Framework for Evaluating the Constitutionality of Gun Control Laws post-Heller and McDonald*

This Chapter will propose a two-step inquiry for evaluating the constitutionality of gun control laws under the Second Amendment and then apply that inquiry to the laws introduced in Australia under the NFA in order to determine whether such laws could be introduced in the US following the Supreme Court’s decisions in *Heller* and *McDonald*. The first step of

<sup>163</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2851 (2008) (Breyer J dissenting); *United States v Skoien*, 587 F 3d 803, 811 (7<sup>th</sup> Cir, 2009); *United States v Mazzarella*, 614 F 3d 85 (3<sup>rd</sup> Cir, 2010); Henigan, above n 146, 1198; Kiehl, above n 152, 1156.

<sup>164</sup> Kiehl, above n 152, 1157.

<sup>165</sup> Henigan, above n 146, 1198.

<sup>166</sup> Kiehl, above n 152, 1158. Only the First and Fifth Amendments receive strict scrutiny.

<sup>167</sup> *Ibid* 1159.

<sup>168</sup> *United States Constitution* amend I.

<sup>169</sup> Kiehl, above n 152, 1158.

<sup>170</sup> *McDonald v City of Chicago*, 130 S Ct 3020, 3046 (2010).

<sup>171</sup> Kiehl, above n 152, 1159.

<sup>172</sup> *Craig v Boren*, 429 US 190, 197 (1976).

<sup>173</sup> *Ward v Rock Against Racism*, 491 US 781, 800 (1989).

<sup>174</sup> Kiehl, above n 152, 1160.

<sup>175</sup> *Ibid* 1162.

the inquiry is to determine whether the relevant gun control law would infringe the right to keep and bear arms. The question to be asked is: does the law burden conduct within the scope of the Second Amendment?<sup>176</sup> If the law burdens conduct beyond the scope of the Second Amendment, then it is constitutional. If, however, the regulation burdens conduct within the scope of the Second Amendment, the second step is to determine whether the infringement is nonetheless justified.<sup>177</sup> As explained in Chapter III, the appropriate standard of scrutiny to be applied in making this determination is intermediate scrutiny. If the law passes an intermediate scrutiny test, then it is constitutional. If, however, the law fails, it is unconstitutional and therefore could not be introduced in the US.

## B *Applying the Framework to Australian-Style Gun Control Laws*

### 1 *Prohibitions on Automatic and Semi-Automatic Long Arms*

The US federal government already prohibits automatic weapons manufactured after 1986.<sup>178</sup> A law extending this ban to apply to all automatic weapons regardless of manufacture date would certainly be constitutional because it passes the first step of the inquiry. The Court in *Heller* made clear that such weapons were beyond the scope of Second Amendment protection when they said that Second Amendment protection is limited to those weapons ‘in common use at the time’ and does not extend to ‘dangerous and unusual weapons’.<sup>179</sup> Thus, the law would not infringe the Second Amendment and would, therefore, be constitutional. The situation regarding semi-automatic weapons is more complicated. Such weapons, though undoubtedly dangerous, are not unusual. Semi-automatic firearms account for about 15% of the 250+ million privately owned firearms in the US.<sup>180</sup> A ban on semi-automatic weapons would, therefore, infringe the individual right to keep and bear arms because it would prohibit individuals from accessing an entire class of weapons currently in common use, thereby burdening conduct within the scope of the Second Amendment.

Such a ban would still likely be constitutional, however, as it would pass an intermediate scrutiny test. The important government interests to be served by this ban are preventing crime and promoting public safety. Semi-automatic weapons, having been designed for rapid fire, are extremely dangerous and often used in the perpetration of violent crimes,<sup>181</sup> and mass shootings in particular.<sup>182</sup> While social science is not conclusive on whether there is a link between semi-automatic firearms bans and crime rates, courts do not require lawmakers to have overwhelming proof before they act. They will look to available data to assess the legislature’s judgment.<sup>183</sup> Trace data collected during the 10 years that the Assault Weapons Ban was in place demonstrated a reduced incidence of assault weapons used in crime, with a

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<sup>176</sup> Rosenthal and Winkler, above n 151, 227.

<sup>177</sup> Gardbaum, above n 153, 388.

<sup>178</sup> 18 USC § 922(o).

<sup>179</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2817 (2008).

