Note – Red Flag Laws: The Constitutionality of Mental Health Provisions for Gun Regulation in Modern-Day America

By Bridget M. Moran*

“It’s a mental health issue in that those individuals [who have a sense of hopelessness and desperation and suicidality] are at a higher risk to move forward with these attacks. It’s a gun issue in that every attacker who has this unfettered, easy access to lethal means can move more quickly to their goal.”

I. Introduction

A “mass shooting” has been defined as an incident where four or more victims are shot or killed, not including the shooter, in a single event. Mass shootings are becoming increasingly common in America, averaging around one per day. Schools have long been targeted by active shooters, but the historic carnage involving K-12 schools during 2018 prompted the introduction of “active shooter drills” as a regular part of “welcome back” curriculum. In 2012, two weeks after a mass shooting in Aurora, 2012, Brian Van Brunt, Intervening Early to Stop Killers, NAT’L PUB’N RADIO (Feb. 15, 2018), https://www.npr.org/2018/02/16/586315515/intervening-early-to-stop-killers. Brian Van Brunt, the executive director of the National Behavioral Intervention Team Association, explained that preventing mass killings at schools requires early intervention. Id. Van Brunt described that the association’s interventions with at-risk students “when they’re best [sic], are about connecting the student to resources and moving them off the pathway to violence and towards a pathway of social connection.” Id.

1 See General Methodology, GUN VIOLENCE ARCHIVE (last visited Sept. 20, 2020), https://www.gunviolencearchive.org/methodology. “The Gun Violence Archive is an online archive of gun violence incidents collected from over 7,500 law enforcement, media, governmental and commercial sources daily in an effort to provide near-real time data about the results of gun violence.” See also, GUN VIOLENCE ARCHIVE. But see Mark Follman, How Many Mass Shootings Are There, Really?, N.Y. TIMES (December 3, 2015). Follman discusses the inconsistencies in mass shooting statistics, due to the fact “that there is no official definition for ‘mass shootings.’” Id.


Colorado, the Houston, Texas Mayor’s Office of Public Safety and Homeland Security posted a six-minute video on YouTube explaining “exactly what to do when someone starts shooting in a public place.” The United States’ gun violence epidemic has even led to the creation of an active shooter consulting industry. The threat of gun violence—in a country with “nearly half of the number of civilian-owned guns in the world”—now reaches every aspect of American society.

The summer of 2019 was violent in the United States. Twenty-six mass shootings left 126 people dead. Americans’ lives were at risk of gun violence while reporting to work, shopping at Walmart, attending local festivals, going out to dinner, and even remaining in the confines of their own homes. On average that summer, a mass

2017 and Memorial Day in May 2018, a campus in this country went into lockdown because of a shooting or the perceived danger of one.” Id. See also FEDERAL COMMISSION ON SCHOOL SAFETY, FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY, at 141 (2018) (citing the shooting at Marjory Stoneman Douglas High School in Parkland, FL in February 2018 as reason for increased active shooter preparedness and mitigation in schools).


8 See Smith, supra note 3.


shooting occurred every three and a half days, and two mass shooting events occurred within 14 hours of each other.\textsuperscript{11} Yet, Americans’ calls for legislative action to stem gun violence continue to go unanswered.\textsuperscript{12}

The gun violence epidemic affecting the United States is not limited to mass shooting events.\textsuperscript{13} Suicide continues to be the leading cause of gun-related deaths, while other major categories include homicide, officer-related shootings, domestic violence-related shootings, gang violence, accidents, and defensive shootings.\textsuperscript{14}

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\textsuperscript{11} See Smith, supra note 3. On August 4, 2019, “officers shot and fatally wounded a gunman within 32 seconds of him opening fire on a packed street lined with bars, nightclubs and shops,” where he killed nine individuals in Dayton, Ohio. \textit{Id}. A case where a husband shot and killed his wife and stepchildren in their respective beds in Madill, Oklahoma “was not an outlier” during the summer of 2019. \textit{Id}. “More than half of the mass killing suspects that summer had a family or romantic tie to at least one victim.” \textit{Id}.

\textsuperscript{12} See Smith, supra note 3. “By Labor Day weekend [in 2019], the national debate about gun control, reopened by El Paso and Dayton, had returned to a familiar stalemate. Democrats wanted stronger background checks and, in some cases, an assault weapons ban. Many Republicans did not. Sweeping national action seemed unlikely.” \textit{Id}. \textit{But see Gould v. Morgan}, 907 F.3d 659, 662 (1st Cir. 2018) (upholding a Massachusetts firearm licensing statute which requires “good reason” for open carry as constitutional). The municipalities of Boston and Brookline enacted the challenged legislation, which required applicants apply to carry firearms in public to provide a “proper purpose.” \textit{Id}. at 663. Boston defined “proper purpose” as employment, hunting and target practice, or sport. \textit{Id}. at 664. Brookline defined “proper purpose” as employment, hunting, target practice sport, transport, domestic (use only in and around one’s home) or collecting. \textit{Id}. The court held that “core Second Amendment right is limited to self-defense in the home.” \textit{Id}. at 660. Applying intermediate scrutiny to analyze a regulation that burdened “rights on periphery of Second Amendment,” the court found that “the Massachusetts firearm regulatory regime did not violate Second Amendment” because it “bore a substantial relationship to the important governmental interests of promoting public safety and preventing crime.” \textit{Id}. at 674. The court opined that “the plaintiffs simply do not have the right ‘to carry arms for any sort of confrontation’ or ‘for whatever purpose’ they may choose.” \textit{Gould}, 907 F.3d at 662 (quoting District of Columbia v. Heller, 554 U.S. 570, 595, 626 (2008)).


Almost every day we hear of another mass shooting in [the United States]. But America’s gun violence epidemic is made up of much more than high-profile media events. Every 16 hours, a woman in America is shot and killed by a current or former intimate partner. Suicides account for 60 percent of all gun deaths. And there are many communities across the county where gun violence on their streets is an everyday reality.


\textsuperscript{14}See GUN VIOLENCE ARCHIVE, Charts and Maps, supra note 13; see also Disrupting Access: Addressing Firearm Suicide in the U.S., EVERYTOWN FOR GUN SAFETY (Sept. 10, 2018), https://everytownresearch.org/report/disrupting-access (reporting 22,000 suicides by firearm occur in the United States every year).
category of gun violence carries its own motives, relatively easy access to a gun increases the risk of death by firearm.\textsuperscript{15}

The Second Amendment to the Constitution of the United States provides that “[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.”\textsuperscript{16} The constitutional right to keep and bear arms initially enjoyed a broad interpretation out of fear of a newly formed centralized government in control of the country’s military.\textsuperscript{17} The United States is a changed landscape since the Second Amendment’s ratification in 1791; there has been a significant decrease in need for armed state militias, but also a noted increase in mental health problems and firearm accessibility.\textsuperscript{18} Americans wrestling with violent tendencies is a mental health issue; easy access to firearms allowing such individuals to act on these violent tendencies is a gun regulation issue.\textsuperscript{19} At a federal level, gun purchaser only need to “pass an instant background check that considers criminal convictions, domestic violence, and immigration status” to obtain a gun; there is no consideration given to the purchaser’s potential mental health issues.\textsuperscript{20}

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  \item[]\textsuperscript{15} See Disrupting Access, supra note 14 (indicating “access to a gun increases the risk of death by suicide by three times”).
  \item[]\textsuperscript{16} See U.S. CONST. amend. II.
  \item[]\textsuperscript{17} See Nelson Lund & Adam Winkler, Common Interpretation: The Second Amendment, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ii/interps/99 (last accessed Sept. 26, 2020) (discussing the historical events leading to the creation of the Second Amendment).
  \item[]\textsuperscript{18} See id.; see also Maddy Reinert, et al., The State of Mental Health in America, MENTAL HEALTH AMERICA https://www.mhanational.org/issues/state-mental-health-america (last visited Oct. 5, 2020) (reporting increase in rate of suicidal ideation in adults from 2012 to 2018). In 2020, 10.3 million American adults reported having serious thoughts of suicide. \textit{Id.}
  \item[]\textsuperscript{19} See Van Brunt, supra note 1; see also Siegel et al., Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States, 107 AM. J. OF PUB. HEALTH 1923, 1928 (2017) (comparing the homicide rates in states with shall-issue firearm licensing laws versus may-issue laws). The study analyzed the relationship between “shall-issue” (application automatically approved unless categorically prohibited) and “may-issue” (application subject to law enforcement’s judgment and discretion) concealed-carry permitting laws and homicide rates. \textit{Id.} The study found the following:

