

# CARR CENTER FOR HUMAN RIGHTS POLICY HARVARD KENNEDY SCHOOL

## Gun Rights & Public Safety

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Reimagining Rights  
& Responsibilities  
in the U.S.

## **Reimagining Rights & Responsibilities in the United States: Gun Rights and Public Safety**

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## Overview

In March 2018, hundreds of thousands of young people walked out of school and marched on their local statehouses and on the U.S. Capitol in Washington, D.C., to advocate for stricter controls on gun sales and ownership. The March for Our Lives was initially organized by students at Margery Stoneman Douglas High School in Parkland, Florida, where a school shooting had killed 17 students. Collectively, the marches were the largest-ever protest against gun violence, and one of the largest protests of any kind in American history.<sup>1</sup>

During the year following the mobilization, 26 states passed 67 different laws strengthening gun control, in efforts led and supported by both Democratic and Republican public officials. Among them were laws increasing waiting periods and establishing higher minimum ages to purchase firearms.<sup>2</sup> Despite those changes, however, there was a notable lack of new federal gun safety laws enacted following the protest. A measure passed by the House of Representatives to require background checks of all gun purchasers (including at gun shows and over the Internet) died in the Senate.<sup>3</sup> In fact, no major gun legislation has been passed by Congress in decades.

These trends reflect the crisis of gun safety in the U.S. Despite overwhelming support for protecting public safety within the context of gun rights through increased regulation of gun sales and ownership, efforts to improve gun safety have been repeatedly stymied by an uncompromising stance by gun lobbyists, led by the National Rifle Association. Debate over the meaning and requirements of the Second Amendment “right to bear arms,” has led gun rights lobbyists to assert extreme claims of a right to own firearms that is virtually unfettered. Yet, the United States far exceeds other countries in firearm-related fatalities, including suicides, homicides, and accidental deaths.

Given the extent of gun violence and the frequency of high-profile shootings in the U.S., it is essential to balance the Second Amendment with the equally important responsibility by the government to support the public safety of its citizens. Our July

2020 national poll demonstrates that Americans are seeking this balance: 52% believe that “a right to bear arms” is “very important,” but 85% believe that a “right to personal safety” is “very important.”

While the partisan divide on guns has widened since 2010, it is clear that the majority of citizens support stricter gun laws overall.<sup>4</sup> Last year, for example, the Pew Research Center found a majority (53%) of citizens said it was more important to “control gun ownership” than to “protect the rights of Americans to own guns.”<sup>5</sup> There was a distinct divide between parties on these issues, with 80% of Republicans advocating for gun rights, while only 21% of Democrats felt similarly.<sup>6</sup>

Yet, even within the debate over gun regulation, there seems to be room for compromise, based on policies that could help control gun violence with minimal impact on the majority of gun owners. A bipartisan supermajority of 91% of respondents to the Pew survey, for example, supported limiting gun purchases by those with mental illness.<sup>7</sup> A similar majority of 88% of respondents supported closing the so-called “gun-show loophole” that allows for the private sale of guns without background checks.<sup>8</sup> Even on more controversial issues, such as banning high-capacity magazines and assault-style weapons, majorities of 71% and 69% respectively supported tighter regulations.<sup>9</sup> While those issues saw a wider partisan divide, they still commanded the support of 54% and 50% of Republicans, respectively.<sup>10</sup>

The growing consensus over the need for some “common-sense” gun laws to regulate the sale and ownership of firearms stands in sharp contrast to the incendiary rhetoric of the National Rifle Association, which has sounded the alarm in recent years that Democrats are coming to “take away” guns or institute a national registry of firearm ownership. Indeed, the reasonableness on both sides of the debate implies that there is a middle-ground that can be achieved to limit gun violence in the United States, while still allowing for responsible ownership of firearms for hunting, sport shooting, and personal protection.

1. Laughland, Oliver, and Lois Beckett. “March for Our Lives: Thousands Join Anti-Gun Protests Around the World.” *The Guardian*, 25 Mar. 2018, <https://www.theguardian.com/us-news/2018/mar/24/washington-march-for-our-lives-gun-violence>.

2. Peters, Katie. “7 Ways America Has Changed Since the March for Our Lives.” *Giffords*, 20 Mar. 2019, <https://giffords.org/blog/2019/03/7-ways-america-changed-since-the-march-for-our-lives/>.

3. Edmondson, Catie. “House Passes First Major Gun Control Law in Decades.” *New York Times*, 27 Feb. 2019, <https://www.nytimes.com/2019/02/27/us/politics/gun-control-bill.html>.

4. Schaeffer, Katherine. “Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017.” *FactTank*, Pew Research Center, 16 Oct. 2019, <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/>.

