

A New State Ice Age for Gun Policy

Allen Rostron[†]

INTRODUCTION

Over eighty years ago in his dissent in *New State Ice Co. v. Liebmann*, Justice Louis Brandeis famously observed that “[i]t is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹ An era of experimentation with different approaches to regulating firearms is underway in the states, and the outcome of the experiments may ultimately determine the direction of national policymaking.

Gun control remains one of America’s most bitterly controversial issues. A series of high profile shootings in recent years has made headlines and intensified concerns about guns and the laws governing them.² The concerns run in both directions, with many Americans calling for greater restrictions on firearms and many others adamantly opposed to further regulations. The debate seems to change few minds and instead each side of the issue seems to only become more entrenched in its views.³

Shortly after Barack Obama became President in 2009, I wrote an article for the *Harvard Law & Policy Review* in which I offered advice about how the Obama administration might approach the gun issue.⁴ I encouraged President Obama to speak candidly about the issue, to acknowledge its complexity, and to lead the nation toward having a reasoned and constructive dialogue about guns.⁵ Beyond that, I suggested that the Obama administration should strive to come up with legislative or regulatory proposals that would simultaneously promote gun rights and gun control.⁶ For example, the article suggested that the administration could work to enhance enforcement of existing gun laws, a step that should be supported by those who favor tighter gun restrictions as well as those skeptical of gun control’s effective-

[†] Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri–Kansas City School of Law. B.A. 1991, University of Virginia; J.D. 1994, Yale Law School. Before becoming a law school teacher, Professor Rostron worked as a senior staff attorney for the Brady Center to Prevent Gun Violence. The views expressed in this article are strictly his own and do not represent the positions of any other person or entity.

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

² See *infra* Part I.

³ Scholars have explored why this is to be expected. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1311–18 (2003) (contending that arguments based on empirical assessments of policies’ effects have little influence on people’s views about those policies).

⁴ See generally Allen Rostron, *Cease Fire: A “Win-Win” Strategy on Gun Policy for the Obama Administration*, 3 HARV. L. & POL’Y REV. 347 (2009).

⁵ *Id.* at 356–58.

⁶ *Id.* at 358–60.

ness.⁷ I also urged the administration to support packages of legislation that included both gun control and gun rights elements, such as a law that would help to keep guns out of the wrong hands by improving the reach and strength of the background check system, but also expand opportunities for law-abiding people to carry guns for defensive purposes by creating a national system of reciprocity for state concealed weapons permits.⁸ The goal, I argued, should be to come up with “win-win” proposals that might allow some useful compromises and progress to be made on the issue.⁹

Seven years have passed since the publication of that article, and Obama’s presidency is now nearing its end. Picking up where the previous article left off, I will examine what has happened and where the issue of guns in America now stands. Unfortunately, my optimistic hopes for progress on the gun issue during President Obama’s time in office have largely been dashed. In Part I of this article, I will describe how Obama was generally inactive on the issue of gun control during his first term. Despite a seemingly endless string of tragic shootings that have repeatedly fixed Americans’ attention on guns, the nation remains stubbornly divided on what to do about the problem. Congress has done nothing and seems hopelessly deadlocked and incapable of moving forward with change in any direction.

The Obama administration finally began to take on the gun issue after the shooting at Sandy Hook Elementary School near the end of Obama’s first term. Congress remained frozen. Clearly frustrated with the stalemate, President Obama announced in January 2016 a set of executive actions that he would take, most notably, a crackdown on those who frequently sell guns but pretend not to be engaged in the business of doing so in order to avoid the legal requirements that apply to federally licensed firearm dealers. In Part II of this article, I will contend that those executive measures are a useful step and perhaps the best that any president could possibly hope to achieve at this point, but they will ultimately have limited effects despite the controversy aroused by them.

While the gun issue largely has been stalled at the federal level, some state legislatures have been more active. Relatively liberal or “blue” states like California, Connecticut, Maryland, and New York have enacted gun control laws, while conservative or “red” states like Kansas and Texas have moved in the opposite direction and passed laws making it easier to acquire guns and carry them in more places. In Part III, I examine gun policy initiatives in several states in recent years and show how the nation continues to become even more fractured on the gun issue, with variation in state approaches to guns becoming even more prominent than in the past.

This schism at the state level may be the best result that gun control proponents can hope to achieve for the time being. In Part IV, I argue that if political realities make it unlikely that there will be any significant move-

⁷ *Id.* at 358–59.

⁸ *Id.* at 360–61, 364–65.

⁹ *Id.* at 358.

ment at the federal level, the achievement of some positive steps in some states would be better than nothing. America may simply be destined to have an ever more stark divergence of approaches to guns at the state level, with some states taking gun restrictions as far as constitutionally permissible and another bloc of states gradually dismantling even the meager limits on guns they currently have in their laws. A national gun control framework may be impossible until state experimentation highlights potential solutions that are capable of obtaining widespread acceptance.

The future of gun policy in America may well continue to be one of dueling experiments, with some states essentially deregulating guns as much as possible and others maintaining tighter controls. Perhaps at some point it will become clear that one experiment or the other has been a greater success, but it may simply be that America is destined to remain a nation divided over the issue and with levels of gun regulation varying significantly across state lines.

I. INACTION ON THE GUN ISSUE DURING OBAMA'S FIRST TERM

Gun control and gun violence received relatively little attention during President Obama's first several years in office. Inaction was the central theme of the Obama administration's approach to guns at that point. A year into Obama's first term, the Brady Center to Prevent Gun Violence issued a report card on Obama's efforts and gave him a grade of "F" in every respect, declaring that his "first-year record on gun violence prevention has been an abject failure."¹⁰ Indeed, the only legislation concerning guns that Obama signed into law in 2009 were measures that repealed bans on carrying loaded guns in national parks¹¹ and on bringing guns in checked baggage aboard Amtrak trains.¹² Meanwhile, the administration "muzzled cabinet members who called for sensible gun laws."¹³ Despite Obama's inaction, fears that his election would mean a crackdown on guns triggered a boom in firearm sales.¹⁴ Meanwhile, public opinion polls showed strong support for gun rights¹⁵ in the wake of the Supreme Court's reinvigoration of the Second

¹⁰ DANIEL R. VICE, ROBYN LONG & ELIKA EFTEKHARI, BRADY CTR. TO PREVENT GUN VIOLENCE, *PRESIDENT OBAMA'S FIRST YEAR: FAILED LEADERSHIP, LOST LIVES 1* (2010), <http://www.bradycampaign.org/sites/default/files/obama-1styear-report.pdf> [<https://perma.cc/KYN5-2A2S>].

¹¹ Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 512, 123 Stat. 1734, 1764 (codified at 16 U.S.C. § 1a-7b (2012)).

¹² Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 159, 123 Stat. 3034, 3061 (codified as note appended to 49 U.S.C. § 24305 (2012)).

¹³ BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 10, at 1.

¹⁴ Rostron, *supra* note 4, at 347-48.

¹⁵ Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 413 n.163 (2009).

Amendment.¹⁶ One pro-gun commentator observed that the National Rifle Association (NRA) “should erect a statue of Barack Obama in front of its D.C. headquarters.”¹⁷

The Obama administration’s muted approach to gun issues was surely motivated in part by political considerations. The conventional wisdom was that gun control hurts Democrats politically,¹⁸ and the Obama administration had its hands full with other matters like health care reform, two wars, and a global economic collapse.¹⁹ But in addition, it was easy for the Obama administration to ignore guns because the public and the media were not particularly focused on them. Attention to the gun issue has waxed and waned over the years, surging in response to notorious incidents such as political assassinations or horrific mass shootings. During President Obama’s first several years in office, there were many tragic events involving guns occurring across the country, but few that really centered the nation’s attention on gun issues. For example, a U.S. Army psychiatrist killed thirteen people and wounded more than thirty others at Fort Hood in Texas in November 2009, but debate about the incident centered on whether the incident should be considered an act of terrorism inspired by radical Islamic ideology rather than on the fact that the attack was perpetrated with firearms.²⁰ And in 2010, the nation was fortunate to experience very few of the sort of mass shootings in public places, like workplaces or schools, that are most terrifying and receive the most public and media attention.²¹ With no extraordinarily high-profile shootings in the news, President Obama was not under tremendous pressure to talk about guns.

That would soon change in dramatic and tragic fashion. The first key turning point occurred in a supermarket parking lot in Tucson, Arizona, in January 2011. A disturbed young man used a pistol with a thirty-round magazine to kill six people and wound thirteen others, including U.S. Representative Gabby Giffords.²² The shooting sparked widespread outrage about

¹⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment gives individuals a right to keep and bear arms that is not limited to militia service).

¹⁷ Bill Schneider, *The Year of the NRA*, NEW WEST (Jan. 8, 2010, 10:00 AM), http://newwest.net/topic/article/the_year_of_the_nra/C41/L41/ [<https://perma.cc/EC66-D75K>].

¹⁸ See, e.g., Evan Thies, *The Democrats’ Cowardice on Guns*, N.Y. DAILY NEWS (Dec. 28, 2012, 3:24 AM), <http://www.nydailynews.com/opinion/democrats-cowardice-guns-article-1.1228457> [<https://perma.cc/9XZY-VYMJ>].

¹⁹ See Philip Rucker & Sari Horwitz, *On Guns, Obama Showed Little Will*, BALTIMORE SUN, Dec. 24, 2012, at 1A.

²⁰ See, e.g., Bill O’Reilly Creators Syndicate, Editorial, *Obama Avoiding Reality of Terrorism*, SUN SENTINEL (Nov. 14, 2009), http://articles.sun-sentinel.com/2009-11-14/news/0911130137_1_muslim-community-terrorist-islamic [<https://perma.cc/8UYT-JZCH>].

²¹ WILLIAM KROUSE & DANIEL RICHARDSON, CONG. RESEARCH SERV. R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999–2013 44 (2015) (reporting that there were two mass shootings at workplaces, schools, restaurants, and other public places in 2010, the lowest number in the fifteen-year period of time addressed by the report).

²² Rhonda Bodfield, *Judge Roll, Girl, 3 Retirees, Aide Slain in Attack on Congresswoman*, ARIZ. DAILY STAR (Jan. 9, 2011, 12:45 AM), <http://tucson.com/news/local/judge-roll-girl-retir>

guns,²³ intemperate political rhetoric,²⁴ and the need to improve identification and treatment of people suffering from serious mental illness.²⁵ President Obama spoke at a memorial for the victims, but chose not to use the occasion to call for stronger gun laws, instead merely noting that “we’ve seen a national conversation commence, not only about the motivations behind these killings, but about everything from the merits of gun safety laws to the adequacy of our mental health system.”²⁶

The nation would be jolted by gun violence again the following year when a deranged young man with an assault rifle, a shotgun, and two pistols killed a dozen people and injured more than fifty others in a movie theater in Aurora, Colorado, in July 2012.²⁷ On the campaign trail in the midst of his quest for re-election, President Obama lamented the event as being “senseless” and “beyond reason” but did not mention the role that firearms played in the tragedy.²⁸

President Obama continued to avoid the topic of guns as much as possible as he campaigned. He did not mention the issue in his speech at the Democratic National Convention,²⁹ although he had done so during his speech accepting the party’s nomination four years earlier.³⁰ Asked about assault weapons at his second presidential debate against Republic candidate Mitt Romney, Obama emphasized his support for Second Amendment rights, called for better enforcement of existing gun laws, and then vaguely

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²³ See, e.g., Karoun Demirjian & Anjeanette Damon, *Gun Control, Tone of Rhetoric Take Center Stage After Arizona Shooting*, LAS VEGAS SUN (Jan. 11, 2011, 2:00 AM), <http://lasvegassun.com/news/2011/jan/11/violence-shifts-debate-dc/> [http://perma.cc/BLX2-FMQ4].