  Shall-issue concealed-carry permitting laws were significantly associated with 6.5 percent higher total homicide rates, 8.6 percent higher firearm-related homicide rates, and 10.6 percent higher handgun-specific homicide rates compared with may-issue states . . . . Our analysis provides further support for the hypothesis that the relationship between shall-issue laws and higher homicide rates increased over time . . . . Moreover, this finding is inconsistent with the hypothesis that permissive concealed-carry laws deter crime by increasing the presence of armed individuals. Were that the case, no one would expect to see lower handgun, non-handgun, and nonfirearm homicide rates in shall-issue states compared with may issue states.
  \item[]\textsuperscript{20} See Audrey Carlsen & Sahil Chinoy, How to Buy a Gun in 16 Countries, N.Y. TIMES (updated Aug. 6, 2019), https://www.nytimes.com/interactive/2018/03/02/world/international-gun-laws.html?emc=edit_NN_p_20190318&module=inline&nl=morning-
“Extreme Risk” laws, also known as “Red Flag” laws, are an attempt by state legislatures to manage the root of the gun access problem by allowing for temporary removal of an individual’s access to firearms. Seventeen states, and the District of Columbia which enacted Red Flag laws, have successfully curbed gun violence since their enactment. Nonetheless, the tension that Red Flag laws have with an individual’s Second Amendment rights invites a discussion on Red Flag laws’ constitutionality. This note analyzes the scope of the Second Amendment in modern-day America and the constitutionality of Red Flag laws, focusing on how the context of the issues have changed from 1791 to the present. Part II discusses the history of the regulatory structure of gun regulation in each branch of the United States government. Part III examines the background, purpose, and function of Red Flag laws. Part IV of this note analyzes the scope of the Second Amendment and the due process implications of Red Flag laws, as well as alternative public policy considerations.

II. History

A. Ratifying the Second Amendment in 1791

briefing&nlid=67072811&section=topNews&cte=1&fbclid=IwAR08-g7UV5uJSeycWNA4z7s0hmz4Kk96oGe_Aq28alMhLAYEvDoz85Bh9k. “Many states have additional buying restrictions, including waiting periods and expanded background checks. Roughly a third of American gun owners buy guns without a background check, which federal law does not require when buying directly from a private seller.” Id.


22 See Extreme Risk, supra note 21. Connecticut, a study found, experienced a 14 percent reduction in firearm suicide rates following an increased enforcement of its Extreme Risk law. Id. Indiana experienced a 7.5 percent decrease in its firearm suicide rate in the 10 years after the state passed its Extreme Risk law in 2005. Id. See, e.g., IND. CODE § 35-47-14-1, et seq. (Indiana Extreme Risk statute). See also Mastaikos, P. & Sacks, C., Criminal Justice Speaker Series: Gun Violence Prevention, MASSACHUSETTS GENERAL HOSPITAL CENTER FOR GUN PREVENTION (John Joseph Moakley United States Courthouse, Feb. 13, 2020) (reporting mitigation of suicide in Connecticut and Indiana via Red Flag laws). Connecticut and Indiana reported every twenty to thirty guns removed through Extreme Risk Protection orders resulted in one less suicide. Id. See also Gould v. Morgan, 907 F.3d 659, 674-75 (2018) (highlighting limited access to firearms in turn controls levels of gun violence). The court noted in its conclusion that Massachusetts consistently holds one of the lowest rates of gun-related deaths in the nation “attributed to its comprehensive firearms licensing regime.” Id.

23 See Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) (upholding a New York statute requiring “proper cause” for a concealed carry license). See also Extreme Risk Laws Save Lives, supra note 21 (discussing the robust due-process protections built into Red Flag laws).

24 See infra, Part IV.

25 See infra, Part II.

26 See infra, Part III.

27 Infra, Part IV.
The Second Amendment was born out of fear of oppression by the federal government following the transfer of power from the States under the Constitution. The Framers allowed the States to control the risk by granting them the protection of “a well regulated militia, being necessary to the security of a free State[.]” The federal government would control the country’s military power, but it did not have the authority to “disarm the citizenry.”

The wording of the Second Amendment has long puzzled U.S. Supreme Court justices and academics. The Court’s linguistic interpretations focus on the meaning and interaction of the prefatory and operative clauses. Gun-regulation advocates argue that

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29 See U.S. CONST. amend. II.; see also Lund & Winkler, supra note 17; Woolf, supra note 28.

30 See Lund & Winkler, supra note 17.


It is hard to believe the framers would be happy with the result of their work. America remains bitterly divided over guns, thanks to a bizarrely worded amendment that is introduced by a statement about militias that is superfluous (if Scalia and gun advocates are right), and was arguably never true at all.

Id. See generally D.C. v. Heller, 554 U.S. 570 (2008) (providing extensive discussion regarding the disagreement amongst U.S. Supreme Court over Second Amendment interpretation).

32 See D.C. v. Heller, 554 U.S. at 598. Justice Antonin Scalia, writing for the majority, explains that the Second Amendment has two parts: its prefatory clause and its operative clause. Id. at 577. He explains their interaction as “the former does not limit the latter grammatically, but rather announces a purpose.” Id. Using an originalist theory, Scalia interpreted that the purpose announced in the prefatory clause is to “prevent elimination of the militia.” Id. at 599. Justice Scalia concludes the linguistic analysis with:

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England.
the prefatory clause (“A well regulated militia, being necessary to the security of a free State”) limits the rights under the Second Amendment to a “need for a militia.”33 On the other hand, gun-rights advocates argue that the operative clause, “the right of the people to keep and bear Arms, shall not be infringed,” is absolute.34 Since its adoption, the Supreme Court has rarely taken up challenges regarding the scope of the Second Amendment.35 Thus, in light of limited Second Amendment jurisprudence, the scope of the right to bear arms remains unclear.36

B. Pre-Heller Second Amendment Jurisprudence

The U.S. Supreme Court established in early Second Amendment challenges that the amendment’s only effect was to limit the powers of Congress and the national government; in essence, the Court did not interpret the amendment as granting the right to keep and bear arms, but instead interpreted it to reserve the power to regulate arms to the States.37 In 1939, in United States v. Miller,38 the Supreme Court narrowed the scope of the Second Amendment to allow the federal government to ban firearms inconsistent with the preservation of a well-regulated militia.39 Prior to the U.S. Supreme Court’s landmark decision in District of Columbia v. Heller in 2008, lower federal courts generally

that prompted codification of the right to have arms in the English Bill of Rights.

Id.; see also Johnson, supra note 31. Jeffrey Kaplan, a linguist at San Diego State University, contends the Second Amendment’s prefatory is now false because America is a “free state” with no militias, and therefore it is no longer operative. Id. 33 See Johnson, supra note 31 (providing a common pro-gun legislation argument).
34 See Johnson, supra note 31 (providing a common anti-gun legislation argument).
35 See Gould v. Morgan, 907 F.3d 659, 667 (1st Cir. 2018). “For over two centuries, the Supreme Court has said very little either about the meaning of [the Second Amendment] or about the scope of the guaranteed right.” Id. See also SARAH H. PECK, POST-HELLER SECOND AMENDMENT JURISPRUDENCE, CONGRESSIONAL RESEARCH SERVICE 1, (last updated March 25, 2019). “Before Heller, the Supreme Court had barely opined on the scope of the Second Amendment, making its last substantive remarks on the right in its 1939 ruling in United States v. Miller.” Id. See also Nelson Lund, The Second Amendment, Heller, and Originalist Jurisprudence, 56 UCLA L. REV. 1343, 1344 (2009). “With almost no relevant precedent to constrain its analysis, the Supreme Court had the opportunity to apply a jurisprudence of original meaning to the Second Amendment’s manifestly puzzling text.” Id.
36 See Gould, 907 F.3d at 670 (“Withal Heller did not supply us with a map to navigate the scope of the right of public carriage for self-defense.”); see also Kachalsky v. Cty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) (discussing ambiguous scope of the Second Amendment); United States v. Carter, 669 F.3d 411 (4th Cir. 2012); Johnson, supra note 31 (critiquing language of prefatory clause of Second Amendment; “[a]t the very least, it has not stood the test of time.”).
37 See United States v. Cruikshank, 92 U.S. 542, 591-92 (1876) (holding states, as opposed to Second Amendment, grant “right to keep and bear arms”); Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding no Second Amendment violation where state banned private citizen from forming personal military group); see also Miller v. Texas, 153 U.S. 535 (1894) (affirming restrictions of Second Amendment apply only to Federal government, not states).
39 See id. (holding act banning possession of shotguns with barrel under 18 inches constitutional).
interpreted the Second Amendment rights as “collective,” belonging to the states in the capacity of a militia or military.40