<sup>180</sup> National Rifle Association Institute for Legislative Action, *Semi-Automatic Firearms and the “Assault Weapon” Issue* (3 June 2011) NRA-ILA <<http://www.nraila.org/news-issues/fact-sheets/2011/semi-automatic-firearms-and-the-“assaul.aspx”>>

<sup>181</sup> Perkins, above n 150, 1091.

<sup>182</sup> Christopher Koper, ‘America’s Experience with the Federal Assault Weapons Ban, 1994-2004: Key Findings and Implications’ in Daniel Webster and Jon Vernick (eds), *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Johns Hopkins University Press, 2013) 157, 157–8.

<sup>183</sup> Rosenthal and Winkler, above n 151, 230.

66% drop in gun crime traces to the weapons banned by the law, as well as a year-by-year and absolute decline in the number of assault weapons traced to crime overall.<sup>184</sup> Thus there is reliable evidence that banning particular types of weapons reduces the availability of these guns for criminal misuse, thereby preventing crime involving that type of weapon and consequently enhancing public safety. A ban on semi-automatic weapons is therefore substantially related to important government interests and for that reason it is constitutional.

## 2 *Owner Licensing and Firearms Registration Requirements*

The implementation of a firearm licensing system in the US would not in and of itself be unconstitutional. However, the licensing system may be unconstitutional if its conditions amount to an unjustifiable infringement on the right to keep and bear arms. The Australian system had four key conditions that require analysis.

Firstly, the requirement that applicants demonstrate a ‘genuine reason’, excluding personal protection, for owning, possessing or using a firearm, would undoubtedly be unconstitutional. That is because the imposition of such a condition would prohibit many individuals from keeping and bearing firearms and would, therefore, burden conduct within the scope of the Second Amendment. Further, this requirement is unlikely to pass an intermediate scrutiny test because, while it is undoubtedly intended to serve the important government interests of preventing crime and enhancing public safety, an American court would likely find that because the regulation prohibits law abiding citizens from possessing firearms, it is ‘substantially broader than necessary to achieve the government’s interest’.<sup>185</sup> In addition, the Court in *Heller* unequivocally stated that the inherent right of self-defence is central to the Second Amendment right, and therefore a law that holds that self-defence is not a ‘genuine reason’ to own, possess or use a firearm would certainly be unconstitutional.<sup>186</sup>

Secondly, as regards the grounds for licence refusal/cancellation, these conditions do infringe the right to keep and bear arms because they prohibit certain individuals from keeping and bearing firearms. However, most of the grounds would pass an intermediate scrutiny test. The important government interests to be served are preventing crime and enhancing public safety. There is little doubt that preventing high-risk individuals from accessing firearms is substantially related to these important government interests. Indeed, the US federal government already prohibits access to firearms by many such individuals,<sup>187</sup> and the *Heller* Court guaranteed that their decision was not to cast doubt on these longstanding prohibitions.<sup>188</sup> Thus, the inclusion of ‘specific reasons’ and reasons of mental and physical unfitness as grounds for license refusal/cancellation would likely be constitutional. However, the inclusion of ‘general reasons’ would likely be unconstitutional because reasons such as ‘not of good character’ and ‘not in the public interest’ are likely to be found ‘broader than necessary to achieve the government’s interest’.<sup>189</sup>

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<sup>184</sup> Brady Center to Prevent Gun Violence, ‘On Target: The Impact of the 1994 Federal Assault Weapon Act’ (Report, Brady Center to Prevent Gun Violence, March 2004) 1, 3  
<[http://www.bradycenter.org/xshare/pdf/reports/on\\_target.pdf](http://www.bradycenter.org/xshare/pdf/reports/on_target.pdf)>.

<sup>185</sup> *Ward v Rock Against Racism*, 491 US 781, 800 (1989).

<sup>186</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2817 (2008).

<sup>187</sup> 18 USC § 922(d).

<sup>188</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2816–7 (2008).

<sup>189</sup> *Ward v Rock Against Racism*, 491 US 781, 800 (1989).

Thirdly, the imposition of a requirement to complete a mandatory safety training course as a prerequisite to obtaining a licence would be constitutional, as it does not infringe the Second Amendment right. The safety training requirement does not prevent individuals from purchasing, using or owning firearms and arguably enhances a citizen's Second Amendment right because it ensures they are adequately trained in how to safely exercise that right.