²⁴ See, e.g., Robert Leger, Opinion, *Every Day, Toxic Politics Assassinate American Spirit*, ARIZ. REPUBLIC (Jan. 12, 2011, 5:31 PM), http://archive.azcentral.com/members/Blog/RobertLeger/113670/sort_A [http://perma.cc/7TU7-RH7V].

²⁵ See, e.g., Donna Leinward, *Americans Fault Mental Health System in Rampage*, USA TODAY (Jan. 19, 2011, 1:41 PM), http://usatoday30.usatoday.com/news/nation/2011-01-19-shooting19_ST_N.htm [https://perma.cc/F24Q-3AXN].

²⁶ *Obama’s Tucson Speech Transcript: Full Text*, WASH. POST (Jan. 13, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/13/AR2011011301532_pf.html [https://perma.cc/SFX4-5YKG].

²⁷ Jennifer Brown, *12 Shot Dead, 58 Wounded in Aurora Movie Theater During Batman Premier*, DENV. POST (July 21, 2012, 12:31 AM), http://www.denverpost.com/ci_21124893/12-shot-dead-58-wounded-aurora-movie-theater [https://perma.cc/QL94-ZYG2].

²⁸ President Barack Obama, Remarks on the Shootings in Aurora, Colorado (July 20, 2012), in OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (July 20, 2012), <https://www.whitehouse.gov/the-press-office/2012/07/20/remarks-president-shootings-aurora-colorado> [https://perma.cc/KM97-RRCB].

²⁹ President Barack Obama, Speech to the Democratic National Convention (Sept. 6, 2012), in WASH. POST (Sept. 6, 2012), https://www.washingtonpost.com/politics/dnc-2012-obamas-speech-to-the-democratic-national-convention-full-transcript/2012/09/06/ed78167c-f87b-11e1-a073-78d05495927c_story.html [https://perma.cc/CD4D-WE4U].

³⁰ See Rostron, *supra* note 4, at 358.

suggested that an assault weapons ban might be part of “a broader conversation about how do we reduce the violence generally.”³¹

II. SANDY HOOK AND ITS AFTERMATH

The month after Obama won re-election, a mentally unstable young man walked into Sandy Hook Elementary School in Newtown, Connecticut, and killed twenty children and six adult staff members with a five-minute, 154-round barrage of rifle fire.³² With tears in his eyes, President Obama declared that the nation had experienced too many similar incidents of gun violence and “we’re going to have to come together and take meaningful action to prevent more tragedies like this, regardless of the politics.”³³ Obama soon vowed that reducing gun violence would be a “central issue” of his second term in office.³⁴

The Sandy Hook shootings shook even the most ardent gun rights advocates. “Within the inner circles of the NRA, the wives of senior NRA officials [were] shedding tears, and saying to their husbands, ‘Something has to happen. You have to do something different, honey.’”³⁵ The NRA stirred hopes that its stance might be softening when it announced that it was “shocked, saddened and heartbroken” by the Sandy Hook massacre and it would be holding a major press conference at which it would “offer meaningful contributions to help make sure this never happens again.”³⁶ The NRA’s contribution turned out to be a proposal to have armed officers standing guard at every school in the country.³⁷ Gun control laws are useless, the

³¹ *October 16, 2012 Debate Transcript*, COMM’N ON PRESIDENTIAL DEBATE (Oct. 16, 2012), <http://www.debates.org/index.php?page=october-16-2012-the-second-obama-romney-presidential-debate> [https://perma.cc/SBQ9-ZHVW].

³² Mark Arsenaunt, *20 Children Slaughtered in Conn. School Shooting*, BOS. GLOBE (Dec. 15, 2012), <https://www.bostonglobe.com/metro/2012/12/15/gunman-rampage-leaves-dead-including-children-conn-elementary-school/W84TE8fnQZePmgUsXrVN1N/story.html> [https://perma.cc/Y647-LRFQ]; Editorial, *Access to Weapons Made Tragedy Possible*, CONN. POST (Mar. 29, 2013, 4:41 PM), <http://www.ctpost.com/news/article/Access-to-weapons-made-tragedy-possible-4392681.php> [https://perma.cc/8XXZ-RQGJ].

³³ Megan Slack, *President Obama Speaks on the Shooting in Connecticut*, THE WHITE HOUSE (Dec. 14, 2012, 3:34 PM), <https://www.whitehouse.gov/blog/2012/12/14/president-obama-speaks-shooting-connecticut> [https://perma.cc/Y63U-S6XP].

³⁴ Michael D. Shear, *Obama Vows Fast Action in New Push for Gun Control*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html> [https://perma.cc/M9HR-TAKC].

³⁵ *Frontline: Gunned Down: The Power of the NRA* (PBS television broadcast Jan. 5, 2015) (quoting Paul M. Barrett, assistant managing editor and senior writer at Bloomberg Businessweek).

³⁶ David Sherfinski, *NRA Seeks a Voice in Talks About Ending Gun Violence*, WASH. TIMES (Dec. 19, 2012), <http://www.washingtontimes.com/news/2012/dec/18/gop-senators-open-gun-control-debate/> [https://perma.cc/HL77-YJE5].

³⁷ Eric Lichtblau & Motoko Rich, *N.R.A. Envisions ‘a Good Guy with a Gun’ in Every School*, N.Y. TIMES (Dec. 21, 2012), <http://www.nytimes.com/2012/12/22/us/nra-calls-for-armed-guards-at-schools.html> [https://perma.cc/3D9E-RGVL].

NRA insisted, for “[t]he *only* thing that stops a *bad* guy with a gun is a *good* guy with a gun.”³⁸

The Obama administration nevertheless moved forward on the issue, with gun control “rocket[ing] through what one administration official called ‘a time warp,’ transforming from an issue that was politically off-limits to one at the top of Obama’s agenda.”³⁹ A task force led by Vice President Joe Biden quickly proposed a package of measures that would strengthen gun laws, mental health services, and school security.⁴⁰ Obama called on Congress to enact legislation banning military-style assault weapons and high-capacity ammunition magazines.⁴¹ He also asked Congress to extend the background check system so that it would cover all gun transfers, not just purchases from licensed gun dealers.⁴² When the background check measure came up for a vote in the Senate in April 2013, it fell six votes short of the sixty votes needed to proceed under the Senate’s filibuster and cloture rules.⁴³

Gun control efforts had reached a dead end in the U.S. Congress. But throughout President Obama’s second term, a steady drumbeat of tragic news provided grim reminders of gun policy issues. A white supremacist killed three people at a Jewish community center and retirement community in Overland Park, Kansas.⁴⁴ A gunman killed five people in a shooting rampage in Santa Monica, California, after evading background check requirements by building his own rifle with component parts purchased through the Internet.⁴⁵ A shooter at the Washington Navy Yard claimed a dozen more lives.⁴⁶ A young man angry about being rejected by women killed six people

³⁸ *Id.*

³⁹ Philip Rucker & Peter Wallsten, *Biden’s Gun Task Force Met with All Sides, but Kept Its Eye on the Target*, WASH. POST (Jan. 19, 2013), https://www.washingtonpost.com/politics/bidens-gun-task-force-met-with-all-sides-but-kept-its-eye-on-the-target/2013/01/19/520d77a6-60c5-11e2-b05a-605528f6b712_story.html [<https://perma.cc/7B36-5HC5>].

⁴⁰ See President Barack Obama & Vice President Joe Biden, Remarks by the President and Vice President on Gun Violence (Jan. 16, 2013), in OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Jan. 16, 2013), <https://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence> [<https://perma.cc/R6JF-JWKM>].

⁴¹ *Id.*

⁴² *Id.*

⁴³ Scott Neuman & Eyder Peralta, *Senate Rejects Expanded Background Checks For Gun Sales*, NPR (Apr. 17, 2013, 6:36 PM), <http://www.npr.org/sections/thetwo-way/2013/04/17/177638177/senate-rejects-expanded-background-checks-for-gun-sales> [<https://perma.cc/4MMT-ZXBB>].

⁴⁴ Laura Bauer et al., *Man with History of Anti-Semitism Jailed in Fatal Shooting of Three at Johnson County Jewish Centers*, KAN. CITY STAR (Apr. 13, 2014, 2:30 PM), <http://www.kansascity.com/news/local/article344979/Man-with-history-of-anti-Semitism-jailed-in-fatal-shooting-of-three-at-Johnson-County-Jewish-centers.html> [<https://perma.cc/D27K-MQJU>].

⁴⁵ Carter Evans, *Santa Monica Shooter Built His Own Weapon*, CBS NEWS (June 14, 2013, 8:12 PM), <http://www.cbsnews.com/news/santa-monica-shooter-built-his-own-weapon/> [<https://perma.cc/D9K9-NPL6>].

⁴⁶ Petula Dvorak, *Another Mass Shooting, This One So Close to Home*, WASH. POST (Sept. 16, 2013), https://www.washingtonpost.com/local/how-can-we-tolerate-another-mass-shooting/2013/09/16/ae738f06-1ee5-11e3-b7d1-7153ad47b549_story.html [<https://perma.cc/J9PV-NMN5>].

during a shooting spree in Isla Vista, California.⁴⁷ A young man hoping to start a race war killed nine African-American people at a prayer service at a church in Charleston, South Carolina.⁴⁸ In an attack purportedly inspired by foreign terrorist propaganda, a man with an AK-47-style rifle killed five in shootouts at a military recruiting center and a military reserve center in Chattanooga, Tennessee.⁴⁹ A student armed with five handguns murdered eight classmates and a professor at a community college in Oregon.⁵⁰ And near the end of 2015, a married couple inspired by foreign terrorist organizations slaughtered fourteen people at a county health department's holiday party in San Bernardino, California.⁵¹ Of course, these incidents that captured headlines represented just a tiny fraction of the overall toll of homicides, suicides, and accidents involving guns occurring every day in America.⁵²

One day after the San Bernardino shootings, the U.S. Senate voted on a series of measures concerning guns.⁵³ A proposal to prohibit gun purchases by people on terrorist watch lists received the support of only forty-five Senators.⁵⁴ Democrats also revived the proposal for expanding background checks that the Senate had rejected after the Sandy Hook shootings, and once again it failed to pass.⁵⁵ Republicans countered with proposals addressing the same topics but with a gun-rights slant.⁵⁶ Rather than simply prohibiting gun sales to those on terror watch lists, the Republican alternative

⁴⁷ Adolfo Flores et al., *A Killer's Rampage in Isla Vista*, L.A. TIMES (May 25, 2014, 12:01 AM), <http://www.latimes.com/local/la-me-isla-vista-shooting-20140525-story.html> [https://perma.cc/9VTF-KD92].