C. Post-Heller Second Amendment Jurisprudence

The Court’s landmark decision in Heller represented a shift in Second Amendment interpretation.41 With its decision, the Court discarded the “collective right theory” and interpreted the Second Amendment instead as granting an individual the right to possess firearms.42 The Court, however, acknowledged that “founding era-like militias no longer exist” and therefore limited this individual right to own firearms to legal purposes like hunting and self-defense in the home.43 The Court provided that reasonable regulations like those prohibiting firearm ownership by felons or by the mentally ill are presumptively lawful.44 Prohibiting firearms from “sensitive places,” like schools and government buildings, are also presumptively lawful.45

The Heller Court declined to further define the scope of the right, particularly in non-sensitive public spaces, leaving lower courts with the task.46 McDonald v. City of Chicago47, the first case in the post-Heller era, the Court affirmed that the rights granted by the Second Amendment, as defined by Heller, apply to the states as well as the federal government.48 McDonald did not materially alter the scope of the right under Heller, and thus in 2010, the scope of the Second Amendment still remained unclear.49

D. Modern Day Second Amendment Jurisprudence

40 554 U.S. 570 (2008); see United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (Second Amendment right collective rather than individual); Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995) (“Second Amendment only confers collective right of keeping and bearing arms which must bear ‘reasonable relationship to the preservation or efficiency of a well-regulated militia’”); United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000) (Second Amendment preserves “collective right of militia” to bear arms, not individual right).
41 554 U.S. at 592 (2008).
42 Id. at 622. (“This meaning is strongly confirmed by the historical background of the Second Amendment.”); see also Johnson, supra note 31 (“Scalia thought the [prefatory] clause should be relevant… England’s Stuart kings had disarmed those likely to be disloyal. So an arms-keeping citizenry ready to muster as a militia, even against its own rulers, was indeed ‘necessary for the security of a free state.’”).
43 Heller, 544 U.S. at 599.
44 Id. at 626.
45 Id.
46 Id. (declining to undertake an “exhaustive historical analysis today of the full scope of the Second Amendment”).
48 Id. at 791. (holding Second Amendment rights incorporated through the Fourteenth Amendment apply to states).
49 See Gould v. Morgan, 907 F.3d 659, 667 (1st Cir. 2018); see also Kachalsky v. Cty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) (“Heller was never meant ‘to clarify the entire field’ of Second Amendment jurisprudence.’”). “[Heller and McDonald] merely scratched the surface: they did not provide much clarity as to how Second Amendment claims should be analyzed in future cases.” Gould, 907 F.3d at 667.
The U.S. Supreme Court generally declined to grant certiorari on Second Amendment challenges in the past decade. In 2016, the U.S. Supreme Court vacated a decision of the Massachusetts Supreme Judicial Court (“SJC”) that had upheld a woman’s criminal conviction under a state law that prohibited the possession of stun guns. The Court held the SJC’s decision contradicted precedent set in *Heller* that the Second Amendment “extends to arms that were not in existence at the time of the founding,” and remanded the case for further proceedings in the SJC. In January of 2019, the Court granted certiorari on a challenge to a New York City firearm licensing provision brought by New York Rifle & Pistol Association. In April of 2020, the Court ruled the petitioner’s claim moot as the State of New York amended the licensing provision to grant the relief petitioner sought, missing an opportunity to further define the scope of the individual right to bear arms.

The Federal Circuit Courts of Appeals have passed down several important decisions on the scope of the Second Amendment since *Heller*. Several circuits have held that bans on semi-automatic rifles and large-capacity magazines survive intermediate scrutiny and thus, do not violate Second Amendment rights. As anticipated, due to the ambiguous scope from *Heller*, federal courts are trying to contain and define the scope right to bear arms in public spaces.

### E. Gun Regulation in the Legislature

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51 See Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (critiquing SJC’s three arguments as inconsistent with *Heller*). The SJC upheld the conviction, pursuant to state law because a stun gun was “not in common use at the time of [Second Amendment] enactment.” Id. at 1029; Commonwealth v. Caetano, 26 N.E.3d 688 (Mass. 2015); MASS. GEN. LAWS, ch. 140 § 131J (2014).

52 See Caetano, 136 S. Ct. at 1027.

53 N.Y. State Rifle & Pistol Ass’n v. City of New York, 139 S. Ct. 939 (2019). The Court will review the 2d circuit’s holding that New York City’s ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment. See N.Y. State Rifle & Pistol Ass’n v. City of New York, 883 F.3d 45 (2d Cir. 2018).


55 See *Heller* v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (upholding assault rifle ban); see also United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011), cert. denied, 565 U.S. 1058 (2011) (upholding ban on carrying or possessing loaded handgun in a motor vehicle within national park); United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013), cert. denied, 574 U.S. 878 (2014) (upholding prohibition on domestic violence misdemeanants possessing firearms); Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017), cert. denied, 138 S. Ct. 469 (2017) (upholding Maryland’s ban on assault weapons and large-capacity magazines as not protected by Second Amendment).

56 See *Heller*, 670 F.3d at 1244; *Kolbe*, 849 F.3d at 114.

57 See Masciandaro, 638 F.3d at 458; Caetano, 136 S. Ct. at 1027.
While regulating private citizens is a gradual and controversial process, federally licensed dealers are much more strenuously regulated. The first attempt at national gun control legislation was the National Firearms Act of 1934 (“NFA”), which imposed a tax on manufacturing, selling, and transporting certain firearms. The NFA also required registration of firearms with the Secretary of the Treasury. Otherwise, it included no provisions to deter crime, like gangland violence, which was a growing concern in the early 20th century. The NFA was incorporated into the Internal Revenue Code in 1954.

In the wake of the assassinations of President John F. Kennedy, former Attorney General and U.S. Senator Robert F. Kennedy, and Dr. Martin Luther King, Jr., Congress passed the Gun Control Act of 1968 (“GCA”). Unlike the NFA, the GCA was created to “provide support to Federal, State, and local law enforcement officials in their fight against crime and violence.” The GCA ended the importation of all military surplus and other guns, unless the Secretary of the Treasury deemed it to have a sporting purpose, and the GCA imposed Federal jurisdiction on “destructive devices.” Further, the GCA blocked specific congressionally defined groups, like convicted felons, minors, and persons “adjudicated as a mental defective”, from accessing firearms. Finally, it required that all guns have a serial number engraved or cast on the receiver or frame of the weapon, which cannot be easily obliterated. In passing the GCA, Congress progressed in forming a stricter firearms licensing and regulation regime in the United States.

Opposition to the increased regulation resulted in Congress passing the Firearm Owners’ Protection Act of 1986, which banned civilian ownership of machine guns in exchange for otherwise lessened restrictions of gun owners. In 1993, Congress passed

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60 See § 4, 48 Stat. 1236.
61 See 48 Stat. 1236.
64 Zimring, supra note 58, at 133.
65 See 18 U.S.C. §§ 921-22 (banning weapons “not being particularly suitable for or readily adaptable to sporting purposes” including most surplus military firearms and “destructive devices” such as bombs, mines, grenades); see also Zimring, supra note 58, at 149.
66 See 18 U.S.C. § 922(d)(3) (2013); Zimring, supra note 58, at 151 (defining minors as under eighteen for shotguns and rifles or under twenty-one for handguns).
68 See id.; see generally Zimring, supra note 58.
the Brady Handgun Violence Prevention Act, named after the acting White House press secretary who was permanently injured during an assassination attempt on Ronald Reagan. This law addressed gaps in the GCA by requiring licensed dealers, manufacturers, or importers to conduct a background check on patrons before selling them firearms. President Clinton passed the Violent Crime Control and Law Enforcement Act in 1994, which contained an assault weapons ban, but the legislation expired in 2004. In 2005, President Bush signed the Protection of Lawful Commerce in Arms Act into law, which protected gun manufacturers “from being named in federal or state civil suits by those who were victims of crimes involving guns made by that company.” Undeterred by changing administrations, the National Rifle Association ("NRA") works tirelessly to loosen the restrictions on gun manufacturers, distributors, and owners.