5. Ibid.

6. Ibid.

7. Ibid.

8. Ibid.

9. Ibid.

10. Ibid.

## Gun Ownership Today

Gun ownership in the U.S. dwarfs that of other wealthy nations. Currently, there are 393 million civilian-owned firearms in the U.S.,<sup>11</sup> compared to a population of 328 million—meaning there are many more guns than people.<sup>12</sup> In fact, the U.S. rate of gun ownership is 120 guns for every 100 people, nearly 4 times as high as the next highest wealthy country, Canada, which has approximately 35 guns for every 100 people.<sup>13</sup> Those numbers increasingly diminish for other European countries, such as Germany, which has less than 20 guns per 100 people;<sup>14</sup> and the United Kingdom, which has less than 5.<sup>15</sup> At the bottom of the list is Japan, which has 0.3 guns per 100 people.<sup>16</sup>

However, despite the prevalence of gun ownership in the United States, guns are not spread proportionately throughout the country. In fact, only 3 in every 10 Americans owns a gun.<sup>17</sup> Of these gun owners, 32% own a single gun, while 37% own between 2 and 4 guns, and 29% own at least 5.<sup>18</sup> In other words, the majority of guns are concentrated into a relatively small percentage of the American populace. These gun owners, according to surveys, tend to be predominantly white, older, rural, and southern.<sup>19</sup>

A majority of gun owners cite protection (67%) as their primary reason for owning a gun, while smaller numbers of gun owners cite hunting (38%), sport shooting (30%), gun collecting (13%), or employment (8%).<sup>20</sup> Gun owners in urban locations are more

**The U.S. rate of gun ownership is 120 guns for every 100 people, nearly 4 times as high as the next highest wealthy country, Canada, which has approximately 35 guns for every 100 people.**

likely to cite protection as their primary reason for ownership.<sup>21</sup> This spring, the COVID-19 pandemic saw a spike in gun sales, with an estimated 3 million more guns purchased between March and June 2020 than would ordinarily have been purchased, according to a Brookings Institution report.<sup>22</sup> The report's authors attribute that spike in sales not only to anxieties over the coronavirus lockdown, but also increased concerns during the social unrest and protests that followed the killing of George Floyd.<sup>23</sup> While gun ownership is higher among conservatives, this spike actually occurred in more liberal states that were initially harder hit by the coronavirus lockdown and the protests that followed.<sup>24</sup>

## Gun Violence in the U.S.

Along with the high rates of gun ownership in the U.S. are the high rates of gun violence. Each year, 36,000 Americans are killed by guns.<sup>25</sup> Almost half of Americans (44%) know someone who

11. Ingraham, Christopher. "There Are More Guns Than People in the United States, According to a New Study of Global Firearm Ownership." *Washington Post*, 19 June 2018, <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/>.

12. Ibid.

13. "Gun Ownership by Country 2020." *World Population Review*, <https://worldpopulationreview.com/country-rankings/gun-ownership-by-country>. Accessed 21 Dec. 2020.

14. Ibid.

15. Ibid.

16. Ibid.

17. Cillizza, Chris. "8 Charts That Explain America's Gun Culture." *CNN*, 3 Oct. 2017, <https://www.cnn.com/2017/10/02/politics/guns-maps-las-vegas/index.html>.

18. Parker, Kim, et al. "America's Complex Relationship with Guns: An In-Depth Look at the Attitudes and Experiences of US Adults." *Social and Demographic Trends*, Pew Research Center, 22 June 2017, <https://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/>.

19. Ibid.

20. Gramlich, John, and Katherine Schaeffer. "7 Facts About Guns in the US." *Pew Research Center*, 22 Oct. 2019, <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/>.

21. Ibid.

22. Levine, Phillip B., and Robin McKnight. "Three Million More Guns: The Spring 2020 Spike in Firearm Sales." *Brookings*, 13 July 2020, <https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/>.

23. Ibid.

24. Ray, Rashawn, and Rebecca Shankman. "How COVID-19 Is Changing the Gun Debate." *Brookings*, 17 June 2020, <https://www.brookings.edu/blog/fixgov/2020/06/17/how-covid-19-is-changing-the-gun-debate/>.

25. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

has been shot, intentionally or accidentally.<sup>26</sup> Not surprisingly, the United States has a higher rate of firearm fatalities compared to peer nations, with a rate of 11.2 per 100,000 people—4 times as many as the next highest nation, Switzerland, which has 2.8 deaths per 100,000 people.<sup>27</sup> An analysis of mortality data from the World Health Organization in 2010 found that Americans were 25 times more likely to die from gun-related homicide, and 10 times more likely to die from gun death of any kind, than citizens of other wealthy, industrialized nations.<sup>28</sup>

Contrary to news reporting that tends to focus on shootings of one person by another, the clear majority of gun deaths are actually self-inflicted. In fact, 61% of gun deaths are suicides, whereas only 35% are homicides.<sup>29</sup> Correspondingly, the biggest predictor of a successful suicide is access to a gun; such access triples the probability that a suicide attempt will result in death.<sup>30</sup> Understanding the prevalence of suicide as a major portion of gun violence has the potential to re-contextualize the purpose of gun ownership and regulation. Despite the fact that a majority of gun owners cite protection as their reason for owning a gun, guns in fact are not frequently used for self-defense. According to an analysis of data from the National Crime Victimization Survey, people defended themselves with a gun in less than 1% of crimes from 2007 to 2011.<sup>31</sup>

Additionally, homicidal gun deaths have a disproportionate effect on minority communities: African Americans are 10 times more likely than whites to be murdered with a gun.<sup>32</sup> In addition, white-on-black killings are much more likely to be ruled justifiable homicide, at 17% compared to 2% overall.<sup>33</sup> Further concerns around gun violence are related to domestic violence and hate-

and bias-driven attacks, both of which are exacerbated by access to firearms. In domestic violence situations, an abuser's access to a gun increases the likelihood that the victim will be killed by five times.<sup>34</sup> Firearms also exacerbate hate- and bias-driven crimes, indicated by the presence of such crimes in other countries with much lower fatality counts.<sup>35</sup>