⁴⁸ Editorial, *Charleston Strong*, CHESTER NEWS & REPORTER (June 23, 2015, 6:38 PM), <http://www.onlinecheester.com/content/charleston-strong> [https://perma.cc/8AQT-PCU4].

⁴⁹ Joy Lukachick Smith & Shelly Bradbury, *Chattanoogans Puzzle Out Answers, Pour Out Grief Day After Deadly Shooting Spree*, CHATTANOOGA TIMES FREE PRESS (July 18, 2015), <http://www.timesfreepress.com/news/local/story/2015/jul/18/puzzling-out-answers-pouring-out-grief/315249/> [https://perma.cc/DXP3-WNNF].

⁵⁰ Dennis Theriault, *Oregon Shooting: Terror and Heroism as Victims' Names Are Revealed*, OREGONIAN (Oct. 2, 2015, 3:30 PM), http://www.oregonlive.com/politics/index.ssf/2015/10/oregon_college_shooting_gunman.html [perma.cc/VD7Q-KQB9].

⁵¹ Josh Dulaney & Rebecca Kimitch, *San Bernardino Mass Shooters: Why Did They Do It?*, L.A. DAILY NEWS (Dec. 12, 2015, 6:24 PM), <http://www.dailynews.com/general-news/20151212/san-bernardino-mass-shooters-why-did-they-do-it> [https://perma.cc/LB8N-RU7A].

⁵² For example, the Centers for Disease Control and Prevention reports that firearms have accounted for over 20,000 suicides, over 11,000 homicides, and over 500 accidental deaths in the most recent years for which data is available. See, e.g., SHERRY L. MURPHY ET AL., DEATHS: FINAL DATA FOR 2012, NAT'L VITAL STATISTICS REPORTS, Aug. 31, 2015, at 45–46, http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_09.pdf [https://perma.cc/P6N5-RR8B]. The 2013 report has been released and shows similar numbers. JIAQUAN XU ET AL., DEATHS: FINAL DATA FOR 2013, NAT'L VITAL STATISTICS REPORTS, Feb. 16, 2016, at 38–42, http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf [https://perma.cc/AL9E-GLW6].

⁵³ Kelsey Snell & Karoun Demirjian, *Senate Rejects Gun Control Amendments Offered Following San Bernardino Shooting*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/12/03/senate-democrats-to-force-gun-control-votes-in-the-wake-of-the-san-bernardino-shooting/> [https://perma.cc/862P-KW33].

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

would delay the sale for seventy-two hours while the government went to court and convinced a judge that there was probable cause to prohibit the sale.⁵⁷ Rather than expanding background checks, the Republican proposal sought to enhance the restrictions already on the books, such as by providing funding for prosecuting those who fail background checks when attempting to buy firearms.⁵⁸ Like the Democrats' gun-control measures, all of the Republicans' gun-friendly counterproposals failed to secure enough votes to be adopted.⁵⁹ Senate Minority Leader Harry Reid concluded that Congress was at an impasse on guns: "We don't do anything. We as the legislative body of this country do nothing."⁶⁰

President Obama had clearly had enough. Early in January 2016, he sat down for a one-hour televised townhall meeting devoted entirely to the gun issue.⁶¹ He took questions from gun control proponents and opponents, including a rape survivor and a murder victim's widow who posed challenging questions about the effectiveness of gun control laws and the risk of disarming people who want to have guns to defend themselves.⁶² President Obama acknowledged the difficulty of the issue, but insisted that there ought to be some middle ground on which most Americans could agree, such as the value of keeping guns out of the hands of people most likely to harm themselves or others.⁶³ "At least let's figure it out," President Obama said, "Let's try some things."⁶⁴ In the short run, the President's efforts to start a reasonable dialogue about guns did not yield any major breakthroughs. The NRA trashed Obama's attempt to discuss the issue, dubbing the townhall meeting the "Obama Gun Ban Media Circus."⁶⁵ Time will tell if the President's efforts to start a reasonable dialogue about guns yield any benefits in the long term.

In addition to talking about the issue, President Obama announced in early 2016 a series of executive actions that his administration would take as part of its efforts to reduce gun violence.⁶⁶ Critics of the measures, including the NRA, denounced them as bad policies as well as unconstitutional in-

⁵⁷ *Id.*

⁵⁸ Burgess Everett & Seung Min Kim, *Gun Measures Fail in Senate*, POLITICO (Dec. 3, 2015), <http://www.politico.com/story/2015/12/gun-amendment-democrats-216389> [<https://perma.cc/F269-73HB>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Townhall on Guns with President Obama* (CNN television broadcast Jan. 7, 2016).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Leonard Greene & Denis Slattery, *NRA Pushes Against President Obama's Gun Control Executive Action with Fox News Interview After CNN Town Hall Meeting*, N.Y. DAILY NEWS (Jan. 7, 2016), <http://www.nydailynews.com/news/national/nra-protests-obama-gun-control-executive-action-article-1.2489008> [<https://perma.cc/C4K9-QU9T>].

⁶⁶ *Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE (Jan. 4, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our> [<https://perma.cc/P8Q9-2GYF>].

fringements of Second Amendment rights and Congress's authority to make law.⁶⁷ Candidates seeking the Republican nomination in the 2016 presidential race vowed to undo Obama's actions if elected.⁶⁸ Asked if he thought there are any circumstances in which gun sales should be limited, Donald Trump, the Republican frontrunner at that time, said no.⁶⁹ Marco Rubio declared that he was "convinced that if this president could confiscate every gun in America, he would."⁷⁰

Despite the hue and cry over them, President Obama's executive actions are actually mild measures that should not even be controversial. For example, the central component of the package of executive actions is essentially just a vow to better enforce an existing law. Federal laws have long required anyone engaged in the business of selling firearms to have a federal firearm dealer license.⁷¹ Congress has defined someone "engaged in the business" of selling firearms as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," as opposed to "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms."⁷² Regulations of the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) strictly track the statutory definitions.⁷³

President Obama's executive action obviously does not change what the statute says. Indeed, the executive action does not even seek to alter the ATF regulations. Instead, the executive action consists of nothing beyond having the ATF issue a guidance document that reiterates the existing legal requirements.⁷⁴ The guidance document lists factors that courts have found signifi-

⁶⁷ See, e.g., Andrew P. Napolitano, Opinion, *Why Obama's Executive Action on Guns Is Unconstitutional*, Fox News (Jan. 5, 2016), <http://www.foxnews.com/opinion/2016/01/05/judge-napolitano-why-obamas-executive-action-on-guns-is-unconstitutional.html> [https://perma.cc/QVD2-SMX9]; *Obama Issues Executive Actions on Guns*, NRA-ILA (Jan. 8, 2016), <https://www.nraila.org/articles/20160108/obama-issues-executive-actions-on-guns> [https://perma.cc/8DGR-EZ2W].

⁶⁸ See Eric Bradner, *GOP 2016 Candidates Bash Obama's Gun Control Push*, CNN (Jan. 5, 2016), <http://www.cnn.com/2016/01/05/politics/obama-gun-control-republican-reaction/> [https://perma.cc/92YG-93U3].

⁶⁹ *Republican Candidates Debate in North Charleston, South Carolina*, AM. PRESIDENCY PROJECT (Jan. 14, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=111395> [https://perma.cc/TK35-XEHF].

⁷⁰ *Id.*

⁷¹ 18 U.S.C. § 923(a) (2012). Federal licensing of firearm dealers began in the National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236.

⁷² 18 U.S.C. § 921(a)(21)(C) (2012).

⁷³ 27 C.F.R. § 478.11 (2016) (defining "engaged in the business" and "dealer"). The ATF regulations supplement the statutory language only with a minor clarification that a person may be engaged in the business of selling firearms even if doing so on a part-time basis. *Id.* (defining "dealer").

⁷⁴ U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ATF PUB 5310.2, DO I NEED A LICENSE TO BUY AND SELL FIREARMS? (2016), <https://www.atf.gov/file/100871/download> [https://perma.cc/B6KU-2S6W].

cant in determining whether someone is engaged in the business of selling firearms (such as the volume and frequency of sales made, the extent to which profit is one's aim, and whether one holds oneself out as a dealer), and provides a series of hypothetical examples of what would or would not constitute being engaged in the business of selling firearms.⁷⁵ The document merely provides guidance for people seeking to understand existing law and does not in any way expand the category of people required to have a federal license and conduct background checks.⁷⁶

Despite its limited effect, the ATF guidance is a useful document to the extent that it helps some people better understand and comply with the law. The issuance of the guidance is also a good thing if it reflects an enhanced effort by the Obama administration to ensure strong enforcement of the laws governing those in the business of selling firearms. Unfortunately, there are too many people who truly are engaged in the business of selling guns but pretend not to be in order to avoid the legal obligations—like conducting background checks—that come with having a federal firearms license.⁷⁷ Selling at gun shows or through the internet or newspaper classified ads enables these sellers to reach a large pool of potential customers interested in acquiring firearms without a background check.⁷⁸ Prosecution and conviction rates for illegally selling guns without a license are low.⁷⁹ Aside from those who want to keep selling guns illegally or those who depend on such sellers for access to guns, no one has legitimate reason to complain about better enforcement of these laws.

The other items in President Obama's package of executive actions are equally sensible measures, although they make no dramatic changes to the legal landscape. Many of the actions taken by the Obama administration essentially amount to asking those involved in the enforcement of gun laws to step up their efforts and try harder to be effective. For example, the administration announced that Loretta Lynch, the Attorney General of the United States, had sent a letter to states highlighting how the background check system depends on states providing complete data on criminal records.⁸⁰ The administration also announced that the Attorney General had conducted a conference call in which she told U.S. Attorneys "to direct fed-

⁷⁵ *Id.* at 7–8.

⁷⁶ See Jonathan H. Adler, Opinion, *New ATF Guidance on Gun Sales Is Legally Meaningless (or Else It Would Be Unlawful)*, WASH. POST, VOLOKH CONSPIRACY (Jan. 5, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/05/new-atf-guidance-on-gun-sales-is-legally-meaningless-or-else-it-would-be-unlawful/> [https://perma.cc/Z2SU-QJRV].

⁷⁷ See, e.g., EVERYTOWN FOR GUN SAFETY, BUSINESS AS USUAL: HOW HIGH-VOLUME GUN SELLERS FUEL THE CRIMINAL MARKET AND HOW THE PRESIDENT CAN STOP THEM (2015), <http://everytownresearch.org/documents/2015/11/business-as-usual.pdf> [https://perma.cc/2KYU-LMTT] (reporting the results of a study tracking high-volume dealers who sold twenty-five or more guns a year through a nationwide online gun marketplace).

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 14.