F. Gun Regulation in the Executive Branch

Following every mass shooting event in the United States, the country looks to the President for action. The shooting at Sandy Hook Elementary in Newtown, Connecticut on December 14, 2012, which killed twenty-six people, twenty of whom were

Prohibiting a national registry of dealer records, limiting ATF inspections to once per year (unless there are multiple infractions), softening what is defined as “engaging in the business” of selling firearms, and allowing licensed dealers to sell firearms at “gun shows” in their state. It also loosened regulations on the sale and transfer of ammunition.

Gray, supra note 59; see also 100 Stat. at 449.


Through the tireless efforts of the [NRA], a provision known as the “Dickey Amendment”—named after a Republican representative from Arkansas who proclaimed himself a “point man for the NRA”—was snuck into an appropriations bill and first signed into law by President Clinton. The provision stipulated that “none of the funds made available for injury prevention and control at the [CDC] may be used to advocate or promote gun control.

Id.


74 See Shen, supra note 7, at 684 (discussing NRA’s attempts to thwart gun regulation during Clinton’s presidency); see also GREG LEE CARTER, GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND THE LAW 435 (Greg Lee Carter ed., 2002) (explaining the NRA successfully weakened the GCA).

75 See Adena Gruskin, Does Tragedy Prompt Change: A Look at Gun Control in the Aftermath of Mass Shootings, 42 DOCUMENTS TO THE PEOPLE 18 (2014).
On January 16, 2013, frustrated by Congressional inaction, former President Barack Obama presented a plan comprised of executive orders and calls for legislation to combat gun violence, starting with closing the

76 See Leila Nadya Sadat and Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J. L. & POL‘Y 1 (2019). Former President Barack Obama described December 14, 2012, as the worst day of his presidency. In his press briefing later that day, President Obama shared these words:

We’ve endured too many of these tragedies in the past few years. And each
time I learn the news I react not as a President, but as anybody else would -- as a parent. And that was especially true today. I know there’s not a parent in America who doesn’t feel the same overwhelming grief that I do.

The majority of those who died today were children -- beautiful little kids between the ages of 5 and 10 years old. They had their entire lives ahead of them -- birthdays, graduations, weddings, kids of their own. Among the fallen were also teachers -- men and women who devoted their lives to helping our children fulfill their dreams.

... As a country, we have been through this too many times. Whether it’s an elementary school in Newtown, or a shopping mall in Oregon, or a temple in Wisconsin, or a movie theater in Aurora, or a street corner in Chicago -- these neighborhoods are our neighborhoods, and these children are our children. And we’re going to have to come together and take meaningful action to prevent more tragedies like this, regardless of the politics.


Second Amendment rights are important, but there are other rights that we care about as well. And we have to be able to balance them. Because our right to worship freely and safely — that right was denied to Christians in Charleston, South Carolina. And that was denied Jews in Kansas City. And that was denied Muslims in Chapel Hill, and Sikhs in Oak Creek. They had rights, too. Our right to peaceful assembly — that right was robbed from moviegoers in Aurora and Lafayette. Our unalienable right to life, and liberty, and the pursuit of happiness — those rights were stripped from college students in Blacksburg and Santa Barbara, and from high schoolers at Columbine, and from first-graders in Newtown. First-graders. And from every family who never imagined that their loved one would be taken from our lives by a bullet from a gun.

loopholes in the federal background check system. Currently, the plan carries no force of law because the proposed federal background check bill failed to receive the necessary votes, so the executive branch’s efforts have had little effect on U.S. gun violence.

77 See WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE (2013); see also Rick Unger, Here are the 23 Executive Orders on Gun Safety Signed Today by the President, FORBES (Jan. 16, 2013, 12:47 PM), https://www.forbes.com/sites/rickungar/2013/01/16/her-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/#3febab222312. Gun Violence Reduction Executive Actions:

1. Issue a Presidential Memorandum to require federal agencies to make relevant data available to the federal background check system.
2. Address unnecessary legal barriers, particularly relating to the Health Insurance Portability and Accountability Act, that may prevent states from making information available to the background check system.
3. Improve incentives for states to share information with the background check system.
4. Direct the Attorney General to review categories of individuals prohibited from having a gun to make sure dangerous people are not slipping through the cracks.
5. Propose rulemaking to give law enforcement the ability to run a full background check on an individual before returning a seized gun.
6. Publish a letter from ATF to federally licensed gun dealers providing guidance on how to run background checks for private sellers.
7. Launch a national safe and responsible gun ownership campaign.
9. Issue a Presidential Memorandum to require federal law enforcement to trace guns recovered in criminal investigations.
10. Release a DOJ report analyzing information on lost and stolen guns and make it widely available to law enforcement.
11. Nominate an ATF director.
12. Provide law enforcement, first responders, and school officials with proper training for active shooter situations.
13. Maximize enforcement efforts to prevent gun violence and prosecute gun crime.
14. Issue a Presidential Memorandum directing the Centers for Disease Control to research the causes and prevention of gun violence.
15. Direct the Attorney General to issue a report on the availability and most effective use of new gun safety technologies and challenge the private sector to develop innovative technologies.
16. Clarify that the Affordable Care Act does not prohibit doctors asking their patients about guns in their homes.
17. Release a letter to health care providers clarifying that no federal law prohibits them from reporting threats of violence to law enforcement authorities.
18. Provide incentives for schools to hire school resource officers.
19. Develop model emergency response plans for schools, houses of worship and institutions of higher education.
20. Release a letter to state health officials clarifying the scope of mental health services that Medicaid plans must cover.
21. Finalize regulations clarifying essential health benefits and parity requirements within ACA exchanges.
G. Current State of the Union

Currently the federal government regulates who can have a gun, background checks, gun sales, licensing, registration, owner responsibilities, child and consumer safety, guns in public places, hardware and ammunition, and gun-related crime. State gun control laws vary between States: machine guns are banned across the board, but assault weapon bans vary from state-to-state. “Stand your ground laws” also vary from state-to-state, but are associated with an increase in homicide rates. Permit-to-purchase laws require a purchaser to acquire a license from a local law enforcement agency through a background check, and in some cases, fingerprinting and handgun safety training.

22. Commit to finalizing mental health parity regulations.
23. Launch a national dialogue led by Secretaries Sebelius and Duncan on mental health.


80 See CAL. PENAL CODE §§ 16350, 16790, 16890, 30500-31115 (Deering 2020); CONN. GEN. STAT. §§ 53-202a – 53-202o (2020); D.C. CODE §§ 7-2501.01(3A), 7-2502.02(a)(6), 7-2505.01, 7-2505.02(a), (c) (2020); HAW. REV. STAT. §§ 134-1, 134-4, 134-8 (2020); MD. CODE ANN., CRIM. LAW §§ 4-301 – 4-306 (LexisNexis 2020); MD. CODE ANN., PUB. SAFETY § 5-101(r) (LexisNexis 2020); MASS. GEN. LAWS ch. 140, §§ 121-23, 131M (2020); MINN. STAT. §§ 624.712, 624.713, 624.7131, 624.7132, 624.7141 (2020); N.J. STAT. ANN. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (LexisNexis 2020); N.Y. PENAL LAW §§ 265.00(22), 265.02(7), 265.10, 400.00(16-a) (Consol. 2020); VA. CODE ANN. §§ 18.2-287.4, 18.2-308.2:01, 18.2-308.2:2, 18.2-308.7, 18.2-308.8 (2020); see also Assault Weapons, GIFFORDS LAW CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#state (last visited Apr. 18, 2020).

California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, and the District of Columbia prohibit assault weapons. The earliest of these assault weapon restrictions was enacted in the District of Columbia as part of a 1932 federal law, with the remainder of states first adopting legislation to prohibit assault weapons later in the 20th century. In addition, Minnesota and Virginia regulate assault weapons.

... In addition to having one of the country’s strongest assault weapons bans, Connecticut also prohibits the sale or retail transfer of any semi-automatic centerfire rifle that has or accepts a magazine with a capacity exceeding five rounds to any person under 21 years of age.