## The Role of the NRA

There are numerous lobbying groups advocating for different positions on gun rights and regulation. The National Rifle Association (NRA), the most well-known, is a pro-gun rights lobbying group. Nineteen percent of gun owners are NRA members. The NRA currently advocates against all forms of gun control and regulation.<sup>36</sup> Founded in 1871, the NRA was initially founded as a sportsman's organization to advocate for hunting and shooting safety, even advocating for limits in gun traffickin and a ban on cheap handguns.<sup>37</sup>

After the Gun Control Act of 1968 was passed in response to the assassinations of President Kennedy, Martin Luther King, and other leaders, the group gradually transformed into a lobbying organization, taking a position against restrictions on gun ownership.<sup>38</sup> The key moment in the NRA's transition occurred in May 1977, during the organization's annual meeting in Cincinnati. A wing within the organization, led by NRA President Harlon Carter, surprised the membership with a strident stance on gun laws. In a meeting lasting until 4 a.m., the splinter wing succeeded in removing the chief operative and many other senior leaders, replacing them with Carter and other leaders whose primary focus was on gun rights.<sup>39</sup>

26. Gramlich, John, and Katherine Schaeffer. "7 Facts About Guns in the US." *Pew Research Center*, 22 Oct. 2019, <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/>.

27. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

28. Grinshteyn, Erin, and David Hemenway. "Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015." *Nursing and Health Professions Faculty Research and Publications*, 2019, p. 130. [https://repository.usfca.edu/nursing\\_fac/130](https://repository.usfca.edu/nursing_fac/130).

29. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

30. Anglemeyer, Andrew, et al. "The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis." *Annals of Internal Medicine*, 2014, Vol. 160, No. 2, pp. 101–110.

31. Raphelson, Samantha. "How Often Do People Use Guns in Self-Defense?" *Here & Now* on NPR, 13, Apr. 2018, <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense>.

32. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

33. Lathrop, Daniel, and Anna Flagg. "Killings of Black Men by Whites Are Far More Likely to Be Ruled 'Justifiable.'" *Marshall Project*, 14 Aug. 2017, <https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable>.

34. Campbell, JC, et al. "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study." *American Journal of Public Health*, 2003, Vol. 93, No. 7, pp. 1089–1097.

35. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

36. Elving, Ron. "The NRA Wasn't Always Against Gun Restrictions." *NPR*, 10 Oct. 2017, <https://www.npr.org/2017/10/10/556578593/the-nra-wasnt-always-against-gun-restrictions>.

37. *Ibid.*

38. *Ibid.* And, Gerhart, Ann and Chris Alcantara. "How the NRA Transformed from Marksmen to Lobbyists." *Washington Post*, 29 May 2018, <https://www.washingtonpost.com/graphics/2018/national/gun-control-1968/>.

39. Suess, Jeff. "NRA: 'Revolt at Cincinnati' Molded National Rifle Association." *Cincinnati Enquirer*, 8 Mar. 2018, <https://www.cincinnati.com/story/news/politics/2018/03/08/revolt-cincinnati-molded-nra-did-you-know-jeff-suess-schism-within-national-rifle-association-led/404628002/>.

Since that incident, known as the Revolt in Cincinnati, the group has taken an uncompromising position, advocating for unfettered gun ownership. With aggressive recruiting, the group grew its membership from around a million members to more than 4 million today. Like many lobbying organizations, it frequently makes campaign contributions to lawmakers that support its anti-gun control stance. What makes it a particularly potent organization, however, is its membership, which the NRA mobilizes to take retribution against any lawmaker who supports gun control, organizing them to vote against them in elections. The ability to compel votes based on a single issue has made the group a potent and feared political force, which has stymied most attempts to pass gun control legislation, no matter how mild in its approach.<sup>40</sup>

Numerous gun safety lobbying groups, such as Giffords Law Center, Brady United Against Gun Violence, and Everytown for Gun Safety, work to counterbalance the NRA's message. These organizations were largely inspired by, or founded in, the wake of instances of gun violence, and today produce research about the consequences of gun violence in the U.S. The most recent entry into gun control activism is the student-led group Never Again MSD, formed in the wake of the Margery Stoneman Douglas mass shooting in Parkland, Florida, which has given new visibility to gun-control issues, especially in state legislatures.