⁸⁰ *Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, *supra* note 66.

eral prosecutors to continue to focus on smart and effective enforcement of our gun laws.”⁸¹ And the Attorney General also issued a memo encouraging federal prosecutors “to renew domestic violence outreach efforts.”⁸²

The Obama administration also moved to aim some additional new resources at the problem. The Federal Bureau of Investigation (FBI) made plans to hire several hundred new staff members to help with processing background checks, while President Obama pledged that his next proposed federal budget would include \$500 million for improving access to mental health care.⁸³ The administration also promised to seek funding for the ATF to hire hundreds of new agents and investigators.⁸⁴ New ATF efforts include a center focused on illegal gun trafficking via the internet.⁸⁵ The administration also called for new federal support for research on gun safety technology.⁸⁶ Suggesting that federal purchasing power could be a lever to encourage development of new safety innovations, the Obama administration directed federal agencies “to review the availability of smart gun technology on a regular basis” and “to consider whether including such technology in specifications for acquisition of firearms would be consistent with operational needs.”⁸⁷

The President’s executive actions also included a few attempts to tweak and improve current laws. For example, the administration touted the issuance of new regulations that would ensure that background checks cannot be evaded by transferring the ownership of a firearm through a trust or corporation.⁸⁸ Other new regulations require gun dealers to notify ATF and local law enforcement when guns are stolen or get lost during shipment to a customer.⁸⁹

These are steps worth taking, but they are small steps. Despite overheated rhetoric from many critics about how President Obama had illegitimately bypassed Congress,⁹⁰ the Obama administration’s actions in no way

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see Machineguns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Trust or Legal Entity with Respect to Making or Transferring a Firearm, 81 Fed. Reg. 2658 (Jan. 15, 2016) (to be codified at 27 C.F.R. pt. 479).

⁸⁹ Commerce in Firearms and Ammunition—Reporting Theft or Loss of Firearms in Transit, 27 C.F.R. § 478.39a (2016).

⁹⁰ For example, Wisconsin Governor Scott Walker threatened to bring a legal challenge to President Obama’s actions, accusing Obama of “disregarding the constitutional principles of separation of powers and exceeding his authority as chief executive.” Jason Stein, *Scott Walker Asks Attorney General to Review Obama’s Gun Actions*, MILWAUKEE J. SENTINEL, Jan. 7, 2016, at 3. For an extensive discussion of the issues surrounding Obama’s resort to executive action, see generally Linda Feldmann, *Is Barack Obama an Imperial President?*, CHRISTIAN SCIENCE MONITOR (Jan. 26, 2014), www.csmonitor.com/USA/politics/2014/0126/Is-Barack-Obama-an-Imperial-president [<https://perma.cc/R32R-NQUW>].

improperly usurped Congress's authority. In particular, President Obama emphasized Congress's repeated refusal to pass laws that would expand background checks,⁹¹ but he refrained from stepping into that breach. President Obama stuck to his proper executive role, proposing ways to better implement the existing background check requirements but without stretching them to cover any new situations for which background checks were not already required. Thus, Obama's executive actions do not improperly intrude on congressional authority.

The notion that Obama's actions violate the Second Amendment⁹² is also without merit. Emphasizing that the right to keep and bear arms is not absolute, the Supreme Court has cautioned that nothing in its decisions "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."⁹³ The Supreme Court has not specified what sort of scrutiny or other test should be applied to laws challenged on Second Amendment grounds,⁹⁴ but lower courts have generally applied an intermediate level of scrutiny that is "very deferential to legislative determinations and requires merely some logical and plausible showing of the basis for the law's reasonably expected benefits."⁹⁵ The lower court decisions have suggested that more intense scrutiny would apply only in exceptional cases where a challenged law imposes a severe burden on conduct at the Second Amendment's core.⁹⁶

President Obama's executive actions do not prevent responsible, law-abiding individuals from obtaining, possessing, or using guns. The actions do seek to keep guns away from convicted felons and others legally disqualified from having guns, but that is surely not an interest at odds with sound protection of Second Amendment rights. Claiming that President Obama's executive actions are unconstitutional may be a useful political maneuver, but as a legal matter the constitutional objections to Obama's actions are frivolous given the solid judicial consensus that governments can regulate the manner in which guns are sold and prohibit firearm possession by specific categories of people particularly likely to misuse guns. The President's

⁹¹ *Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, *supra* note 66.

⁹² See, e.g., Adam Edelman, *GOPer Says Censure Obama*, N.Y. DAILY NEWS, Jan. 8, 2016, at 6 (reporting that Rep. Steven Palazzo sought to have Congress censure President Obama for infringing Second Amendment rights and violating separation of powers); Greene & Slatery, *supra* note 65 (describing NRA's online petition asking "Are you prepared to let President Obama take away your Second Amendment rights through executive action?").

⁹³ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); see *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

⁹⁴ Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 716–18 (2012).

⁹⁵ *Id.* at 752; Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALBANY L. REV. 819, 824–25 (2014/2015).

⁹⁶ Rostron, *The Continuing Battle*, *supra* note 95, at 825.

actions are valid, well-intentioned, and worthwhile efforts. Their greatest flaw is not that they overreach, but that they are relatively mild measures and therefore unlikely to have dramatic effects.

III. POLICYMAKING AT THE STATE LEVEL

At least for the foreseeable future, little hope exists for significant progress on gun issues at the federal level. Congress is deadlocked, and the executive branch's ability to act without legislative cooperation is limited. Even the small steps undertaken by President Obama provoked a firestorm of controversy and potential political backlashes.

With the situation so dismal at the national level, those hoping for progress on the gun issue must look to the states. In recent years, some states have moved ahead, taking important steps that could serve as models for other states to follow. A variety of methods have been adopted in the "laboratories" of state law, including universal background checks for firearm acquisition, extending background checks to cover ammunition sales, and systems of gun licensing and registration.

A. *Universal Background Checks*

Background checks are the central pillar of gun laws in the United States. Federal laws disqualify some people from having guns, such as convicted felons, fugitives, drug addicts, illegal aliens, people with misdemeanor convictions for domestic violence or subject to domestic violence restraining orders, and people who have been committed to a mental institution or determined through court adjudication to have serious mental impairments.⁹⁷ Background checks are the crucial mechanism that underlies those prohibitions and makes them meaningful. Only about one percent of background checks result in a denial, but with millions of background checks being done every year, the number of firearm transactions that are stopped by the background check system is substantial.⁹⁸ The key is what happens to the people who fail a background check, as well as those who know they will fail and who therefore do not attempt to buy guns in ways that will involve a background check. Does the background check system stop these people from obtaining guns, or are they able to circumvent the system by obtaining guns in other ways? The background check system at least provides some hope for keeping guns out of the hands of people prohibited from having them.

⁹⁷ 18 U.S.C. § 922(g) (2012).

⁹⁸ U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFO. SERVS. DIV., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS iii (2014), <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report> [<https://perma.cc/LX7H-V63H>] (reporting data for background checks conducted in 2014).

Unfortunately, federal laws do not require background checks in all instances where a person acquires a firearm. Instead, federal laws require a background check only when a person buys a gun from a licensed firearms dealer.⁹⁹ If the seller is not a licensed dealer, a background check is not required. This means that a person who is legally disqualified from having a gun may nevertheless obtain one by finding a seller who is not obligated to do a background check, such as a friend or neighbor, a stranger selling guns on the street, or a person selling guns through a website or newspaper classified ad. Gun shows pose a particular worry, because they are marketplaces bringing together large numbers of gun sellers, many of whom are not licensed gun dealers.¹⁰⁰ A substantial portion of firearm transfers thus are not covered by the federal background check requirements. For example, a survey of prison inmates who committed crimes with handguns found that only about eleven percent obtained guns from licensed dealers.¹⁰¹ Far more often, these offenders had obtained guns from “friends or family members” or “from street or black market suppliers,” or in other words through sources outside the federal background check regime.¹⁰²

A growing number of states have responded to this problem by making background checks a universal requirement for purchases of firearms, including purchases from people who are not licensed dealers.¹⁰³ In some states, this has been done by requiring anyone who acquires a handgun to have a permit or license before doing so, and a background check is part of the process for obtaining that permit or license.¹⁰⁴ For example, since 1968, Illinois has required anyone acquiring or possessing a firearm to have a Firearm Owners’ Identification Card,¹⁰⁵ a measure enacted in order to give law enforcement an opportunity to investigate and grant approval before some-

⁹⁹ 18 U.S.C. § 922(t) (2012).

¹⁰⁰ See BRADY CTR. TO PREVENT GUN VIOLENCE, NO CHECK. NO GUN. WHY BRADY BACKGROUND CHECKS SHOULD BE REQUIRED FOR ALL GUN SALES 12–20 (2009), <http://www.bradycampaign.org/sites/default/files/no-check-no-gun-report.pdf> [<https://perma.cc/S79L-BQLK>].

¹⁰¹ Daniel W. Webster et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 109–10 (2013).

¹⁰² *Id.*

¹⁰³ Although it is common to say these laws make background checks a universal requirement for every gun transfer, the laws typically contain some special exemptions such as for transfers between immediate family members. See, e.g., CAL. PENAL CODE § 27875 (West, Westlaw through Ch. 1 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2nd Ex. Sess.); N.Y. GEN. BUS. § 898(1) (West, Westlaw through L.2016, chapter 1).

¹⁰⁴ See LAW CTR. TO PREVENT GUN VIOLENCE, *Universal Background Checks & the “Private” Sale Loophole Policy Summary* (Sept. 10, 2015), <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/> [<https://perma.cc/3FBJ-5Q7P>] (listing Hawaii, Illinois, Massachusetts, and New Jersey as states that require a background check as part of the permit process for all firearms; and Iowa, Michigan, Nebraska, and North Carolina as states that require a background check as part of the permit process for handguns).

¹⁰⁵ See 430 ILL. COMP. STAT. 65/2 (West, Westlaw through P.A. 99-500 of the 2016 Reg. Sess.). For a discussion of the connection between Illinois laws and Chicago gun homicide rates, see Zack Beauchamp, *No, Chicago Isn’t Proof that Gun Regulation Doesn’t Work*, THINKPROGRESS (Feb. 15, 2013), <http://thinkprogress.org/justice/2013/02/15/1599631/no-chicago-isnt-proof-that-gun-regulation-doesnt-work/> [<https://perma.cc/F3AL-V8MV>] (arguing

one receives a firearm.¹⁰⁶ Other states simply require the background check to be conducted at the point of transfer of the firearm.¹⁰⁷ For example, the nation's largest state, California, has required background checks for all sales of firearms since 1991, including transfers made by individuals not in the business of selling guns.¹⁰⁸ The process essentially involves using a licensed gun dealer as an intermediary between the owner of the gun and the person seeking to buy it. The owner takes the gun to a licensed dealer,¹⁰⁹ and the dealer runs a background check on the prospective purchaser.¹¹⁰ If the purchaser passes the background check, the purchaser gets the gun.¹¹¹ If not, the dealer returns the gun to the owner.¹¹²

Putting a strong and comprehensive system of background checks into place throughout the country should be the primary focus of gun control efforts. As divisive as gun issues may be, keeping guns out of the wrong hands is a goal on which Americans can agree, as is illustrated by polls showing that even large majorities of gun owners and NRA members favor background checks for all firearm sales.¹¹³ Background checks do not impair the interests of law-abiding, responsible people who choose to have guns.

The number of states making background checks a universal requirement for acquisition of firearms has climbed steadily in recent years. In the

that Chicago's recent increase in gun homicides is not caused by gun control laws and does not prove that gun regulations are ineffective).