GIFFORDS LAW CTR., supra note 79; see also CONN. GEN. STAT. § 29-37a(b)(2).
81 See Masiakos & Sacks, supra note 22.
Background checks, however, are only required when purchasing from a federally licensed dealer; individual sellers can sell guns without conducting a background check, unless preempted by state law.\textsuperscript{83} Second Amendment case law remains largely as it did following\textit{Heller}.\textsuperscript{84}

In 2018, acting Attorney General Matthew Whitaker announced that the Department of Justice amended the regulations of the ATF.\textsuperscript{85} He announced:

\begin{quote}
[T]he final rule clarifies that the definition of “machinegun” in the Gun Control Act (GCA) and National Firearms Act (NFA) includes bump-stock-type devices, i.e., devices that allow a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.\textsuperscript{86}
\end{quote}

Recently, the House passed the “Handgun Purchaser Licensing Act” which requires gun owners to reapply for a permit every five years and submit fingerprints and photographs in connection with the permit application.\textsuperscript{87} Overall, gun control regulations are still notably lacking mental health provisions.\textsuperscript{88}

### III. Facts

Much has changed in the United States in the two centuries since the Second Amendment was drafted.\textsuperscript{89} The need to maintain well-regulated militias have decreased as “state-based militia organizations were eventually incorporated into the federal military structure,” and Americans no longer believe that a civilian militia could overtake the country’s armed forces.\textsuperscript{90} In addition, research and trends show that mental health conditions, like anxiety and depression, are worsening among the U.S. population,

\begin{itemize}
  \item \textsuperscript{84} See PECK, supra note 35, at 1 (referencing incorporation of Second Amendment in Heller as most recent and relevant case law).
  \item \textsuperscript{86} See Press Release, supra note 85. “As a result, persons in possession of bump-stock-type devices must divest themselves of the devices . . . .” Id.
  \item \textsuperscript{88} See Gruskin, supra note 75, at 20. “In January, a little over a month after the [Sandy Hook] massacre, the Mental Health First Aid Act of 2013 was introduced to the House and Senate, which would authorize grants for mental health first aid training.” Id.
  \item \textsuperscript{89} See Lund & Winkler, supra note 17. “We have come a long way from muskets and gunpowder.” Id.
  \item \textsuperscript{90} See Lund & Winkler, supra note 17 (describing how the traditional militia fell into desuetude).
\end{itemize}
especially among the youth (age 12-17), and suicidal ideation has steadily increased in recent years.91 Inflammatory, divisive rhetoric and hate crimes have spiked recently, with a notable increase following the election of President Trump in 2016.92 Social media has changed the way people interact, which can have mental health implications.93 Social media has also provided a breeding ground for radicalization and cyberbullying—particularly for the youth population.94


93 See THE MIND EXPLAINED: ANXIETY, supra note 91. “One particular culprit keeps coming up, social media… Seeing others’ ‘amazing lives’ and comparing yours can induce anxiety.” Id. Social media is designed to hold your attention and anxiety is a powerful way to do that, for example:

Teenagers who spend more hours looking at screens, are more likely to have been diagnosed with anxiety (18 percent at 7 hours). People who spend more time on social media feel more isolated, which can make the symptoms of anxiety worse. The takeaway is unclear whether anxious, lonely people are just more drawn to screens or if social media is really driving an increase in anxiety. It is hard to tell if clinical anxiety is on the rise because the way we define and study anxiety keep changing.

94 See Morahan-Martin, J., & Schumacher, P., Loneliness and Social Uses of the Internet, 19 COMPUTERS IN HUM. BEHAV. 659, 671 (2003); see also THE MIND EXPLAINED: ANXIETY, supra note 91 (discussing social media link with anxiety and depression); Van Geel et al., Relationship Between Peer Victimization, Cyberbullying, and Suicide in Children and Adolescents: a Meta-Analysis, 168 JAMA PEDIATRICS 435, 440; Bauman et al., Associations Among Bullying, Cyberbullying, and Suicide in High School Students, 36 J. ADOLESCENTS 341, 345 (2013); FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS IN THE UNITED STATES: 2000-2013, FBI BEHAVIORAL ANALYSIS UNIT (2018) (detailing all active shooters had significant involvement in an online community during year of attack).
Firearm capacity has increased exponentially since the 18th century musket, which could shoot two to three rounds per minute under optimal conditions. Modern semi-automatic rifles like the AR-15—named the most common gun used in mass shootings (i.e., the exact model used to kill forty-nine people and wound fifty-three others at the Pulse Nightclub in Orlando, Florida in 2016)—are capable of firing at forty-five to sixty rounds per minute in any environmental conditions. In 2018, the Department of Justice declared bump stocks, which transform semi-automatic weapons into machine guns, illegal. As gun violence grows in the United States, Second Amendment law falls behind the curve, while First Amendment law keeps evolving to protect modern forms of speech and technology, and privacy law adapts to novel security threats.

Gun access is central to the issue when considering the country’s increasing volatility and declining mental health. Research shows that access to a firearm increases a person’s risk of death by suicide by three times, both for the gun owner and everyone else in the household. Research also demonstrates that “laws and policies that enable

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95 See George C. Neumann, Shoulder Arms of the American Revolution, VALLEY FORGE NAT’. HISTORICAL PARK (n.d.). The 18th century musket was eight to ten pounds (compared to modern guns which range from three to ten pounds), and the ammunition was “a paper cartridge preloaded with black powder and a lead ball.” Id.


97 See Press Release, supra note 85.

98 See Shen, supra note 7, at 684. According to the American Medical Association, gun violence in the United States is “a public health crisis.” Id. “Yet, Congress has prohibited the Center for Disease Control and Prevention (“CDC”) from conducting further research into the extent of the effects of gun violence in the United States.” Id. But see Worman v. Healey, 922 F.3d 26, 37 (1st Cir. 2019) (upholding assault weapon ban because purpose of firearm is outside of scope of self-defense within the home).

99 See Van Brunt, supra note 1; see also Siegel, supra note 19, at 1929 (studies suggest “a robust association between shall-issue laws and higher rates of firearm homicides”). Id. Siegel added that “the trend toward permissive concealed-carry laws is inconsistent with public opinion, which tends to oppose the carrying of guns in public. Id. Their findings “suggests that [shall-issue] laws may also be inconsistent with the promotion of public safety.” Id.

100 See Masiakos & Sacks, supra note 22 (reporting access to firearms is an independent risk factor for death from suicide). The Doctors classified gun violence in the United States as a “systemic issue requiring a systemic solution.” Id. They found that suicide rates by firearm increased thirty percent from 1999 to 2016. Id. Adolescents, thirty-year-old men, and adults sixty-five and older are most at risk. Id. Doctors Masiakos and Sacks report that the act [of suicide by firearm] is impulsive—about ten seconds of deliberation—and ninety percent of those who have an unsuccessful attempt do not try again. Id. Doctors Masiakos and Sacks also identified that seventy percent of veterans use a gun in suicide, and that seventeen veterans died [by suicide by firearm] per day in 2017. Id. The problem with suicide among military members was so bad, that the organization issued an order prohibiting guns from being taken home on weekends, and it resulted in no weekend suicides. Id. Interestingly, Masiakos and Sacks explained that in Sri Lanka, people commonly committed suicide using pesticides. Id. Sri Lanka banned the specific pesticide and saw a fifty percent reduction in the country’s mortality from suicide. Id.
firearm access during emotionally charged moments also seem to correlate with gun violence more strongly than does mental illness alone."101

Red Flag laws, formally known as Extreme Risk Protection Orders ("ERPOs") or Gun Violence Restraining Orders ("GVROs"), allow for "temporary confiscation of firearms if a gun owner displays dangerous or threatening behavior."102 Red Flag laws are implemented at the state level, however, only seventeen states and the District of Columbia have enacted these protections.103 Connecticut was the first state to pass a Red Flag law in 1999,104 Colorado, the District of Columbia, Hawaii, Indiana, Nevada, New York, and Washington passed Red Flag laws in the 2019 legislative cycle.105 Michigan, Ohio, Pennsylvania, and North Carolina are on track to be next, with Red Flag laws currently pending.106 As of now, no federal equivalent is under consideration, however, Congress has considered a grant program to encourage more states to pass Red Flag laws.107 In September 2019, following a mass shooting which killed fifty-three people, CEOs from 145 American companies sent a letter to members of the Senate calling for bipartisan support for background checks on all sales of guns.108

Ultimately, Masiakos and Sacks determined that access to lethal means matters (and having a gun at home does not make you safer).109 See also Extreme Risk, supra note 21.