## The Second Amendment: What Are the Rights?

The debate over firearms is centered around the Second Amendment, which is split into a prefatory clause, "*A well regulated Militia, being necessary to the security of a free State,*" and an operative clause, "*the right of the people to keep and bear Arms shall not be infringed.*"<sup>41</sup> Considering these 2 clauses separately has led to different interpretations of who can exercise this right and who is responsible for regulation. The Second Amendment stems from English common law, which provided a right to bear arms for self-defense and to protect either collective or individual security. But, it also has historical ties to the American institution of slavery. James Madison viewed the Second Amendment as a way to protect the system of slavery, seeing the need for states to have militias in order to prevent slavery from being dismantled.<sup>42</sup>

After the Civil War, the Fourteenth Amendment granted citizenship rights to former slaves, including—it has been argued—the right to bear arms for self-defense.<sup>43</sup>

The prefatory clause seems to indicate on its face that the right to bear arms is a collective right that exists in the context of a militia, whereas the operative clause indicates that the right to bear arms is an individual right given to the people. In *United States v. Miller* (1939), the Supreme Court affirmed that Congress could regulate the interstate sale of short barrel shotguns. This gave a right of regulation to the federal government, based on the argument that this particular type of gun did not relate to the "preservation or efficiency of a well regulated militia."<sup>44</sup> Since short barrel shotguns were not related to a collective militia, Congress was permitted to regulate their use. This framed the right to bear arms as a collective, rather than an individual, right and seemed to open the door to the regulation of firearms that are not related to their collective use. The Court held that, unless the firearm in question "has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."<sup>45</sup>

The prevailing legal interpretation of the Second Amendment has shifted over time. Prior to 1990, the predominant view was that the Second Amendment was intended to be a collective right, with some scholars identifying it as specifically intended for individual states to have militias.<sup>46</sup> Since then, there has been a movement among legal scholars (including prominent liberals Laurence Tribe, Akhil Reed Amar, and Sanford Levinson) to view the right to bear arms as an individual right. This shift, however, does not preclude reasonable government regulation, which has had long-standing support among legal scholars.<sup>47</sup>

This changing view of the right to bear arms was reflected in *District of Columbia vs. Heller* (2008).<sup>48</sup> This case was brought by a police officer to challenge the Firearms Control Regulations Act of 1975, a D.C. law which banned handguns. The plaintiff sought the right to bear handguns for use in self-defense, and the Supreme Court ruled that the handgun ban was unconstitutional. The decision effectively reversed *Miller* in defining the right as

40. Achenbach, Joel, et al. "How NRA's True Believers Converted a Marksmanship Group into a Mighty Gun Lobby." *Washington Post*, 12 Jan. 2013, [https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15\\_story.html](https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html).

41. "Bearing Arms: Second Amendment." *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/constitution-conan/amendment-2>. Accessed 21 Dec. 2020.

42. Bogus, Carl T. "The Hidden History of the Second Amendment." *UC Davis Law Review*, 1998, Vol. 31, p. 309, <https://ssrn.com/abstract=1465114>.

43. "Bearing Arms: Second Amendment." *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/constitution-conan/amendment-2>. Accessed 21 Dec. 2020.

44. "*United States v. Miller*." *Oyez*, <https://www.oyez.org/cases/1900-1940/307us174>. Accessed 21 Dec. 2020.

45. Volokh, Eugene. "Supreme Court Cases on the Right to Keep and Bear Arms." *UCLA Law School*, <http://www2.law.ucla.edu/volokh/beararms/sct.htm>. Accessed 21 Dec. 2020.

46. Liptak, Adam. "A Liberal Case for Gun Rights Sways Judiciary." *New York Times*, 6 May 2007, <https://www.nytimes.com/2007/05/06/us/06firearms.html>.

47. *Ibid.*

48. "*District of Columbia v. Heller*." *Oyez*, <https://www.oyez.org/cases/2007/07-290>. Accessed 21 Dec. 2020.



an individual right not related to a collective “well regulated militia.” This case focused on the operative clause of the Second Amendment and stated that the prefatory clause did not limit the right to bear arms as a collective right. The opinion states that there is a “guarantee of an individual right to possess and carry weapons in case of confrontation.”

*Heller* was a 5-4 decision, and the dissenting justices argued that the ruling by the majority did not preclude gun regulation. Justice Stevens stated that the right to bear arms is not an unlimited right, and Justices Souter, Ginsburg, and Breyer joined his opinion. Because the case was brought against Washington, D.C., it only applies to federal jurisdiction, leaving open the possibility that states could regulate firearms under the Second Amendment. Additionally, the decision did not address whether the Second Amendment provides an individual right to bear arms outside of the context of handguns within the home being used for self-defense.

Two types of regulation have been addressed by the courts after the *Heller* decision: concealed carry and “Stand Your Ground” laws. Concealed carry allows an individual to carry a weapon, generally on their person, in a concealed fashion. This has been an area of significant regulation with differences across states, and the Supreme Court has not ruled on the regulation of concealed carry laws. States vary from unrestricted (no permit required), to shall-issue (permit required, but issuance of permit involves no discretion), to may-issue (permit required and not essentially universally provided), to no-issue (no concealed carry).

A century before *Heller*, the Supreme Court actually addressed concealed carry obliquely in *Robertson v. Baldwin* (1897), which held that “the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.”<sup>49</sup> Specific concealed carry laws have been addressed by federal circuit courts, where decisions have been split between allowing states to maintain may-issue policies to requiring shall-issue or looser policies.