¹⁰⁶ See Bruce Petesch, Legislation Note, *Illinois Firearm Control—A High Caliber Solution Targeting the Owner*, 17 DEPAUL L. REV. 400, 404 (1968); Editorial, *For Better Control of Firearms*, CHI. TRIB., Apr. 26, 1967, § 1, at 16. The identification card approach may not be fully effective if it would allow a person to continue using a card after the person has become disqualified from possessing firearms. For example, suppose that a person with no criminal record obtains an identification card, but that person subsequently becomes a convicted felon. Illinois addresses this risk with provisions for revocation of firearm identification cards, 430 ILL. COMP. STAT. 65/9.5 (West, Westlaw through P.A. 99-500 of the 2016 Reg. Sess.), and provisions requiring anyone selling a gun to check with the Illinois state police to confirm that the gun purchaser's Firearms Owner Identification Card number is still valid, 430 ILL. COMP. STAT. 65/3(a-10) (West, Westlaw through P.A. 99-500 of the 2016 Reg. Sess.).

¹⁰⁷ See LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 104 (listing California, Colorado, Connecticut, Delaware, the District of Columbia, New York, Oregon, Rhode Island, and Washington as jurisdictions where a background check is required at the point of transfer of any type of firearm; and listing Maryland and Pennsylvania as states requiring background checks at the point of transfer of a handgun).

¹⁰⁸ See Carl Ingram, *Governor Signs Bill for Delay in Buying Guns*, L.A. TIMES (Mar. 4, 1990), http://articles.latimes.com/1990-03-04/news/mn-2801_1_gun-controls [https://perma.cc/FHD7-QCFJ].

¹⁰⁹ CAL. PENAL CODE § 28050(b) (West, Westlaw through Ch. 1 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2nd Ex. Sess.).

¹¹⁰ *Id.* § 28050(c).

¹¹¹ *Id.*

¹¹² *Id.* § 28050(d).

¹¹³ Benton Strong, *Gun Owners Overwhelmingly Support Background Checks*, See *NRA as Out of Touch, New Poll Finds*, CTR. FOR AM. PROGRESS (Nov. 17, 2015), <https://www.americanprogress.org/press/release/2015/11/17/125618/release-gun-owners-overwhelmingly-support-background-checks-see-nra-as-out-of-touch-new-poll-finds/> [https://perma.cc/C94N-MH4S] (reporting that eighty-three percent of gun owners and seventy-two percent of NRA members support background checks for all sales of firearms).

wake of the Newtown shootings, Colorado,¹¹⁴ Connecticut,¹¹⁵ Delaware,¹¹⁶ and New York¹¹⁷ began requiring background checks for private firearms transfers in 2013. Oregon followed suit in 2015.¹¹⁸

In those states, legislatures enacted the universal background check measures. In the state of Washington, gun control advocates instead took the issue directly to the public, putting a universal-background-check measure on the state's ballot in November 2014.¹¹⁹ Although the NRA and its allies are often able to outspend gun control proponents, the tables were turned in Washington, as the background check campaign succeeded in raising more than ten million dollars, compared to less than two million dollars spent on the other side of the issue.¹²⁰ Key funders of the background check initiative included wealthy residents of the state (Bill Gates, Steve Ballmer, and Nick Hanauer) and former New York City Mayor Michael Bloomberg's advocacy group Everytown for Gun Safety.¹²¹ The ballot measure passed easily, drawing the support of nearly sixty percent of Washington voters.¹²²

Gun control groups like Everytown for Gun Safety and the Brady Campaign to Prevent Gun Violence vowed to pursue similar ballot measures in other states.¹²³ A universal-background-check measure will be on the ballot in November 2016 in Nevada,¹²⁴ where the legislature previously passed a bill to expand background checks but the state's governor vetoed it.¹²⁵ Ari-

¹¹⁴ See COLO. REV. STAT. § 18-12-112 (West, Westlaw through the First Reg. Sess. of the 70th General Assem. (2015)); Lynn Bartels & Kurtis Lee, *Governor Signs 3 Gun Bills into Law*, DENVER POST, Mar. 21, 2013, at 1A.

¹¹⁵ See CONN. GEN. STAT. § 29-36(l) (West, Westlaw through General Statutes of Connecticut, Revised to January 1, 2016); Jon Lender et al., *Somber Day for Families; Months After Newton[sic], Tougher Gun Laws Take Effect*, HARTFORD COURANT, Apr. 5, 2013, at A1.

¹¹⁶ See DEL. CODE § 1448B (West, Westlaw through 80 Laws 2015, ch. 194); Jenn Bernstein, *Gov. Markell Signs Expanded Gun Background Checks into Law in Del.*, CBS PHILLY (May 8, 2013, 5:56 PM), <http://philadelphia.cbslocal.com/2013/05/08/gov-markell-signs-expanded-gun-background-checks-into-law-in-del/> [<https://perma.cc/CU2Y-9FAM>].

¹¹⁷ See N.Y. GEN. BUS. LAWS § 898 (West, Westlaw through L.2016, ch. 1); Robert J. Spitzer, *New York State and the New York SAFE Act: A Case Study in Strict Gun Laws*, 78 ALBANY L. REV. 749, 754 (2014/2015).

¹¹⁸ 2015 OR. REV. STAT. ANN. ch. 50, § 2 (West, Westlaw through End of the 2015 Reg. Sess.); Alisha Roemeling, *Background Checks Now Ore. Law*, STATESMAN J. (Salem, Or.), Aug. 13, 2015, at A3.

¹¹⁹ Joseph O'Sullivan, *Voters Approve Measure to Expand Checks for Gun Buyers*, SEATTLE TIMES (Nov. 5, 2014, 8:16 PM), <http://www.seattletimes.com/seattle-news/voters-approve-measure-to-expand-checks-for-gun-buyers/> [<https://perma.cc/9S9C-P6NW>].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; Jennifer Steinhauer, *Fight on Guns Is Being Taken to State Ballots*, N.Y. TIMES (Jan. 2, 2015), <http://www.nytimes.com/2015/01/03/us/gun-control-groups-blocked-in-washington-turn-attention-to-states.html> [<https://perma.cc/78D7-YRQ6>].

¹²⁴ See Emerson Marcus, *Gun Check, Recreational Pot Petitions Certified for 2016 in Nevada*, RENO GAZETTE-J. (Dec. 9, 2014, 7:40 AM), <http://www.rgj.com/story/news/politics/2014/12/08/gun-check-pot-petitions-certified-nevada/20117775/> [<https://perma.cc/SW3U-LCUT>].

¹²⁵ Steinhauer, *supra* note 123.

zona and Maine are among the states where ballot initiatives may be launched next.¹²⁶

The same-sex marriage issue provides a hopeful analogy for gun control advocates. “The arc of the marriage-equality movement started in the federal government, and got them the Defense of Marriage Act,” noted John Feinblatt, president of Everytown for Gun Safety.¹²⁷ “Then they went to the states and showed that if you can get the majority of the public on your side state by state, that will influence the courts and Congress in the end.”¹²⁸ The push for background checks likewise achieved a major but incomplete victory with the federal enactment of the Brady Handgun Violence Prevention Act in 1993, which created a national system of background checks that did not cover all firearm transfers.¹²⁹ Growing public support for the Brady law was vital in achieving its enactment.¹³⁰ Incremental progress toward completing and strengthening the background check regime is now moving forward on a state-by-state basis. As in the case of marriage equality, it is possible that public support for comprehensive gun control reform can help incentivize the federal government to act.

B. Background Checks for Ammunition

Comedian Chris Rock once famously joked that what America really needs is bullet control, not gun control.¹³¹ A few states have begun to move in that direction by strengthening their regulations of ammunition.

In particular, with its new laws enacted in 2013, just a month after the Newtown shootings, New York became the first state in the nation making a significant effort to track ammunition purchases.¹³² New York required all those engaged in the business of selling ammunition to register with the state police.¹³³ The state police vowed that sellers with felony convictions or mental illness would not be approved.¹³⁴ The New York law also required sales of ammunition to be made in person.¹³⁵ For example, a business selling

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–23 (2012)).

¹³⁰ For an account of the battles over the Brady Bill, see Richard Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 *FORDHAM URB. L.J.* 417, 420–28 (1995).

¹³¹ *Chris Rock: Bigger & Blacker* (HBO television broadcast July 10, 1999).

¹³² Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Groundbreaking Legislation That Will Give New York State the Toughest Protections Against Gun Violence in the Nation (Jan. 15, 2013), <https://www.governor.ny.gov/news/governor-cuomo-signs-ground-breaking-legislation-will-give-new-york-state-toughest-protections> [<https://perma.cc/P2QA-GLSS>].

¹³³ N.Y. PENAL LAW § 400.03(1) (West, Westlaw through L.2016, ch. 1).

¹³⁴ Letter from Joseph A. D’Amico, N.Y. State Police Superintendent, <http://programs.governor.ny.gov/sites/default/files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf> [<https://perma.cc/QD6J-6NXY>].

¹³⁵ N.Y. PENAL LAW § 400.03(7) (West, Westlaw through L.2016, ch. 1).

ammunition via the internet could not simply ship ammunition to a customer, but instead would need to complete its sales transactions by shipping the ammunition to a registered New York firearms or ammunition dealer who could then hand over the ammunition in person to the buyer.¹³⁶

The legislation also sought to make New York “the first state in the nation to track ammo purchases in real time.”¹³⁷ For every sale of ammunition, a dealer would be required to do a background check on the purchaser and send information about the sale to the state police.¹³⁸ This would not only prevent purchases of ammunition by people legally disqualified from possessing firearms, but also provide an alert to law enforcement about purchases of large volumes of ammunition.¹³⁹

New York’s attempt to start requiring background checks for ammunition purchases has run into difficulties. The New York enactment left some uncertainty about how the background checks for ammunition would be conducted, hinting that perhaps the checks could be done through the national instant criminal background check system used for firearm sales,¹⁴⁰ but providing that the background check requirement for ammunition would not take effect until the state police certified that a state database for background checks had been established and was fully operational.¹⁴¹ That certification has not yet occurred, and in July 2015, New York announced that it was suspending indefinitely the implementation of the background check requirement for ammunition sales.¹⁴² The announcement attributed the suspension of the law to technological difficulties with creation of the database,¹⁴³ but some Democratic lawmakers in the state claimed the announcement was actually the result of a political bargain struck by New York’s Governor Andrew Cuomo and Republican legislators who opposed the background check law.¹⁴⁴

While New York’s enactment has so far failed to achieve implementation, a campaign is underway in California to put an ammunition-background-check measure on the ballot for voter approval in 2018.¹⁴⁵ “New

¹³⁶ See Letter from Joseph A. D’Amico, *supra* note 134.

¹³⁷ Press Release, *supra* note 132.

¹³⁸ N.Y. PENAL LAW § 400.03(2)-(6) (West, Westlaw through L.2016, ch. 1).

¹³⁹ Press Release, *supra* note 132.

¹⁴⁰ N.Y. PENAL LAW § 400.03(6).

¹⁴¹ *Id.* § 400.03(3).

¹⁴² Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales Is Suspended in New York*, N.Y. TIMES (July 10, 2015), <http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html> [perma.cc/BNE5-TJZ5].

¹⁴³ Nick Reisman, *Memorandum of Understanding Regarding the Statewide License and Record Database Utilization for Eligibility to Purchase Ammunition, New York Safe Act*, SCRIBD. (July 10, 2015), <http://www.scribd.com/doc/271175351/Mou-Ny-Safe-Act-07-10-15> [https://perma.cc/GZ9V-44P3].