102 See Richard J. Bonnie & Jeffrey W. Swanson, Extreme Risk Protection Orders: Effective Tools for Keeping Guns Out of Dangerous Hands, 37 Dev. Mental Health L. 1, 7 (2018) (Red Flag Laws are also known as “risk-based gun removal” and “dangerous persons firearms seizure”); see also Pelley, supra note 96; NATIONAL THREAT ASSESSMENT CENTER, Mass Attacks in Public Spaces, (March 2018), https://www.secretservice.gov/forms/USSS_NTAC-Mass_Attacks_in_Public_Spaces-2017.pdf (listing characteristics of attackers who carried out mass attacks in 2017). In the twenty-eight mass attacks captured by the National Threat Assessment Center operating under the Department of Homeland Security, the Center recorded that all attackers were male, and their average age was thirty-seven years. Id. at 3. About sixty-seven percent of attackers experienced psychosis, suicidal thoughts, or other reported mental health experiences prior to the attack. Id. at 4. Eighty-two percent of the attackers displayed traits of aggressive narcissism. Id. at 5.

Majority of the attackers (seventy-nine percent) participated in dangerous or threatening communication that concerned others including a history of making threats, specific threats to the target, or “other concerning communication.” Id. at 6.


105 See CRS § 13-14.5-101; DC Code § 7-2510.01; HI SB1466; Ind Code § 35-47-14-1; NV AB291; NY CLS CPLR § 6340; and ARCW § 7.94.010.

106 See MI HB4283, SB156; OH HB4283, SB156; PA SB90, SB293; and NC HB454.

107 See also Extreme Risk, supra note 21; see also Bonnie & Swanson, supra note 102, at 5 (suggesting the federal government integrate risk protection orders into the national instant background check system).

Under Red Flag laws, a law enforcement officer or family member may petition a court for an ERPO if they are concerned that a person poses a serious risk of harm to themselves or others. If the judge agrees a risk is present and issues the order, law enforcement will immediately collect any guns the individual owns, and this individual will be banned from possessing or purchasing additional firearms for one to three weeks. After that cooling-off period a full hearing including all parties will take place. If the judge finds that new evidence demonstrates a persisting risk of harm, the gun owner can be banned from access to firearms for up to one year. These laws act as a temporary civil restraining order to “get the firearm out of an explosive situation before it’s too late.” Red Flag laws are narrow in scope and provide robust due process protections. At the full hearing, the gun owner has the right to testify and cross-examine witnesses, using court rules, rules of evidence, and involving judicial oversight.

As leaders of some of America’s most respected companies and those with significant business interests in the United States, we are writing to you because we have a responsibility and obligation to stand up for the safety of our employees, customers, and all Americans in the communities we serve across the country. Doing nothing about America’s gun violence crisis is simply unacceptable, and it is time to stand with the American public on gun safety. Gun violence in America is not inevitable; it’s preventable. There are steps Congress can, and must, take to prevent and reduce gun violence. We need our lawmakers to support common sense gun laws that could prevent tragedies like these. That’s why we urge the Senate to stand with the American public and take action on gun safety by passing a bill to require background checks on all gun sales and a strong Red Flag law that would allow courts to issue life-saving extreme risk protection orders.

Id. at 1.

109 See Bonnie & Swanson, supra note 102, at 3.
110 See id.
111 Id.
112 Id.
113 See Pelley, supra note 96.
114 See Bonnie & Swanson, supra note 102, at 3. Bonnie & Swanson explain the due process protections built into Red Flag laws:

These innovative, public-health-driven laws fully respect the Second Amendment and the requirements of “due process”. Almost all of the statutes require that before firearms can be removed from an individual, a judge must review submitted evidence and determine that the individual poses an imminent risk of harm to self or others according to a common set of criteria and standard of proof; typically, this occurs in an ex parte process, with most laws requiring a full evidentiary hearing (for which the individual is given prior notice and the opportunity to participate) within fourteen days of the entry of the ex parte order.

Id. See also Extreme Risk, supra note 21.
115 See Bonnie & Swanson, supra note 102, at 3.
Red Flag laws have demonstrated efficacy in reducing gun violence, and so far, courts have rejected challenges to the constitutionality of these laws. Experts estimate that for every ten ERPOs issued, one life is saved. The success can be tied to the reality that the majority of active shooters exhibit warning signs beforehand. Although mass shootings receive the lion’s share of media attention, Extreme Risk laws have also had a demonstrated effect in reducing rates of suicide by firearm. In addition, studies show that a majority of Americans “strongly” support the use of both family-initiated ERPOs and police-initiated ERPOs. The U.S., however, will continue to need increasing gun regulation adequate enough to deal with increasing gun violence.

IV. Analysis

Under the Fourteenth Amendment, the Framers of the Constitution deemed certain historically recognized and traditionally embedded rights as fundamental to the

116 See Aaron J. Kivisto & Peter Lee Phalen, Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015, 69 PSYCHIATRIC SERV. 855, 855 (2018); see also Jeffrey W. Swanson et al., Criminal Justice and Suicide Outcomes with Indiana’s Risk-Based Gun Seizure Law, 47 J. AM. ACAD. PSYCHIATRY L. 188–97, (2019); see also Pelley, supra note 96; Extreme Risk, supra note 21.
117 See Bonnie & Swanson, supra note 102, at 188; see also Pelley, supra note 96.
118 See Shen, supra note 7, at 706; see also, Pelley, supra note 96. Fifty-one percent of mass shooters showed warning signs before their attack and in eighty-one percent of school shootings, someone other than the perpetrator had knowledge of the plans. Id. Before the shooting in Parkland, Florida, teachers and students observed threatening behavior from the shooter, and his own mother alerted authorities about his behavior beforehand. Id. See also, Audra D. S. Burch and Patricia Mazzei, Death Toll Is at 17 and Could Rise in Florida School Shooting, N.Y. TIMES (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html. Since Florida did not have a Red Flag law at the time, Nikolas Cruz went on to kill or injure 34 students in minutes with an AK-15 rifle that he owned at Marjory Stoneman Douglas High School in the city of Parkland. Id. See also, Matt Vasilogambros, Red Flag Laws Spur Debate Over Due Process, PEW (Sept. 4, 2019) https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process. Following the shooting now referred to as “Parkland,” Florida enacted a Red Flag law and courts have approved 2,500 ERPOs since. Id. See also NATIONAL THREAT ASSESSMENT CENTER, supra note 102 (classifying “disturbing behavior” as aggressive narcissism, threat making, fixations, etc).
119 See Kivisto & Phalen, supra note 116, at 855; Bonnie & Swanson, supra note 102, at 188; Extreme Risk, supra note 21. Since enacting Red Flag laws, Connecticut and Indiana have observed a 14 percent and 7.5 percent reduction, respectively, in rates of suicide by firearm. Id.
120 See APM research lab, APM Survey: Americans Views on Key Gun Policies Part One: Opinions on “Red Flag” Laws (August 20, 2019), https://www.apmresearchlab.org/gun-survey-red-flag. “More than three-fourths of American adults support family-initiated ERPOs, the majority of whom say they ‘strongly’ support such measures. Similarly, 70 percent support police-initiated ERPOs.” Id.
The right to self-defense is recognized as a basic right under the liberty interests of the Fourteenth Amendment. The U.S. Supreme Court has bound states to the standard that self-defense under the Second Amendment be incorporated to the Due Process clause of the Fourteenth Amendment. To justify government infringement of a fundamental right under the due process clause, strict scrutiny must be satisfied. Thus, federal and state regulation affecting Second Amendment rights, like Red Flag laws, must withstand strict scrutiny to pass constitutional muster. Intermediate scrutiny, however, is appropriate to evaluate firearms regulations that burden rights on the periphery of the Second Amendment like public-carry license and storage requirements.

The scope of the right identified in Heller is limited to protecting the individual’s right to bear arms for legal purposes like hunting and self-defense in the home. The Court cautioned that the right is not unlimited. Despite the warning, courts have given Heller virtually unchecked scope in the decade since the Supreme Court issued the ruling. Individuals are able to carry guns in nearly all public spaces; viewed in light of


124 See McDonald v. City of Chicago, Ill., 561 U.S. 742, 750 (holding that Second Amendment rights incorporated through the Fourteenth Amendment to apply to the states); see also District of Columbia v. Heller, 554 U.S. 570 (2008).

125 See Skinner v. Oklahoma, 316 U.S. 535, 538-41 (1942) (holding state criminal statute unconstitutional for violating the equal protection clause of the Fourteenth Amendment); Matter of Adoption of K.T.B, 2020 UT 51, 32 (Utah 2020) (noting the strict scrutiny standard applies for fundamental rights); see also U.S. CONST., amend XIV, § 1 “[N]or shall any state deprive any person of liberty, or property, without due process of law.” Id.