Finally, the requirement that all firearms and licences be registered on a national register would undoubtedly be constitutional. This requirement does not burden conduct within the scope of the Second Amendment because it in no way prevents individuals from exercising their right to keep and bear arms. 'Registration does not restrict an individual from owning a firearm or from using it in the manner he wishes';<sup>190</sup> it simply makes registration a precondition in order for him or her to do so.

### 3 *Safe Storage Requirements*

Australian-style safe storage requirements would burden conduct within the scope of the Second Amendment because such laws make it more difficult for individuals to use their lawfully owned firearms for self-defensive purposes. However, the Court in *Heller* made clear that their analysis did not suggest the invalidity of all laws regulating the storage of firearms,<sup>191</sup> thus opening up the possibility that contemporary safe storage laws might constitutionally burden the Second Amendment right.<sup>192</sup>

If subjected to an intermediate scrutiny test, Australian-style safe storage laws would likely be found to be constitutional. The purpose of safe storage laws is to prevent accidental weapons discharges, particularly amongst children, and also to prevent deliberate but rash weapons use.<sup>193</sup> These are undoubtedly important government interests. Once again, social science is not conclusive on whether there is a link between the implementation of these kinds of laws and the achievement of their objective. Some critics argue that there is no evidence that safe-storage laws reduce either juvenile accidental gun deaths or suicide, and that these laws simply impair people's ability to use guns defensively.<sup>194</sup> However, a vast number of studies have demonstrated that safe storage laws significantly reduce accidental gun deaths among children,<sup>195</sup> as well as unintentional firearm injuries and suicides.<sup>196</sup> Thus, there is sufficient evidence to show that safe storage laws are related to these important government interests.

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<sup>190</sup> Perkins, above n 150, 1092.

<sup>191</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2820 (2008).

<sup>192</sup> Tushnet, above n 150, 1438.

<sup>193</sup> *Ibid.*

<sup>194</sup> See, eg, John Lott and John Whitley, 'Safe-Storage Gun Laws: Accidental Death, Suicides, and Crime' (2001) 44 *Journal of Law and Economics* 659, 659.

<sup>195</sup> See, eg, Peter Cummings et al, 'State Gun Safe Storage Laws and Child Mortality Due to Firearms' (1997) 278 *Journal of the American Medical Association* 1084, 1084.

<sup>196</sup> See, eg, David Grossman et al, 'Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries' (2005) 293 *Journal of the American Medical Association* 707, 712; Daniel Webster et al, 'Association Between Youth-Focused Firearm Laws and Youth Suicides' (2004) 292 *Journal of the American Medical Association* 594, 594; Andrew McClurg, 'The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More "Smoking Gun"' (2000) 51 *Hastings Law Journal* 953, 958.

In contrast to the DC safe storage law struck down in *Heller*, Australian-style safe storage laws would pass the ‘substantially related’ hurdle because, unlike the DC law, which required firearms to be rendered and kept inoperable,<sup>197</sup> Australian-style laws would not make it impossible for individuals to use their lawfully owned firearms for self-defensive purposes, as citizens could still retrieve firearms and render them useful for self-defence. The Australian-style laws are therefore ‘not substantially broader than necessary to achieve the government’s interest’.<sup>198</sup>

#### 4 *Firearm Dealer and Sales Regulations*

Finally, Australian-style regulations of firearm dealers and sales would also be constitutional if introduced in the US. Such regulations do not infringe the individual right to keep and bear arms because they burden conduct beyond the scope of the Second Amendment. Restricting authority to sell firearms to licensed dealers does not prevent individuals from keeping or bearing arms. Similarly, restricting mail order sales to licensed dealers does not prevent individuals from purchasing firearms in person. Further, requiring firearm dealers to record sales and check licences does not even impact upon the individual right to keep and bear arms, as these are simply conditions on the commercial sale of arms. The court in *Heller* explicitly said ‘nothing in our opinion should be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms’.<sup>199</sup> Thus all of these regulations would pass the first step of the inquiry.

### C *A Note on State Constitutions*

This analysis has focused on the relationship between gun control laws and the federal constitution. However, all American states also have a state constitution, and 42 of 50 states have a constitutional provision guaranteeing an individual right to bear arms.<sup>200</sup> The above analysis is not undermined by the existence of these state-level constitutional guarantees because any law that passed the above inquiry would also be upheld at state level. That is because no state court applies strict or even intermediate scrutiny when they assess the constitutionality of gun control laws.<sup>201</sup> Instead they apply a lower standard, known as the reasonable regulation test.<sup>202</sup> Any law that meets an intermediate scrutiny test would easily meet this standard as well.