“Stand Your Ground” laws permit proactive self-defense with “no duty to retreat,” even if safe retreat is possible. Different states have set different limits on when someone has this right, from the “castle doctrine,” which restricts this right to one’s own home, to applying stand-your ground in any public space. These laws came under national scrutiny in 2012, in the wake of the Trayvon Martin fatal shooting by George Zimmerman. Zimmerman, a “community watch” member, claimed that he shot Martin in self-defense under Florida’s Stand Your Ground law. Zimmerman was acquitted of second-degree murder and manslaughter. Racial bias is often evident in justifiable homicide cases like Zimmerman’s, where

white-on-black cases are more likely to be found justifiable than black-on-white cases.<sup>50</sup> This raises concerns about the expansion of “Stand Your Ground” laws and opens these laws up to scrutiny for their potentially discriminatory nature. The Supreme Court has not ruled on the constitutionality of “Stand Your Ground” laws in the context of racial discrimination.

## Government Responsibility to Protect its Citizens

Responsibility for the protection of public safety is split between state governments and the federal government. The protection of “life, liberty and the pursuit of happiness” expressed in the Declaration of Independence is the primary responsibility of both governments. U.S. ratification of international human rights treaties, such as the International Covenant on the Elimination of All Forms of Racial Discrimination (ratified in 1994) and the International Covenant on Civil and Political Rights (ratified in 1992), extends “the right to life and bodily integrity”<sup>51</sup> from international law into U.S. law. Federal and state government responsibility to protect citizens under these treaties could theoretically compel the U.S. to reduce gun violence through regulations on gun use and ownership.

However, these international protections have not been found to extend beyond protecting citizens from *government* violence to protecting citizens from *private* violence. For example, in *Deshaney v. Winnebago Department of Social Services* (1988),<sup>52</sup> the Supreme Court found that the state government did not have a responsibility to protect an individual from private violence under the Due Process Clause of the Fourteenth Amendment. In this case, 4-year-old Joshua Deshaney’s mother had sued the Winnebago Department of Social Services for failing to protect her son from his father’s abuse, thereby depriving him of physical safety. The Supreme Court, in a 6-3 ruling, found that, while the Due Process Clause “forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”<sup>53</sup>

The rejection of a citizen’s right to government protection from private violence has implications for the responsibility state governments have in ensuring the physical safety of their citizens. This in turn affects the government’s obligations to protect citizens from specific instances of gun violence. The *Deshaney* decision does not address whether the government can regulate guns *proactively* with the aim of preventing violence in general. In fact, there have been numerous successful laws regulating guns that have stood up to Second Amendment challenges.

49. Volokh, Eugene. “Supreme Court Cases on the Right to Keep and Bear Arms.” *UCLA Law School*, <http://www2.law.ucla.edu/volokh/beararms/sct.htm>. Accessed 21 Dec. 2020.

50. Roman, John K. “Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data.” *Urban Institute*, July 2013, <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF>.

51. Sadat, Leila N., and George, Madaline. “The US Gun Violence Crisis: Human Rights Perspectives and Remedies.” *Washington University in St. Louis Legal Studies Research Paper No. 19-01-11*, 2019, <https://ssrn.com/abstract=3317143>.

52. “*DeShaney v. Winnebago County Department of Social Services*.” *Oyez*, <https://www.oyez.org/cases/1988/87-154>. Accessed 21 Dec. 2020.

53. *Ibid.*



## Successful and Unsuccessful Federal Regulation

Throughout U.S. history, government has gone back and forth between waves of more restrictive and less restrictive regulation of firearms. The first national gun regulation law was the 1934 National Firearms Act (NFA), which established firearm-related taxes and required that certain types of weapons be registered. This law was challenged in the *Miller* case<sup>54</sup> and upheld by the Supreme Court, in a decision that stated that the Second Amendment does not guarantee a right to own and carry a sawed-off shotgun. As noted, the *Miller* decision was premised on the argument that such a weapon “does not have a reasonable relationship to the preservation or efficiency of a well-regulated militia.” This decision focused on the prefatory clause of the Second Amendment and supported the constitutionality of federal gun regulation. The National Firearms Act remains part of federal firearms law. An additional law was passed in 1938, the Federal Firearms Act (FFA), which added a licensing requirement for manufacturers, importers, and sellers, and restricted gun ownership to purchases from licensed sources.

These 2 laws constituted the primary federal firearms regulation until the 1968 Gun Control Act (GCA). Congress passed this law in the wake of the assassinations of John F. Kennedy, Robert F. Kennedy, and Martin Luther King. It incorporated the 1934 NFA, and portions of the 1938 FFA. The GCA maintained licensing requirements for gun sellers but did not address the possibility of unlicensed individuals making private sales. It also defined groups of people who were not permitted to own guns, including convicted felons, underage people, those having severe mental illnesses, and those with convictions of misdemeanor domestic violence.

The legislative trend shifted away from restrictive regulation with the 1986 passage of the Firearm Owners Protection Act (FOPA). This law protected gun owners and dealers by prohibiting a national database of “firearms, firearm owners, or firearm transactions or disposition,” and limited federal compliance inspections to once a year. It loosened the definition of what constitutes a gun seller that would require a federal license. It also laid the groundwork for the “gun show loophole” by legalizing on-site sales by licensed gun dealers. It loosened some regulations on types of sales and weapons, such as the sale and transfer of ammunition, and tightened others, such as the sale of parts for silencers and a prohibition against civilians owning machine guns. Finally, it created provisions permitting the transport of guns from states with looser gun laws through states with stricter gun laws.