127 See Gould v. Morgan, 907 F.3d 659, 665 (1st Cir. 2018) (noting intermediate scrutiny was appropriate lens for considering the constitutionality of the challenged gun law); Wilson v. Cook County, 943 N.E.2d 768 (Ill. App. Ct. 2011).

128 See Heller, 554 U.S. at 626. (finding “presumptively lawful” spaces for prohibiting possession of firearms in schools and government buildings). “The right secured by the Second Amendment is not unlimited.” Id. See also United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012).

129 See id. at 595. “Of course the right was not unlimited, just as the First Amendment’s right to free speech is not unlimited.” Id. (citing United States v. Williams, 553 U.S. 285 (2008)).

130 Gould, 907 F.3d at 667 (declaring “[Heller and McDonald] merely scratched the surface: they did not provide much clarity as to how Second Amendment claims should be analyzed in future cases”); see also McDonald v. Chicago, 561 U.S. 742, 791 (2010) (holding second amendment is
Heller, this seems to expand the notion of what is fundamental. \textsuperscript{131} Recent history demonstrates that the new-found freedom under \textit{Heller} has allowed any public space – meaning “outside of one’s home, excluding ‘sensitive places’ such as schools and government buildings” – to become a potential “active-shooter zone.” \textsuperscript{132}

For substantive due process to be implicated there must be direct and substantial governmental interference with a fundamental right. \textsuperscript{133} Removing an individual’s firearms and preventing said individual from further firearm purchases is a direct and substantial infringement on Second Amendment rights. \textsuperscript{134} Due process calls for a balance between private and public interests at stake in the matter. \textsuperscript{135} Firearms will be removed from only a small portion of the U.S. population under ERPOs, and every infringement offers the potential to save a life. \textsuperscript{136} Unconstrained Second Amendment rights have allowed gun violence to substantially interfere with the rights of other individuals to life. \textsuperscript{137} Stopping future active shooters from accessing firearms has the potential to stop the carnage caused by mass shootings. \textsuperscript{138} Achieving that goal requires a prompt recalibration of the scope of the Second Amendment.

Even where the government directly and substantially interferes with a fundamental right, its infringement can still pass constitutional muster with sufficient justification. \textsuperscript{139} Strict scrutiny requires that the government provide a compelling applicable to states through Due Process Clause of Fourteenth Amendment). In applying \textit{Heller} to the states, the court struck down a municipal ordinance banning handguns in the city of Chicago. \textit{Id.} The Court noted that the right to defense is “deeply rooted in the Nation’s tradition and history.” \textit{Id.} at 768 (citing \textit{Washington v. Glucksberg}, 521 U.S. 702, 721 (1997)). This is despite handguns being used in shootings in the city of Chicago—a known city for gang violence—more than any other weapon. \textit{Id.} at 891 (Stevens, J., dissenting) (“firearms have a fundamentally ambivalent relationship to liberty”).

\textsuperscript{131} See Gould, 907 F.3d at 662; see also \textit{Heller}, 554 U.S. at 630 (asserting the core purpose of the Second Amendment is self-defense); see also \textit{Smith}, supra note 3, at 2; see also \textit{Pelley}, supra note 96. The United States is a country where an individual can easily purchase an AR-15, bring it to places like churches, shopping malls, movie theaters, elementary and high schools, universities, office buildings, concert venues, and local festivals, and cause mass casualty. \textit{Id.}

\textsuperscript{132} See Gould, 907 F.3d at 667.

\textsuperscript{133} See \textit{Roe v. Wade}, 410 U.S. 113, 128, 169 (1973) (explaining due process protects against “substantial, arbitrary impositions and purposeless restraints” which directly injure the plaintiff).

\textsuperscript{134} See Gould, 907 F.3d at 665, 668 (explaining two-prong test for challenges and determining level of burden and appropriate scrutiny); see also \textit{Pelley}, supra note 96 (explaining the ERPO process including due process protections).


\textsuperscript{136} See \textit{Pelley}, supra note 96; Bonnie & Swanson, supra note 102.

\textsuperscript{137} See generally Bonnie & Swanson, supra note 102.

\textsuperscript{138} See Masiakos & Sacks, supra note 22 (concluding based on research that access to lethal means matters); see also \textit{Van Brunt}, supra note 1 (explaining through by example that intervening early with students can stop future gun violence).

\textsuperscript{139} See \textit{Roe v. Wade}, 410 U.S. 113, 156 (1973) (holding Texas failed to narrowly tailor their regulation which infringing on fundamental rights). “Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling interest.” \textit{Id.} at 155. See also \textit{Employment Division v. Smith}, 494 U.S. 872 (1990) (allowing states to deny unemployment benefits to employees using illegal drugs for religious purposes).
government interest for infringement. To be compelling, a truly vital interest must be served by the legislation. Protecting the citizenry’s rights to life and liberty—in light of the degree to which the United States has become more volatile in the past 200 years with regard to gun violence—is a vital interest, and thus a compelling reason to justify the existence of Red Flag laws. It is essential that the contours of the Second Amendment stay current with the reality of increasingly common gun violence.

As previously mentioned, today the states no longer need a well-regulated militia for protection from the federal government. The Court recognized this sentiment in *Heller* when it strayed from the collective right to keep and bear arms to the individual right. In addition, the individual right to bear arms established in *Heller* has been given essentially unlimited scope. Baptist churches and Jewish synagogues, already covered by governmental security grants, are hiring private armed security teams for protection.

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142 See *Shen*, supra note 7 (advocating for Extreme Risk Protection Orders given increasing violence); *Lund & Winkler*, supra note 17, at 2 (asserting that societal changes since 1792 warrant reconsideration of the Second Amendment’s role).
143 See *Shen*, supra note 7, at 692; *Van Brunt*, supra note 1, at 2-3.
144 See *Lund & Winkler*, supra note 17, at 2; see also *Johnson*, supra note 31 (arguing the Second Amendment’s language is now false because America is a “free state” with no militias, and therefore it is no longer operative).

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.

*Id.* (emphasis added).
146 See *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018).
Cable news outlets are sharing videos with tips for surviving an active shooter event.\textsuperscript{148} The Second Amendment now interferes with rights to life, liberty, and safety of the public.\textsuperscript{149}

Furthermore, the marked increase in the number of Americans struggling with mental health issues and the role of mental health in gun violence presents another compelling justification for the validity of Red Flag laws.\textsuperscript{150} The youth population specifically, reported alarming increases in suicidal ideation and major depressive episodes in 2019.\textsuperscript{151} Having a gun present in the home makes the probability of suicide by firearm three times more likely, for the individual, and harm for everyone in the house.\textsuperscript{152} The only thing standing in the way of an individual in crisis from accomplishing a lethal objective is how easily they can access a firearm.\textsuperscript{153} Even where firearms are removed from an at-risk individual, current gun regulation can enable the individual to replace the removed firearm with one purchased elsewhere.\textsuperscript{154} The window of opportunity where an individual is in the midst of a mental health crisis, where they desire to harm themselves or others, makes access to firearms the paramount risk.\textsuperscript{155}

Another factor helping to foster an increasingly volatile climate in the United States is the commonality of hateful rhetoric.\textsuperscript{156} Notions of white supremacy, anti-Semitism, Xenophobia, Islamophobia, and gender discrimination have all seen an unfortunate resurgence in American culture.\textsuperscript{157} President Donald Trump’s rhetoric — disparaging military servicemembers, sexual assault survivors, immigrants, the LGBTQ


\textsuperscript{149} See U.S. Const. amend. II; Shen, supra note 7, at 684 (stating American Medical Association classifies this as “Public Health Crisis”); see generally, WHITE HOUSE, supra note 77 (outlining plans to combat issue of public safety with regards to gun violence).

\textsuperscript{150} See generally Reinert et al., supra note 18 (mapping out mental health issues in United States among both youth and adults).

\textsuperscript{151} See Reinert et al., supra note 1818 (archiving mental health issues in United States from 2012-2017); THE MIND EXPLAINED: ANXIETY, supra note 91.

\textsuperscript{152} See Masiakos & Sacks, supra note 22 (presenting evidence that shows role of guns in the home in suicides).

\textsuperscript{153} See id. Access to firearms is an independent risk factor for suicide. Id. Seventy percent of Veterans who committed suicide in 2017, used a gun, suggesting it is the most lethal method of suicide. Id. See also Van Brunt, supra note 1 (opining that intervening early is effective in preventing shootings in schools)

\textsuperscript{154} See Pelley, supra note 96. A father shared with Scott Pelley on 60 Minutes how his son was depressed and suicidal. Id. The father removed all of the firearms out of the house, but his son was able to purchase another firearm. Id. His son ultimately committed suicide with the newly purchased firearm. Id.