## VI CONCLUSION

What this analysis reveals is that the Second Amendment to the US Constitution, as interpreted in the cases of *Heller* and *McDonald*, does not prevent the US from adopting a successful gun control regime such as Australia’s. In Chapter IV it was demonstrated that a

<sup>197</sup> DC Code Ann § 7-2507.02 (2008).

<sup>198</sup> *Ward v Rock Against Racism*, 491 US 781, 800 (1989).

<sup>199</sup> *District of Columbia v Heller*, 128 S Ct 2783, 2816–7 (2008).

<sup>200</sup> Adam Winkler, ‘Scrutinizing the Second Amendment’ (2007) 105 *Michigan Law Review* 683, 683.

<sup>201</sup> *Ibid.*

<sup>202</sup> Under this test, a court asks whether the challenged law is a reasonable method of regulating the right to bear arms. So long as a law does not render the right nugatory, it will be considered reasonable and therefore constitutional: *Ibid.*

vast majority of the types of regulations introduced in Australia under the NFA would be constitutional if introduced in the US. The examination revealed that the US could ban automatic and semi-automatic weapons, introduce a licensing and registration system mandating safety training and prohibiting high risk individuals from accessing firearms, tighten safe storage laws, ensure only licensed dealers are entitled to sell firearms, and strengthen firearm dealer and sales regulations, all without violating the Second Amendment. This is because even after the endorsement of an individual right interpretation in *Heller* and *McDonald*, the Second Amendment does not prevent the introduction of gun control laws that are substantially related to important government interests, such as preventing crime and enhancing public safety, as are the vast majority of Australian gun control laws.

In light of the proven effectiveness of Australian gun control laws in reducing gun violence in Australia and the failure of the current American gun control regime to control gun violence in the US, America should seriously consider introducing Australian-style gun control. President Obama has demonstrated that he has the will to introduce stricter gun control in the US. It remains for him to find a way to overcome the powerful and well-funded gun lobby and steer the changes through a hostile Senate and House of Representatives. The Second Amendment, however, does not stand in his way.

APPENDIX A – MAJOR US FEDERAL GUN CONTROL INSTRUMENTS<sup>203</sup>

Legislation	Key Provisions
National Firearms Act of 1934 (PL 73-474; 48 <i>Stat.</i> 1236)	<ul style="list-style-type: none"> <li>– Imposed a tax on the making and transfer of NFA firearms</li> <li>– Imposed a tax on persons and entities engaged in the business of importing, manufacturing, and dealing in NFA firearms</li> <li>– Required registration of all NFA firearms with the Secretary of the Treasury</li> </ul> <p>NB NFA firearms included shotguns and rifles having barrels less than 18 inches in length, certain firearms described as “any other weapons”, machine guns, and firearm mufflers and silencers<sup>204</sup></p>
The Gun Control Act of 1968 (PL 90-618; 18 <i>Stat.</i> 1226)	<ul style="list-style-type: none"> <li>– Banned the sale of guns to certain ‘prohibited persons,’ including: minors; drug addicts; convicted felons; and the mentally ill</li> <li>– Banned interstate sales of firearms and ammunition to private individuals</li> <li>– Strengthened dealer licensing and record-keeping requirements</li> <li>– Mandated that all guns be affixed with a serial number</li> <li>– Banned the importation of military surplus firearms with no ‘sporting purpose’</li> </ul>
The Firearms Owners Protection Act of 1986 (PL 99-360; 100 <i>Stat.</i> 449) (McClure-Volkmer Act)	<p>Amended the Gun Control Act by:</p> <ul style="list-style-type: none"> <li>– Loosening dealer licensing requirements</li> <li>– Legalising gun sales by licensed dealers at gun shows</li> <li>– Eliminating record-keeping requirements for ammunition dealers</li> <li>– Lifting the ban on the interstate sale of long guns</li> </ul> <p>Also:</p> <ul style="list-style-type: none"> <li>– Limited the number of unannounced ATF gun dealer inspections to one per year</li> <li>– Prohibited the federal government from maintaining a centralised database of gun dealer records</li> <li>– Banned future transfer and possession of fully automatic machine guns</li> </ul>
The Brady Handgun Violence Prevention Act of 1993 (PL 103-159; 107 <i>Stat.</i> 1536) (Brady Act)	<ul style="list-style-type: none"> <li>– Mandated background checks for all firearm purchases from a licensed dealer</li> <li>– Imposed a 5-day waiting period for handgun purchases (replaced in 1998 with the National Instant-Check System)</li> </ul>

<sup>203</sup> This table is based on a similar table published in Spitzer, above n 9, 168–9, with the addition of the *National Firearms Act of 1934*.