¹⁴⁴ See Kaplan, *supra* note 142.

¹⁴⁵ Valerie Richardson, *‘Ammo Control’ Picks up Steam Among Democrats Aiming to Limit Gun Access*, WASH. TIMES (Oct. 15, 2015), <http://www.washingtontimes.com/news/2015/oct/15/background-checks-ammunition-buys-moving-toward-ba/> [https://perma.cc/YR3D-ZKAS].

York tried. California will be the first to do it,” vowed California’s Lieutenant Governor Gavin Newsom, a leading proponent of the ballot initiative.¹⁴⁶ If voters pass the ballot measure and California succeeds (unlike New York) in implementing the background checks, the California law will be a model that other states can imitate. Just like background checks on firearms, the background checks on ammunition would adversely affect only those legally prohibited from using guns and not interfere with the rights of responsible, law-abiding gun users. States adopting systems for background checks and data reporting about ammunition sales would also create valuable streams of information for law enforcement, a worthwhile endeavor in an era of heightened concern about terrorist use of firearms.¹⁴⁷

C. Beyond Background Checks

After the intense battle over background checks that culminated in the enactment of the federal Brady Handgun Violence Protection Act in 1993, organizations and legislators favoring gun control turned their attention to new proposed legislation that was dubbed “Brady II.”¹⁴⁸ The Brady II law would have required all states to have systems for licensing gun owners and registering firearms.¹⁴⁹ The Brady II proposal never came close to being enacted by Congress, and any attempt to push for licensing and registration requirements at the national level today would be hopeless. But some states have implemented licensing and registration requirements,¹⁵⁰ and it is an approach that could be spread to additional states.

Licensing is an appealing approach because it would enable states to require gun owners to do more than simply pass a background check. States could require safety training, ensuring that those who have guns know the laws governing firearms and have had some basic instruction on safe handling and use of guns. For example, California requires anyone obtaining a firearm to have a firearm safety certificate.¹⁵¹ The state issues instructional

¹⁴⁶ *Id.*

¹⁴⁷ Wilson Dizard, *Sharp Divide over California’s Bullet Background Check Bill*, AL JAZEERA AM. (Oct. 15, 2015), <http://america.aljazeera.com/articles/2015/10/15/california-guns-bullets-background.html> [<https://perma.cc/KR7R-54AW>].

¹⁴⁸ See Aborn, *supra* note 130, at 433–35.

¹⁴⁹ *Id.*

¹⁵⁰ See *Licensing Gun Owners & Purchasers Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 23, 2013), <http://smartgunlaws.org/licensing-of-gun-owners-purchasers-policy-summary/> [<https://perma.cc/46F2-THPU>] (listing California, Connecticut, the District of Columbia, Hawaii, Illinois, Massachusetts, and New Jersey as jurisdictions with licensing requirements for all firearms, and Iowa, Maryland, Michigan, Nebraska, New York, North Carolina, and Rhode Island as states with licensing requirements for handguns); *Registration of Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 1, 2013), <http://smartgunlaws.org/registration-of-firearms-policy-summary/> [<https://perma.cc/S3UL-4H9C>] (listing Hawaii and the District of Columbia as jurisdictions that require registration of all firearms, and listing California, Connecticut, Maryland, New Jersey, and New York as states requiring registration of handguns or certain other specified types of firearms).

¹⁵¹ CAL. PENAL CODE § 31615 (West, Westlaw through Ch. 2 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2d Ex. Sess.).

materials, establishes standards for instructors, and prepares written tests that must be passed in order to receive the firearm safety certificate.¹⁵²

Firearm registration laws make it easier for law enforcement to trace guns recovered from crime scenes.¹⁵³ Registration requirements also reinforce the background check system, because “[i]f you wanted to sell a gun to a neighbor, you would have every reason to ensure that he was licensed and legally qualified to have the gun so that you could update the registration and later prove easily that you no longer had the gun if it turned up in connection with a shooting or other unsavory incident.”¹⁵⁴

Recent studies support the view that these sorts of regulations of firearms can have positive impacts. For example, researchers have looked at the effect that enactment or repeal of permit-to-purchase laws has on homicide rates. Connecticut enacted a law in 1995 that raised the age for handgun purchases from eighteen to twenty-one, required handgun purchasers to obtain a permit from local police, and mandated a minimum of eight hours of handgun safety training.¹⁵⁵ Researchers used a statistical model based on comparison states to estimate what Connecticut’s homicide rates would have been without the law, and they compared those numbers to the actual rates of firearm and non-firearm homicides that Connecticut experienced in the years after the new laws took effect.¹⁵⁶ They found that Connecticut’s laws reduced homicides committed with firearms by forty percent.¹⁵⁷

Missouri revised its laws in the other direction in 2007, repealing a longstanding law that had required all handgun purchasers to obtain a permit from local law enforcement.¹⁵⁸ Researchers found that Missouri’s repeal of the permit requirement was associated with a twenty-three percent increase in homicides committed with firearms, an increase “out of sync with changes during that period nationally and in states bordering Missouri.”¹⁵⁹

¹⁵² *Id.* §§ 31630, 31635, 31640, 31645.

¹⁵³ Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 564 (2008).

¹⁵⁴ *Id.*

¹⁵⁵ Kara E. Rudolph et al., *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH, e49, e49 (2015).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at e51. The study found that Connecticut’s law had no effect on homicides committed by means other than firearms. *Id.* Many factors affect crime rates, and therefore it is difficult to isolate the effect of a new law. Critics claim that the study of Connecticut’s law is “cherry picking” favorable results. *Bloomberg’s School of Public Health Cherry Picked Claim that Firearm Homicides in Connecticut Fell 40% Because of a Gun Licensing Law*, CRIME PREVENTION RES. CTR. (June 11, 2015), <http://crimeresearch.org/2015/06/daniel-websters-cherry-picked-claim-that-firearm-homicides-in-connecticut-fell-40-because-of-a-gun-licensing-law/> [https://perma.cc/7MCL-2AH5]. For example, the study looked at the law’s effect over a ten-year period, but using a longer period such as eleven or fifteen years would have produced the conclusion that the Connecticut gun control law caused firearm homicide rates to increase. *Id.*

¹⁵⁸ Daniel Webster et al., *Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH BULL. N.Y. ACAD. MEDICINE 293, 294 (1994).

¹⁵⁹ *Id.* at 297.

Comparison of data on suicides in Connecticut and Missouri produced similar results.¹⁶⁰ Researchers found that Connecticut's adoption of a law requiring a permit for a handgun was associated with a fifteen percent reduction in firearm suicide rates, while Missouri's repeal of such a law was associated with a sixteen percent increase in firearm suicide rates.¹⁶¹ These examples illustrate the significant positive effects of stronger permit requirements.

Maryland is among the states that have recently moved toward stronger controls on guns, requiring handgun purchasers to be fingerprinted and successfully complete a training class.¹⁶² Maryland's Attorney General Brian Frosh called on other states to join in enacting such laws, recognizing that these measures "would be even more effective if it weren't so easy for people to buy guns in neighboring jurisdictions and bring them across state lines illegally."¹⁶³ When it comes to state action on guns, there is safety in numbers, because every state's choices about its firearm laws can have consequences for other states.

D. Assault Weapons and High-Capacity Ammunition Magazines

From 1994 to 2004, federal laws banned the manufacture of certain military-style "assault weapons" and "large capacity" ammunition magazines.¹⁶⁴ The statute expired after ten years,¹⁶⁵ and Congress has never renewed it.¹⁶⁶ Several of the high-profile mass shootings in the United States in recent years have involved assault-type weapons, such as AR-15 rifles, or high-capacity ammunition magazines.¹⁶⁷ Some states have responded by en-

¹⁶⁰ Cassandra K. Crifasi et al., *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTIVE MED. 43, 43 (2015).

¹⁶¹ *Id.* at 46.

¹⁶² MD. CODE ANN., PUB. SAFETY § 5-117.1 (West, Westlaw through Ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.).

¹⁶³ Editorial, *Gun Control Works*, BALT. SUN (Feb. 19, 2014), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-guns-checks-20140219-story.html> [<https://perma.cc/XTS6-KRLR>].

¹⁶⁴ See Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796.

¹⁶⁵ *Id.* § 110105(2).

¹⁶⁶ See Lauren Carroll, *Obama Omits Assault Weapons Ban from His 2016 Gun Violence Reduction Plan*, POLITIFACT (Jan. 11, 2016, 1:03 PM), <http://www.politifact.com/truth-ometer/promises/obameter/promise/1118/work-renew-assault-weapons-ban/> [<https://perma.cc/MSS5-855A>].

¹⁶⁷ Brian Haas, *Assault Rifles at Center of Gun Ownership Debate*, ASBURY PARK PRESS, Jan. 7, 2013; Opinion, *Restrict Access to Mass Killing Tools*, DENV. POST, July 24, 2012, at 21A.

acting or strengthening laws banning assault weapons¹⁶⁸ and high-capacity magazines.¹⁶⁹

While I can certainly understand the rationales for seeking to ban military-style assault weapons, I am among those who would put this low on the list of gun control priorities. As Alex Seitz-Wald observed, “in an ideal world [an assault weapon ban] would be a part of any comprehensive response to gun violence, mainly because assault weapons seem to be so popular among mass shooters,” but “[o]f all the policy proposals to prevent gun violence, it’s probably the least important and the most controversial.”¹⁷⁰ Writing statutes that draw a sensible and durable line between assault weapons and other firearms is a challenge. For example, gun manufacturers “made a mockery of the 1994 [federal] ban by creating new models that were identical to banned ones, save the removal of a single feature.”¹⁷¹ And unlike measures such as background checks which aim at those disqualified from having firearms, an assault weapons ban does have an adverse impact on law-abiding gun owners, who will lose their ability to own these types of weapons despite not having used guns improperly.

Gun control proponents would be better off focusing attention on large-capacity ammunition magazines. While critics can claim that the difference between a banned assault weapon and other firearms is merely cosmetic, no one can deny that the number of rounds in a magazine is a substantive characteristic affecting the use of the gun.¹⁷² A killer with magazines holding thirty or fifty rounds is going to be able to do more harm in less time than one with magazines holding only ten or fewer rounds. The dilemma, of course, is that guns can be used to do good things as well as bad. They can be used to defend and save lives, and characteristics that make a gun more effective for criminal use also tend to make the gun more effective for defensive purposes. For example, one could imagine scenarios in which a heroic

¹⁶⁸ See, e.g., CONN. GEN. STAT. §§ 53-202a, 202c (West, Westlaw current through Gen. Statutes of Connecticut, Revised to January 1, 2016); MD. CODE ANN., CRIM. LAW § 4-303 (West, Westlaw current through Ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.); N.Y. PENAL LAW §§ 265.00(22), 265.36 (West, Westlaw current through L.2016, ch. 1).

¹⁶⁹ See, e.g., COLO. REV. STAT. §§ 18-12-301, 18-12-302 (West, Westlaw current through the First Reg. Sess. of the 70th Gen. Assemb. (2015)); CONN. GEN. STAT. § 53-202w (West, Westlaw current through Gen. Statutes of Connecticut, Revised to January 1, 2016); MD. CODE ANN., CRIM. LAW § 4-305(b) (West, Westlaw current through Ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.); N.Y. PENAL LAW §§ 265.00(23), 265.37 (West, Westlaw current through L.2016, ch. 1).