\textsuperscript{155} See Masiakos & Sacks, supra note 22; see also Van Brunt, supra note 1.

\textsuperscript{156} See The Deadly Intersection of Guns and Hate Crimes, supra note 92 (finding majority of hate crimes are directed at minorities and LGBTQ members).

\textsuperscript{157} See The Deadly Intersection of Guns and Hate Crimes, supra note 92 (documenting rise in mass shootings driven by anti-Semitic, homophobic, and racist notions). Id. See also Edwards & Rushin, supra note 92; see also Müller & Schwarz, supra note 92; Jamal, supra note 92.
community, and those with disabilities – has invigorated these sub-cultures. Each affected community has been the target of at least one hate-fueled mass shooting. Research has shown that President Trump’s inflammatory and divisive rhetoric caused a “Trump Effect” – validating potential perpetrators with justification, motivation, and a sense of permission to commit hate crimes. The current social climate establishes a compelling state interest in regulating the firearms of at-risk individuals with Red Flag laws.

Social media has fostered a unique combination of isolation and connection in contemporary life. While social media allows people the unprecedented outlet to connect, social media use can also have negative effects on mental health, such as anxiety, depression, and loneliness. The increased connectivity has also brought the dawn of cyberbullying—perpetrated through the internet—which disproportionately affects the youth community, and is strongly connected to suicidal ideation and suicide attempts. Young girls are particularly vulnerable to cyberbullying as they experience suicidal ideation immediately upon victimization; young boys, in contrast, feel the effects over a prolonged period of time.

The final compelling state interest in reforming gun regulation is that 21st century firearm capacity is exponentially more advanced than founding-era 18th century firearms. An AR-15 semi-automatic assault rifle fires at a rate that is approximately twenty times faster than the 18th century musket—and it will function no matter the environmental conditions. In 1791, when drafting the Second Amendment, the Founding Fathers could not have anticipated a firearm of this magnitude.

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158 See Edwards & Rushin, supra note 92, at 18; Muller & Schwarz, supra note 92; Jamal, supra note 92.
159 See Disrupting Access, supra note 14, at 63.
160 See supra note 92 (citing the intersection between hate crimes, social media and gun violence). President Trump’s rhetoric may be aiding in the prejudice behaviors, and this is only increased by social media. Supra note 92. See also THE MIND EXPLAINED: ANXIETY, supra note 91 (teenagers who spend more time on social media are more likely to be diagnosed with mental illness).
161 See THE MIND EXPLAINED: ANXIETY, supra note 91 (discussing social media’s relationship to anxiety).
162 See THE MIND EXPLAINED: ANXIETY, supra note 91 (explaining that seeing others’ ‘amazing lives’ and comparing yours can induce anxiety).
163 See Morahan-Martin & Schumacher, supra note 94, at 671; see also THE MIND EXPLAINED: ANXIETY, supra note 9191; Van Geel et al., supra note 94; Bauman et al., supra note 94, at 346 (finding depression significantly mediated the relation between cyber victimization and suicide attempts); James Silver et al., A Study of the Pre-Attack Behaviors of Active Shooters in the United States: 2000-2013, FBI BEHAVIORAL ANALYSIS UNIT (last accessed November 24, 2019) www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view (detailing all active shooters had significant involvement in an online community during year of attack).
164 See Van Geel et al., supra note 94, at 440.
165 Compare Neumann, supra note 95, at 3 & 34 (noting reload time and single shot capacity meant firearms were not incredible advantages in warfare); with Pelley, supra note 96 (stating that semi-automatic AR-15 has firing capacity of 60 rounds a minute).
166 See Neumann, supra note 95; see also Pelley, supra note 96. But see Gun News Daily, supra note 96. An AR-15 can malfunction in many ways: failure to feed, magazine malfunction, buffer spring malfunction, ammunition feed malfunction, fouling from debris build-up. Id.
167 See Neumann, supra note 95; see also Pelley, supra note 96.
Even where the government provides sufficient justification for a law that burdens a fundamental right, the means must be necessary to achieving the purpose.\textsuperscript{168} Allowing a window of opportunity for the proper authorities to intervene in order to prevent at-risk individuals from obtaining and using firearms to harm themselves and others is the purpose of Red Flag laws.\textsuperscript{169} Red Flag laws can accomplish this purpose, because commonly, perpetrators of mass shootings and people who commit suicide give warning signs before they act.\textsuperscript{170} Most active shooters have no histories of seeking treatment for mental illness, however, “many have exhibited symptoms of psychological distress, extreme anger, suicidal thoughts, loss of control and other behaviors that worried their families, co-workers, teachers or neighbors.”\textsuperscript{171} To prevent people from harming themselves or others, law enforcement needs to have the legal authority to deny an individual access to firearms where the individual displays disturbing behavior.\textsuperscript{172} Easy access to firearms is the issue underlying America’s gun violence epidemic, and Red Flag laws accommodate for changed circumstances in the 21st century.\textsuperscript{173}

An even more daring proposition in response to the recent uptick in mass shootings across the United States, would be to ban semi-automatic and high-capacity firearms altogether. While Heller stands for the right to bear arms for the protection of the home, other courts have limited this by upholding regulations that ban weapons deemed inherently dangerous to the public.\textsuperscript{174} States have an interest banning these

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\textsuperscript{168} See Roe v. Wade, 410 U.S. 113, 156 (1973). Where strict scrutiny is involved, if the state’s regulations are far broader than necessary, even if the state asserts a compelling interest, this will not pass constitutional muster. \textit{Id.}

\textsuperscript{169} See Pelley, supra note 96.

\textsuperscript{170} See Bonnie & Swanson, supra note 102, at 7; Pelley, supra note 96; NATIONAL THREAT ASSESSMENT CENTER, supra note 102 (identifying disturbing behavior as aggressive narcissism, threat making, fixations, etc); see also Silver et al., supra note 163 (reporting all active shooters from 2000-2013 had significant involvement in an online community during year of attack).

\textsuperscript{171} See Bonnie & Swanson, supra note 102, at 3.

\textsuperscript{172} See Disrupting Access, supra note 14.

\textsuperscript{173} See Masiakos & Sacks, supra note 22.100 Masiakos and Sacks determined that access to lethal means matters (and having a gun at home does not make you safer), and thus Red Flag laws could assist with controlling people’s access to weapons, and keeping weapons out of the hands of those that cause risk. \textit{See id.}

\textsuperscript{174} See District of Columbia v. Heller, 554 U.S.570, 599 (2008); see also Worman v. Healey, 922 F.3d 26, 37 (1st Cir. 2019) (upholding assault weapon ban because they did not share the purpose of handguns in protection of homes), \textit{cert. denied}, 207 L. Ed. 2d 1050; Kolbe v. Hogan, 849 F.3d 114, 151 (4th Cir. 2017) (en banc) (upholding assault weapon ban because such guns were designed primarily for military use and did not properly serve the purpose of self-protection ), \textit{cert. denied}, 138 S. Ct. 469; Friedman v. City of Highland Park, Ill., 784 F.3d 406, 408 (7th Cir.
inherently dangerous weapons for civilian use because the AR-15 is the most common firearm used in mass shootings, and because these firearms are capable of quick and massive casualty.\textsuperscript{175}

V. Conclusion

The Second Amendment no longer properly serves the United States, and its gun violence epidemic is a systemic issue requiring a systemic solution. Future policy must work from both ends of the spectrum – prevention of potential incidences of gun violence by limiting access to firearms through Red Flag laws, and prevention by fixing the root of the problem. The United States must make mental health treatment a priority as suicide rates rise yearly and mass shootings occur with such frequency that the population has come to expect their occurrence. Hateful rhetoric encouraging white supremacy, anti-Semitism, Xenophobia, and Islamophobia must stop at the highest level in order to be rooted out of society. In any civilian situation, no citizen needs possession of a semi-automatic or high-capacity firearm. The reality is, either substantial, common-sense gun regulation is to happen in the near future, or the United States will continue to suffer mass casualties from gun violence.

\textsuperscript{175} See Pelley, supra note 96; see also Healey, 922 F.3d at 31 (1st Cir. 2019) (noting the Massachusetts assault rifle legislation and that they are not made for recreation or self-defense).