<sup>204</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, *National Firearms Act (NFA)*, US Department of Justice <<http://www.atf.gov/firearms/nfa/>>.

	<p>was introduced)</p> <ul style="list-style-type: none"> <li>– Increased dealer licensing fees</li> <li>– Required local police to conduct background checks of gun buyers reported to have made multiple handgun purchases (struck down in <i>Printz v US</i> (521 US 898) as a violation of state ‘police power’)</li> </ul>
<p>The Violent Crime Control and Law Enforcement Act of 1994 (Title XI; PL 103-322; 108 <i>Stat.</i> 1796) (Assault Weapons Ban) (Expired September 2004)</p>	<ul style="list-style-type: none"> <li>– Prohibited (for 10 years) the future manufacture, transfer and possession of 19 specified types of semi-automatic assault weapons and copies of these weapons (more than 661 sporting rifles and all existing assault weapons exempted)</li> <li>– Prohibited (for 10 years) the future transfer and possession of large capacity ammunition magazines, capable of holding more than 10 bullets</li> </ul>
<p>The Protection of Lawful Commerce in Arms Act of 2005 (PL 109-92; 119 <i>Stat.</i> 2095)</p>	<ul style="list-style-type: none"> <li>– Banned civil law suits against manufacturers/dealers/importers of firearms/ammunition (with certain exceptions)</li> <li>– Required handguns be sold with a secure gun storage or safety device</li> <li>– Banned the manufacture or importation of armour piercing bullets</li> </ul>

APPENDIX B – FEDERAL AND STATE GUN CONTROL AREAS<sup>205</sup>

<b>Gun Control Area</b>	<b>Federal regulation</b>	<b>States with regulation</b>
<b>CLASSES OF WEAPONS</b>		
Assault weapons	Expired 2004	7 states ban assault weapons (CA, CT, MA, NJ, NY; HI & MD ban assault pistols); 3 states regulate assault weapons (MD, MN, VA); D.C. bans assault weapons indirectly
Large capacity ammunition magazines	Expired 2004	6 states ban large capacity ammunition magazines (CA, HI, MD, MA, NJ, NY)
Fifty caliber rifles	No	California bans 50 caliber rifles; Connecticut bans one model of 50 caliber rifle; Maryland regulates one model of 50 caliber rifle
Handguns	No	No state bans handguns since <i>DC v Heller</i>
Non-powder guns	No	19 states regulate use or possession (CA, CO, CT, DE, FL, IL, MA, MI, MN, MS, MO, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, TC, UT, VT, VA, WA, WI)
Ammunition regulation	Limited	41 states and D.C. regulate ammunition (AL, AK, AZ, CA, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI)
<b>SALES AND TRANSFERS</b>		
Prohibited purchasers	Yes	49 States and D.C. (Vermont is the only state without prohibited purchaser laws)
Minimum age to purchase and possess firearms	Yes	37 states and D.C. stricter than the federal law (AK, AZ, AR, CA, CT, DE, FL, HI, ID, IL, IN, IA, LA, ME, MD, MA, MI, MN, MS, MO, MT, NV, NJ, NY, ND, OH, OK, OR, PA, RI, SC, TX, UT, VT, WA, WI)
Domestic violence and firearms	Yes	35 states and D.C. stricter than federal law (AK, AZ, CA, CO, CT, DE, FL, HI, IL, IN, IA, MD, MA, MI, MN, MT, NE, NV, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SD, TN, TX, UT, VA, WA, WV, WI)

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This table is primarily based on a similar table that was published as an appendix to: Legal Community Against Violence, 'Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws' (Report No 2, Legal Community Against Violence, 1 February 2008) 258–64 <<http://smartgunlaws.org/regulating-guns-in-america-an-evaluation-and-comparative-analysis-of-federal-state-and-selected-local-gun-laws/>>. The original table has been updated here to take account of recent developments in federal, state and local gun control laws since the LCAV report publication in 2008 and an additional category of 'open carry' has been added.