The regulatory trend shifted again with the 1993 Brady Handgun Violence Prevention Act, named for another victim of gun violence, James Brady, who was shot during an assassination attempt on President Reagan. The Brady Act established the National Instant Criminal Background Check System (NICS) and required a background check for any gun purchase from a licensed dealer. This regulation leaves space for purchases made from unlicensed sellers of guns, online purchases, and sales made by dealers at gun shows when background checks are not required. Shortly after enactment of the Brady Law, Congress passed a ban on assault weapons as part of the Violent Crime Control and Law Enforcement Act. This law, enacted in 1994, prohibited the manufacture, transfer, or possession of assault weapons (certain semi-automatic weapons and those with large capacity magazines) for civilian use. The bill contained a sunset provision set for 2004, at which time the ban was not renewed.

The assault weapons ban faced 2 legal challenges, but was upheld both times. First, it was challenged under the Commerce Clause in *Navegar, Inc. v. United States*. Two gun manufacturers who produced restricted semi-automatic weapons claimed that the assault weapons ban was a regulation that exceeded Congress’s authority under the Commerce Clause.<sup>55</sup> In 1997, a circuit court upheld the law and the Supreme Court then declined to hear the case.<sup>56</sup> This demonstrated the feasibility of limited gun regulation under the Commerce Clause, as long as possession of a gun could be tied to interstate commerce.<sup>57</sup>

Secondly, the assault weapons ban was challenged under the Equal Protection Clause in *Olympic Arms v. Buckles*. The premise of this case was that, because other weapons that had not been prohibited were functionally equivalent to assault weapons, those weapons should be considered equal, and therefore permitted. A circuit court stated that this argument was not legitimate under the Equal Protection Clause, which “protects against inappropriate classifications of people, rather than things.”<sup>58</sup> The court also stated that the assault weapons ban was a rational prohibition. The post-*Heller* shift towards making the right to bear arms an individual right could mean that a national assault weapons ban might not be upheld by the Supreme Court today. However, state assault weapons bans that have gone into effect after the 2004 sunset of the federal assault weapons ban have been upheld by state courts.<sup>59</sup>

54. “*United States v. Miller*.” Oyez, <https://www.oyez.org/cases/1900-1940/307us174>. Accessed 21 Dec. 2020.

55. United States, District Court for the District of Columbia. *Navegar, Inc. v. United States*. 986 F. Supp. 650. 1 Dec. 1997. *Justia*, <https://law.justia.com/cases/federal/district-courts/FSupp/986/650/1459248/>.

56. “*Navegar v. United States – Opposition*.” *US Department of Justice*, July 2000, <https://www.justice.gov/osg/brief/navegar-v-united-states-opposition>.

57. Chu, Vivian S. “Federal Assault Weapons Ban: Legal Issues.” *Congressional Research Service*, 14 Feb. 2013, <https://fas.org/sgp/crs/misc/R42957.pdf>.

58. *Ibid.*

59. *Ibid.*

After the passage of the Violent Crime Control and Law Enforcement Act, Congress once again changed course towards a more permissive attitude towards guns, passing several amendments and laws limiting gun regulation. In 1996, the Dickey Amendment prevented the Centers for Disease Control and Prevention (CDC) from advocating for or promoting gun control—stymieing the consideration of gun violence as a public health issue. In fact, 2020 is the first year since the passage of this amendment that money has been allocated to conduct research on gun-related deaths and injuries. The research is to be done by the CDC and the National Institutes of Health (NIH).<sup>60</sup>

In 2003 and 2005, Congress passed other laws protecting gun manufacturers and dealers. The 2003 Tiahrt Amendment prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) from releasing data about where criminals procure firearms to anyone other than law enforcement. The 2005 Protection of Lawful Commerce in Arms Act prevented gun manufacturers and dealers from being named in civil suits involving crimes committed using guns made by those manufacturers or purchased from those dealers.

One of the most recent shifts in gun regulation came in the wake of the 2017 Las Vegas mass shooting. After what was the latest in a long line of mass shootings, advocates attempted unsuccessfully to pass a law banning bump stocks—gun stocks that allow semi-automatic rifles to fire more rapidly. However, in response to widespread public pressure, the Department of Justice (DOJ) reclassified bump stocks as machine guns, rendering them illegal. As this case shows, discretionary regulation through the DOJ may be another avenue for future shifts in gun control. Despite this modest limitation, however, the Trump administration and the U.S. Senate have mostly continued to block any meaningful gun control measures.

## State Regulation of Guns

Each state has a different set of gun regulations, which has made a complex patchwork of different laws throughout the U.S. The ability of states to have different laws makes the concept of regulation quite complex, as guns cross state borders. So, a gun purchased in a more permissive state can be used in a stricter

## The ability of states to have different laws makes the concept of regulation quite complex, as guns cross state borders.

state. Nevertheless, states with stricter gun laws see lower gun violence—with the highest rates of gun violence found in southern and western states with some of the most permissive gun laws, while the lowest rates are in the stricter northeastern states.<sup>61</sup> Some states have reciprocity agreements. Certain types of laws are enforced against anyone who is physically present in a state, whereas others, such as concealed carry permits, are generally recognized across states based on residency.