¹⁷⁰ Alex Seitz-Wald, *Don't Mourn the Assault Weapons Ban's Impending Demise*, SALON (Feb. 6, 2013) http://www.salon.com/2013/02/06/dont_mourn_the_assault_weapons_bans_impending_demise/ [<https://perma.cc/J6JM-29R9>].

¹⁷¹ *Id.*; CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003 10 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> [<https://perma.cc/7HET-RAZG>] (“Relatively cosmetic changes, such as removing a flash hider or bayonet mount, are sufficient to transform a banned weapon into a legal substitute, and a number of manufacturers now produce modified, legal versions of some of the banned guns.”).

¹⁷² KOPER ET AL., *supra* note 171, at 1 (stating that a large-capacity magazine “is arguably the most functionally important feature of most [assault weapons], many of which have magazines holding 30 or more rounds”).

civilian with a firearm would be better off having high-capacity magazines, such as if outnumbered by a gang of terrorists carrying out a Paris-style attack.¹⁷³ Making policy on large-capacity magazines therefore requires at least some rough assessment of the relative extent to which restrictions on access to the magazines would affect legitimate versus illegitimate uses. State legislatures certainly might reasonably conclude that the safety benefits of ammunition capacity limits would exceed the potential risks.¹⁷⁴

A ban is also not the only approach available to legislatures concerned about assault weapons or large-capacity magazines. Tighter restrictions on access to these items could be imposed without completely banning them. For example, machine guns and other particularly dangerous weapons are subject to special controls under the National Firearms Act (NFA), and that approach provides a sensible way of accommodating those weapons' risks and the legitimate interests in their use.¹⁷⁵ A person who owns a NFA weapon is subject to an array of stronger controls than those that apply to ordinary firearms, "including more thorough background checks, a significant waiting period, law enforcement discretion over access to the weapons, and a comprehensive system of registration."¹⁷⁶ State legislatures could opt to create similarly stricter regulatory regimes for certain weapons without going so far as to ban them completely.

IV. THE RISKS OF STATE EXPERIMENTATION

The potential benefits of states improving their gun laws are clear. States may implement measures that have substantial safety benefits and strike a sound balance between protecting legitimate use of guns and reducing the extent to which guns are misused. Policies that prove to be successful may be imitated by other states. But when states begin to experiment with varied approaches to regulation of guns, there are potential adverse consequences as well. The most obvious is that some states will, in the process of experimentation, inevitably adopt gun laws that are ineffective or even increase the risk of gun violence.

¹⁷³ See Lori Hinnant & Greg Keller, *Terror Attacks Kill 140 in Paris*, CHI. TRIB., Nov. 14, 2015, at A1.

¹⁷⁴ Enforcing a ban on high-capacity magazines might be even more difficult than enforcing bans on certain types of firearms. See, e.g., *Many Circumventing Colorado High-Capacity Magazine Ban*, CBS DENVER (Oct. 30, 2014), <http://denver.cbslocal.com/2014/10/30/many-circumventing-colorado-high-capacity-magazine-ban/> [<https://perma.cc/QYX3-U2AK>] (reporting that Colorado's ban may be undercut by sales of kits that can easily be assembled into high-capacity magazines); Andy Greenberg, *Gunsmiths 3D-Print High Capacity Ammo Clips to Thwart Proposed Gun Laws*, FORBES (Jan. 14, 2013), <http://www.forbes.com/sites/andy-greenberg/2013/01/14/gunsmiths-3d-print-high-capacity-ammo-clips-to-thwart-proposed-gun-laws/#79138b003fed> [<https://perma.cc/7PHH-QQNF>] (describing how homemade gun enthusiasts distribute blueprints for creating high-capacity magazines with 3D printers).

¹⁷⁵ See Allen Rostron, *High-Powered Controversy: Gun Control, Terrorism, and the Fight Over .50 Caliber Rifles*, 73 U. CIN. L. REV. 1415, 1466 (2005).

¹⁷⁶ *Id.*

This phenomenon has been particularly striking in the aftermath of the 2012 shooting at the Sandy Hook school in Newtown, Connecticut. Many people naturally wondered about the extent to which that tragic event would inspire states to enact new gun control laws, but it quickly became apparent that it had the opposite effect in many states. Indeed, the idea that Newtown sparked a pro-gun backlash, with more states weakening their gun laws than strengthening them, became the predominant media narrative.¹⁷⁷ One can debate whether pro-gun enactments really outnumbered or outweighed the importance of the gun control measures passed in Newtown's wake,¹⁷⁸ but it is easy to see why the media would latch on to the strikingly counterintuitive idea that Newtown had swung America toward favoring weaker gun laws instead of stronger ones. Horrific shootings in other nations, such as the United Kingdom¹⁷⁹ and Australia,¹⁸⁰ had produced an overwhelming consensus on the need for tighter legal restraints on guns. Only in America, the media observed, could a horrific massacre by a gunman at an elementary school swing legislative sentiment toward favoring looser regulation of firearms.¹⁸¹

Kansas is a prime example of a state where all the legislative momentum has been in favor of gun rights in recent years. Rather than increasing controls on access to guns, Kansas has taken a series of substantial steps to promote ownership and carrying of guns. In 2013, just a few months after the Newtown shooting, the Kansas legislature revised the state's laws to loosen restrictions on gun possession and challenge the enforcement of federal laws.¹⁸² The legislation provided that people generally would be allowed to carry concealed guns in public buildings. Under the new Kansas law, if state or local government officials want to ban guns in a particular building, they have the burden of establishing that the building has metal detectors or other adequate security measures to stop people from bringing in weapons.¹⁸³

¹⁷⁷ See, e.g., *Tracking State Gun Laws: 2014 Developments*, LAW CTR. TO PREVENT GUN VIOLENCE (May 2, 2014), <http://smartgunlaws.org/tracking-state-gun-laws-2014-developments/> [<https://perma.cc/26F7-D9WJ>].

¹⁷⁸ *Id.* (arguing that the number of enactments that weakened gun laws after Newtown was about the same as the number of enactments that strengthened gun laws, but the gun control measures tended to be significant changes while many of the pro-gun enactments were relatively minor in nature).

¹⁷⁹ See Allen Rostron, *School Shootings and the Legislative Push to Arm Teachers*, 45 U. TOLEDO L. REV. 439, 439 (2014) (describing Parliament's reaction to the 1996 murders of a teacher and students at a school in Dunblane, Scotland).

¹⁸⁰ Will Oremus, *How Many Shootings Will It Take for America to Control Its Guns?*, SLATE (Dec. 3, 2015) http://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html [<https://perma.cc/6BH7-6ULV>].

¹⁸¹ See, e.g., Editorial, *NRA Fires Blank on Gun Violence*, DENV. POST, Dec. 22, 2012, at 23A; Mike Lupica, *NRA Boss Is So Vile, So Stupid & Far Too Powerful*, N.Y. DAILY NEWS, Dec. 22, 2012, at 6; Eugene Robinson, *The Out-of-Touch NRA*, WASH. POST, Feb. 5, 2013, at A15.

¹⁸² *Gov. Brownback Signs into Law Concealed Carry Measure; Campuses Exempt for Four Years*, LAWRENCE J.-WORLD (Apr. 17, 2013), <http://www2.ljworld.com/news/2013/apr/17/brownback-signs-law-concealed-carry-measure-campus/> [<https://perma.cc/3F63-DT2U>].

¹⁸³ 2013 Kan. Sess. Laws ch. 105, § 2.

The legislation gave Kansas colleges and universities the ability to opt out of permitting concealed weapons on their campuses, but only for four years.¹⁸⁴ Likewise, the legislation allowed public medical facilities and mental health centers to continue banning guns, but only for four years.¹⁸⁵ After that point, they would be obligated to either install security measures such as metal detectors or start allowing guns to be brought in by people with concealed carry permits.¹⁸⁶ Kansas also authorized elementary and secondary schools to start allowing teachers and other employees to carry guns in schools.¹⁸⁷

The Kansas legislation helped gun owners in other respects. It guaranteed the confidentiality of concealed-carry permit records, giving them a special exemption from the state's general practice of making public records open to the public.¹⁸⁸ Likewise, Kansas enacted a generous concealed-carry reciprocity law, providing that Kansas would permit the carrying of concealed guns in Kansas by anyone with a valid concealed-carry permit or license from another state.¹⁸⁹

Not content to simply revise state laws, the Kansas Legislature also directly challenged the authority of the federal government with respect to guns. Kansas enacted what legislators there called the nation's "strictest Second Amendment protection law."¹⁹⁰ Federal regulation of guns is generally justified on the basis of Congress's power to regulate interstate commerce, including the power to regulate activities that do not constitute interstate commerce but have a substantial effect on interstate commerce.¹⁹¹ Repudiating that widely accepted basis for federal authority, the Kansas legislature in 2013 declared that Congress can regulate only firearms that actually traveled in interstate commerce and therefore federal laws do not apply to guns that were manufactured in Kansas, never left the state, and bear a "Made in Kansas" stamp.¹⁹² Although the Kansas legislature's narrow conception of the

¹⁸⁴ *Id.* § 2(j)(5).

¹⁸⁵ *Id.* § 2(j)(1)–(4).

¹⁸⁶ *Id.*

¹⁸⁷ 2013 Kan. Sess. Laws ch. 556, § 9 (codified at KAN. STAT. ANN. § 75-7c10(d) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)); see Rostron, *School Shootings*, *supra* note 179, at 442–52 (discussing the Kansas enactment and other state laws allowing teachers to carry guns in schools).

¹⁸⁸ 2013 Kan. Sess. Laws ch. 559, 569, §§ 6, 8 (codified at KAN. STAT. ANN. §§ 45-221(a)(53), 75-7c06(b) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁸⁹ 2013 Kan. Sess. Laws ch. 36, § 4 (codified at KAN. STAT. ANN., 75-7c03(c) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁹⁰ John Celock, *Kansas Governor Signs 'Strictest Second Amendment Protection Law' in Nation*, HUFFINGTON POST (Apr. 17, 2013) http://www.huffingtonpost.com/2013/04/17/kansas-gun-bill_n_3103488.html [<https://perma.cc/XVY3-8VYM>].