Background checks	Yes	49 states and D.C. (Vermont is the only state without laws requiring background checks)
Mental health reporting	Limited	14 states authorise or require reporting to NICS (AL, CO, CT, FL, GA, IL, IA, KS, ME, MI, MO, VA, WA, WI)
Waiting Periods	No	12 states and DC impose waiting period on purchases of some or all firearms (CA, CT, FL, HI, IL, IA, MD, MN, NJ, RI, SD, WI)
Restrictions on multiple purchases or sales of firearms	No	2 states limit handgun purchases to one per person per month (CA, VA); Maryland limits purchases of handguns and assault weapons to one per person per month
<b>GUN DEALERS AND OTHER SELLERS</b>		
Dealer regulations	Yes	28 states and D.C. license and/or regulate firearms dealers (AL, CA, CT, DE, FL, GA, HI, IN, ME, MD, MA, MI, MN, NH, NJ, NY, NC, OH, OR, PA, RI, SC, TX, VA, WA, WV, WI)
Private Sales	No	2 states and D.C. require universal background checks for all firearm transfers (CA, RI); 3 states require universal background checks for transfers of some firearms (MD – handguns and assault weapons, CT, PA – handguns); 5 states require background checks for all firearm transfers at gun shows CO, CT, IL, NY, OR)
Gun shows	No	8 states regulate gun shows (CA, CO, CT, IL, MD, NY, OR, VA)
<b>GUN OWNERSHIP</b>		
Licensing of gun owners or purchasers	No	4 states require a license or permit for purchasers or owners of all firearms (HI, IL, MA, NJ); 7 states require a license or permit for handguns only (CA, CT, IA, MI, NY, NC, RI)
Registration of firearms	Limited	Hawaii and D.C. require registration of all firearms; California requires registration of pre-ban assault weapons and 50 caliber rifles; 4 states require registration of pre-ban assault weapons (CT, HI, MD, NJ); Louisiana registers certain other firearms; 9 states prohibit registration of some or all firearms (CA, DE, FL, GA, ID, PA, RI, SD, VT)
Reporting lost or stolen firearms	Federally licensed firearm dealers only	7 states and D.C. require firearm owners to report lost or stolen firearms (CT, MA, MI, NJ, NY, OH, RI)
Open carry	No	3 states and D.C. do not allow open carry of handguns in public places (FL, IL, TX); 3 states do not allow open carry of long guns in public places (FL, MA, MN); 5 states prohibit open carry of loaded long guns (CA, IA,

		NJ, TN, UT)
Carrying concealed weapons	Yes	2 states do not allow carrying concealed weapons (IL, WI); 34 states are “shall issue” (AR, CO, FL, GA, IA, ID, IN, KS, KY, LA, ME, MI, MN, MS, MO, MT, NE, NV, NH, NM, NC, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WA, WV); 11 states and D.C. are “may issue” (SL, CA, CT, DE, HI, MD, MA, NJ, NY, RI, WY); 3 states do not require a permit to carry (AZ, AK, VT)
<b>CONSUMER AND CHILD SAFETY</b>		
Design safety standards for handguns	Imported firearms only	8 states (CA, HI, IL, MD, MA, MN, NY, SC)
Locking devices	Yes	11 states and D.C. (CA, CT, IL, MD, MA, MI, NJ, NY, OH, PA, RI)
Personalised firearms	No	2 states (MD, NJ)
Child access prevention	No	27 states and D.C. (CA, CO, CT, DE, FL, GA, HI, IL, IN, IA, KY, MD, MA, MN, MS, MO, NV, NH, NJ, NC, OK, RI, TN, TX, UT, VA, WI)
<b>CRIME DETECTION</b>		
Ballistic identification	No	CA requires handgun microstamping; 3 states use ballistic imaging (CT, MD, NY)
Retention of firearms sales and background check records	Yes	21 states and D.C. require sellers to retain sale records (AL, CA, CO, CT, DE, GA, IL, ME, MD, MA, MI, MS, NJ, NY, NC, OR, PA, RI, TN, VT, WA); 10 states retain seller-reported sales information (AL, CA, CT, MD, MA, MI, NJ, NY, PA, WA); 9 states are required to purge background check records (DE, FL, NE, NH, RI, TN, UT, VA, WI)

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