There are many areas in which states differ on gun control. In terms of licenses, permits, and registration, some states require gun owners to have a permit in order to purchase a gun, to have a license to carry the gun, and to register the gun; others have none of these restrictions.<sup>62</sup> For background checks, 18 states have stronger laws than those set out in the federal GCA and Brady Law.<sup>63</sup> There are also differences in how strictly states regulate gun possession in the context of domestic violence. Federal law only limits gun possession in cases of spouses, parents, or cohabitants who have been convicted of domestic violence, but does not limit gun possession by dating partners or stalkers.<sup>64</sup> Some states have instituted such regulations. This issue is particularly relevant today, with studies showing an increase in domestic violence due to the coronavirus pandemic, creating a particularly dangerous situation in cases where there is a weapon within reach of an abusive partner.<sup>65</sup>

Concealed and open carry is also an area of large difference, with some states requiring permits for concealed and/or open carry and others not requiring a permit.<sup>66</sup> There are broad, state-by-state differences in what types of guns and ammunition are allowed. Some states have placed limits on certain types of weapons, including assault weapons, semi-automatic guns, and certain magazines. Some states also have additional restrictions on bump stocks, which are legal restrictions separate from the DOJ reclassification in 2018.<sup>67</sup> There is also a federal law restricting

60. Wetsman, Nicole. "After a 20-Year Drought, US Lawmakers Fund Gun Violence Research." *The Verge*, 19 Dec. 2019, <https://www.theverge.com/2019/12/19/21028779/gun-violence-research-funding-20-year-freeze-congress-bill-cdc-nih-dickey>.

61. "Gun Violence Statistics." *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

62. Permit to purchase: CT, HI, IA, MD, MA, MI, NE, NJ, NC, RI; license to own: IL, MA, NY; registration: DC; safety certificate: CA, WA.

63. Universal background checks: WA, OR, CA, CO, MA, NY, CT, RI, DE, IL, HI, NJ; partial background checks: NE, IA, MI, NC, PA, MD.

64. Domestic violence regulations: AL, CA, CO, CT, DE, DC, HI, IL, IN, IA, KS, LA, MA, ME, MD, MN, NE, NV, NJ, NM, NY, OR, PA, RI, SC, SD, TE, TX, UT, WA, WV.

65. Taub, Amanda. "A New Covid-19 Crisis: Domestic Abuse Rises Worldwide." *New York Times*, 14 Apr. 2020, <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html>.

66. May-issue: CA, CT, DE, DC, HI, MD, MA, NJ, NY; shall-issue: AL, AR, CO, FL, GA, IL, IN, IA, LA, MI, MN, MT, NE, NV, NM, NC, OH, OR, OR, PA, RI, SC, TN, TX, UT, VA, WA, WI; unrestricted: AK, AZ, ID, KS, KY, ME, MS, MO, NH, ND, OK, SD, VT, WV, WY; No open carry: CA, DC, FL, IL, NY, SC; permitted open carry: AL, CT, GA, HI, IN, IA, MD, MA, MN, MO, NJ, ND, OK, PA, RI, TN, TX, UT, VA, WA.

67. Bump stock regulations: FL, VT, DE, HI, MD, WA, DC, NV.

ownership age to 18, and some states have additional restrictions setting the limit at 21 for at least some types of weapons.<sup>68</sup>

A final type of state law that is an area of particularly active debate today is the extreme risk protection order,<sup>69</sup> also known as a “red flag law.” These laws permit the removal of guns from someone deemed—sometimes by courts and sometimes by other officials—to be at extreme risk of committing a crime of violence or to pose an extreme risk. These laws are under scrutiny for mandating removal of weapons from owners without adequate due process.<sup>70</sup> As all of these laws show, it is possible to balance the right to own and use firearms, with safety measures to protect the safety of American citizens. A renewed commitment to pass such laws on both a state and federal level could increase the impact of gun safety measures and save lives across the country.

## Recommendations

### 1. FOCUS ON AREAS OF CONSENSUS<sup>71</sup>

Opinion polling has revealed several areas in which there is broad consensus, namely where federal gun regulation has national, cross-party support among constituents.

First, over 90% of Democrats/Democratic-leaning independents and Republicans/Republican-leaning independents support laws prohibiting those with mental illnesses from buying guns. Tying this idea to the concerns over how prevalent suicides are as a portion of gun violence could help build consensus establishing stricter restrictions on who should have guns. A second area of consensus is closing the loophole that allows gun purchases at gun shows and in private sales without having background checks. Ninety-three percent of Democrats and 82% of Republicans support such a measure. This demonstrates that the public understands that it is possible to maintain gun rights and constitutionality while also expecting citizens and the government to take responsibility for how the right to own a gun is allocated.

Several polls in 2019 were released showing that 60% of Americans support stricter gun laws, particularly in the wake of mass shootings. An even larger percentage of Americans, 85%, are concerned about gun violence. Narratives created by lobbyists and those with extreme opinions mislead beliefs about what is politically viable, but recent polling demonstrates that there are areas of broad consensus. This, in combination with a history of

constitutionality of federal gun regulations, gives reason to believe that additional federal regulation is feasible and could be effective.

### 2. FOCUS ON STATES

While there is broad support on certain issues that make federal legislation possible, states have shown themselves to be the most successful in passing gun legislation. As discussed above, state regulations are broad ranging, can reflect public opinion, and also have a strong legal basis for constitutionality based on previous court cases. While guns can travel across state borders and reduce the efficacy of state regulations, states with stricter laws see lower gun violence.<sup>72</sup> Polling done on the state level might provide state legislatures with a better picture of what gun laws might be most appropriate in their states. This type of polling could also help hold lawmakers more accountable to the public interest and encourage them to uphold these responsibilities, rather than being most responsive to lobbyists.

One final important feature in state laws that must be contended with is preemption law.<sup>73</sup> These are state-level laws that have local effects. Such laws nullify municipal ordinances, thereby preventing cities and other municipalities from having different gun laws than the state as a whole. In states with effective, well-supported gun legislation, this is not especially problematic. On the other hand, in states with ineffective or unpopular gun legislation, or a lack thereof, this ties the hands of local governments. Working to overturn preemption laws will further increase flexibility in responses to gun violence and make local reform an area with potential.

### 3. REFRAME THE ISSUE

Finally, in order to be more effective, advocates of increased “gun control” must reframe the issue. In considering a framework where government at the local, state, and federal level and citizens of the U.S. have both rights and responsibilities, the concept of “gun control” is too simplistic and too contentious. The Second Amendment provides a right to keep and bear arms, and the Supreme Court has indicated that this is an individual right. However, this right does not supersede the importance of other rights and responsibilities: the right to life requires gun safety, citizens have the responsibility to hold government accountable for public safety, and the government is responsible for protecting its citizens.

68. States with age limit of 21 (for at least some types of guns): CA, CT, DE, DC, FL, HI, IL, IA, MD, MA, NE, NJ, NY, OH, RI, VT, WA, WY.

69. Vasilogambros, Matt. “Red Flag Laws Spur Debate Over Due Process.” *Stateline*, Pew Charitable Trusts, 4 Sept. 2019, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process>. And, Boghani, Priyanka. “‘Red Flag’ Laws Allow Guns to Be Taken from ‘Dangerous’ People.” *Frontline*, PBS, 7 Aug. 2019, <https://www.pbs.org/wgbh/frontline/article/the-law-that-allows-guns-to-be-taken-from-dangerous-people/>.

70. All states have provisions for removal of guns in response to domestic violence, otherwise, the following states have additional Extreme Risk Protective Order (ERPO) petitions: CA, CO, DE, DC, HI, IL, MD, MA, NV, NJ, MY, OR, WA, CA (as of 9/1/20), DC, HI, MD, NY, FL, RI, VT.

71. Gramlich, John, and Katherine Schaeffer. “7 Facts About Guns in the US.” *Pew Research Center*, 22 Oct. 2019, <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/>. And, “Browse Gun Violence Statistics: By the Numbers.” *Giffords Law Center*, <https://lawcenter.giffords.org/facts/polling/>. Accessed 21 Dec. 2020.

72. “Gun Violence Statistics.” *Giffords Law Center*, <https://lawcenter.giffords.org/facts/gun-violence-statistics/>. Accessed 21 Dec. 2020.

73. “City Rights in an Era of Preemption: A State-by-State Analysis.” *National League of Cities*, 16 Feb. 2017, <https://www.nlc.org/resource/city-rights-in-an-era-of-preemption-a-state-by-state-analysis/>.

In thinking about security, it is worth noting that many people carry guns for self-defense and see guns as a form of protection and security. Gun ownership and gun safety are 2 sides of the same coin. Without a constitutional amendment, guns cannot and should not be banned. However, gun ownership is not an unlimited right. This right must be balanced and contextualized. Framing this debate as being about gun safety rather than “taking away guns,” brings it closer to public concerns about reducing gun violence, while still allowing for responsible gun ownership. This means accepting a responsibility for safety and security along with maintaining the right to own and carry a gun.

## How to Reimagine Rights and Responsibilities:

- **Mandate Gun Regulation.** The next U.S. administration should take the lead in calling for legislation that balances Second Amendment rights with the protection of public safety. Gun regulation can be formulated that protects both the constitutional right to bear arms and public safety.
- **Ban Categories of Gun Sales and Restrict Gun Ownership.** Federal and state legislation should ban the sale or use of assault weapons and high-capacity ammunition magazines; ban the purchase and ownership of guns by persons with mental illness, individuals under 21, and domestic partners with domestic violence misdemeanor convictions (the “boyfriend loophole”); and require gun owners to store guns in locked containers.
- **Regulate the Sale and Manufacture of Guns.** Federal and state legislation should require background checks for all gun sales, including at gun shows, online, and in private sales; mandate a 1 week waiting period for gun sale approval; require the Justice Department to publish the identities and locations of gun dealers who have sold guns that have been used in crimes; repeal federal law protecting gun dealers and manufacturers from liability in civil suits for death or injury resulting from the use of guns they sold or manufactured.
- **Institute a Federal Gun Buyback Program.** The federal government should establish a program to buy back guns from private owners in order to reduce the size of a national arsenal of 393 million guns now privately owned in U.S.
- **Expand Research and Polling on Gun Violence.** The federal government should support research and polling on gun violence in the U.S. in order to provide a scientific basis and public opinion support for establishing the balance of gun rights and public safety in gun regulation.



## **Reimagining Rights & Responsibilities in the United States**

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