¹⁹¹ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

¹⁹² 2013 Kan. Sess. Laws ch. 100, § 4 (codified at KAN. STAT. ANN. §§ 50-1204, 50-1205 (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kansas Leg.)). In a minor concession to gun safety, the Kansas legislature provided that the exemption from federal regulation would not apply to automatic weapons. *Id.* § 9(c) (codified at KAN. STAT.

interstate commerce power runs counter to current judicial understandings,¹⁹³ the Kansas legislature nevertheless made it a felony for federal law enforcement agents to attempt to enforce federal gun laws with respect to “Made in Kansas” guns.¹⁹⁴

In a throwback to the sort of rhetoric that preceded the American Civil War, the Kansas law contained other stunning assertions of state authority to nullify federal power. The Kansas Legislature declared that federal laws violating the Second Amendment are “null, void and unenforceable in the state of Kansas.”¹⁹⁵ The statute did not specify who would be entrusted to determine that a federal law violated the Second Amendment and was therefore null and void in Kansas. If the law simply meant that courts can enforce Second Amendment rights in Kansas, it was a pointless enactment. No reason has ever existed for doubting that the power of judicial review extends to violations of the Second Amendment in Kansas. The Kansas Legislature presumably was not making such an obvious and unnecessary point, and its enactment was instead darkly hinting that the state would be entitled to negate federal gun laws that it regarded as undue encroachments on Second Amendment rights even if no court ruling blessed the state’s understanding of the right to keep and bear arms.¹⁹⁶

One might think that at that point Kansas lawmakers would have been satisfied that the state’s gun laws had been adequately loosened, but in 2014 the Kansas Legislature enacted another round of pro-gun measures.¹⁹⁷ The new provisions made it legal to carry guns openly (not concealed) throughout the state.¹⁹⁸ The legislature also prohibited cities and counties from using

ANN. § 50-1209(c) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁹³ See *Mont. Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 981–83 (9th Cir. 2013) (striking down a Montana law similar to the one enacted in Kansas, concluding that the power to regulate interstate commerce has been expansively construed by the Supreme Court and reaches far enough to cover the manufacture and sale of guns that never cross a state’s borders).

¹⁹⁴ 2013 Kan. Sess. Laws ch. 100, § 7 (codified at KAN. STAT. ANN. § 50-1207 (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁹⁵ 2013 Kan. Sess. Laws ch. 100, § 6 (codified at KAN. STAT. ANN. § 50-1206(a) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁹⁶ The federal government warned Kansas that the enactments purporting to nullify federal law were unconstitutional. See Letter from Eric Holder, U.S. Attorney General, to Sam Brownback, Governor of Kan. (Apr. 26, 2013), <http://www.propublica.org/documents/item/695506-attorney-general-holder-letter-to-kans-gov> [https://perma.cc/MXA9-L7E8] (advising Kansas that the federal government “will take all appropriate action, including litigation if necessary, to prevent the State of Kansas from interfering with the activities of federal officials enforcing federal law”). Gun control advocates sued to have the Kansas law struck down, but a federal district judge found they did not have standing. See *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1093–1102 (D. Kan. 2015).

¹⁹⁷ See Andy Marso, *Brownback Approves Bill Nullifying Local Gun Regulations*, TOPEKA CAP. J. (Apr. 23, 2014), <http://cjonline.com/news/2014-04-23/brownback-approves-bill-nullify-ing-local-gun-regulations> [https://perma.cc/53XG-7BS9].

¹⁹⁸ Kansas had previously allowed cities and counties to decide whether to allow or prohibit open carrying of firearms. The 2014 legislation took away that local discretion. 2014

any public funds to undertake gun “buyback” programs.¹⁹⁹ Treating guns with an almost reverential attitude, Kansas also ordered police to stop destroying guns obtained by seizure or forfeiture. With the exception of guns that are broken or had been used to commit a felony, the legislature ordered law enforcement agencies to put seized and forfeited guns to some good use such as selling them to a gun dealer so that they could make their way back into public circulation.²⁰⁰

Kansas lawmakers did not stop there. In 2015, Kansas joined the small group of so-called “constitutional carry” states that do not require any sort of permit or license for carrying concealed weapons.²⁰¹ Prior to this, the requirements for obtaining a concealed gun license in Kansas were not burdensome, with applicants being required to have just eight hours of training on firearm safety and proper use.²⁰² Doing away with even those minimal training requirements, the state’s Governor Sam Brownback noted that training is valuable and he encouraged everyone to have it, but Kansas was not going to make anyone get a “permission slip from the government” in order to carry a gun.²⁰³

For now, Kansas affords the “constitutional carry” right only to those who are at least twenty-one years old, but gun rights advocates in the state have vowed that the next step will be to lower the age requirement to eighteen.²⁰⁴ Kansas legislators have also introduced a bill in the 2016 session that would protect the rights of elementary school students to bring air guns to school in order to participate in BB gun clubs.²⁰⁵ And they have proposed legislation that would prohibit discrimination against firearms and ammunition businesses.²⁰⁶ Critics of the bill noted that the Kansas Legislature has not shown as much interest in preventing discrimination against lesbian and

Kan. Sess. Laws ch. 97, § 7 (amending KAN. STAT. ANN. § 12-16, 124(d) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

¹⁹⁹ *Id.* § 2 (codified at KAN. STAT. ANN. § 12-16, 124b (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

²⁰⁰ *Id.* § 13 (amending KAN. STAT. ANN. § 22-2512(c)(6) (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)).

²⁰¹ 2015 Kan. Sess. Laws ch. 45, §§ 3, 7 (amending KAN. STAT. ANN. §§ 21-6302, 75-7c03 (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.)); see Bryan Lowry, *Brownback Signs Bill That Allows Permit-Free Concealed Carry of Guns in Kansas*, KAN. CITY STAR, Apr. 2, 2015 (reporting that Kansas became the sixth state to allow “constitutional carry” of concealed handguns without a license or permit).

²⁰² See Rostron, *School Shootings*, *supra* note 179, at 451. In contrast, Kansas generally requires those seeking licenses to drive automobiles to do fifty hours of supervised driving practice in addition to completion of an approved driver education course. See KAN. STAT. ANN. § 8-2, 101 (West, Westlaw current through laws enacted during the 2015 Reg. Sess. of the Kan. Leg.).

²⁰³ Lowry, *supra* note 201.

²⁰⁴ *Id.*

²⁰⁵ Edward M. Eveld, *Gun Rights Are at Center of Kansas Action*, KAN. CITY STAR, Feb. 4, 2016, at 5A.

²⁰⁶ *Id.*

gay people or against businesses like Planned Parenthood that enable Kansans to exercise their constitutional rights with respect to abortion.²⁰⁷

Kansas lawmakers have not been alone in seeking creative new ways to make their state friendly to guns. Every year, states enact a host of measures that enable more people to carry guns in more places than before.²⁰⁸ For example, a new law will take effect in Texas on August 1, 2016, that expands the right to carry concealed firearms at Texas universities.²⁰⁹ In a chilling coincidence, that date will be the fiftieth anniversary of the day when a student took guns to the top of a tower at the University of Texas and began randomly firing at and killing strangers on the campus below.²¹⁰

America's most gun-loving states have essentially been competing to see who can go the farthest, with some legislators specifically acknowledging that they hope to out-do other states in order to impress gun manufacturers and entice them to relocate. For example, a Kansas legislator bragged that the pro-gun legislation he sponsored was really "a pro-job growth bill because of it encouraging the large gun manufacturers or those who make gun components to move to Kansas."²¹¹ The economic benefits of luring manufacturers to a state are not worthwhile if outweighed by the social costs of greater amounts of gun violence. For example, a state would not be justified in drastically reducing auto safety standards to entice car manufacturers to build factories in the state.²¹²

States thus have been trending in two opposite directions in recent years, with some strengthening their gun laws and others relaxing them. This pattern demonstrates how deeply divided the nation remains on gun issues, but it may have virtues as well. As Justice Brandeis observed in his *New State Ice* dissent, variations in state law provide an opportunity for valuable

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Firmin DeBrabander, *New Gun Laws Pass Often in the United States. But They Usually Make Guns Easier to Get.*, WASH. POST (Oct. 6, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/06/obama-said-the-nation-has-been-inactive-on-gun-legislation-heres-why-hes-wrong/> [<https://perma.cc/89ZP-LPYW>]; Wayne Drash & Toby Lyles, *States Tighten, Loosen Gun Laws After Newtown*, CNN (June 8, 2013), <http://www.cnn.com/2013/06/08/us/gun-laws-states/> [<https://perma.cc/K3MH-8ETS>]; Alissa Scheller, *Since Newtown, the Nationwide Trend Has Been Toward Weaker Gun Laws*, HUFFINGTON POST (Dec. 12, 2014), http://www.huffingtonpost.com/2014/12/12/newtown-gun-control_n_6310032.html [<https://perma.cc/FFH4-7M93>].

²⁰⁹ Manny Fernandez & Dave Montgomery, *Texas Lawmakers Pass a Bill Allowing Guns at Colleges*, N.Y. TIMES, June 3, 2015, at A11.

²¹⁰ Pamela Colloff, *96 Minutes*, TEX. MONTHLY (Aug. 2006), <http://www.texasmonthly.com/story/96-minutes/> [<https://perma.cc/JED7-BY6F>].

²¹¹ Celock, *supra* note 190.

²¹² State legislatures do not invariably put public safety concerns ahead of manufacturers' economic interests. For example, lawmakers in Michigan have been arguing for years about a state law that shields pharmaceutical manufacturers from liability for defective products and that was enacted in part to encourage drug companies to locate factories in the state. See, e.g., Tom Lamb, *When Will Michigan State Senate Vote Whether to Repeal Statute Prohibiting Drug Injury Lawsuits*, DRUG INJURY WATCH (Jan. 18, 2010), <http://www.drug-injury.com/druginjury.com/2010/01/fda-defense-michigan-state-senate-vote-whether-to-repeal-law-and-al-low-drug-injury-lawsuits.html> [<https://perma.cc/VY55-LV3P>].

experimentation, with unsuccessful approaches being discarded in favor of those proven to yield better results.²¹³ A single courageous state may come up with a new and better way to regulate guns that other states will then imitate. And even if no ideal approach clearly emerges from the state laboratories, there may nevertheless be a benefit in pushing authority down to the state level and giving each state the discretion to choose an approach that best reflects its citizens' sentiments. America may never reach a consensus on the proper level of regulation for firearms, but if states are free to go their own ways, Kansas can have weak gun laws if that is what most Kansans want, and New York can maintain the stronger laws that most New Yorkers prefer.

Still, it is important to recognize the deficiencies of a system in which states engage in various, disparate experiments with their gun control laws. When states try a variety of novel policy approaches, some will inevitably make bad choices. Looking on the bright side, Brandeis observed that at least the impact of the bad choices will be limited when the misguided experiment was conducted by a state, not the entire country.²¹⁴ But the bad choices nevertheless do have harmful effects, even if those effects are less than if the poor policy had been implemented on a nationwide basis. Gun laws are serious business, for an experiment that goes badly may cost some people their lives. Depending on one's perspective, the divergence in states' approaches to guns either means that some people in states like Kansas are facing dangers of gun violence that could be avoided by enactment of strong gun laws, or some people in states like New York are unnecessarily having their freedom and safety impaired by gun laws that only disarm law-abiding individuals. From either perspective, the variation in states' approaches comes with real dangers.

Guns may be an issue where variations in state law are particularly troubling. In many circumstances, experimentation and incrementalism may be highly effective modes of policymaking, with decisionmakers trying different approaches and gradually gravitating toward those that work best.²¹⁵ Difficult problems get solved gradually rather than through a comprehensive solution implemented in one fell swoop.²¹⁶ But there are some policy issues for which that sort of decentralized, incremental approach is problematic. Some issues need a comprehensive solution. For example, "thousands of individuals tinkering alone in their garages might produce some impressive technological breakthroughs, such as development of better personal computers, but individual efforts could not put a person on the moon."²¹⁷ Suc-

²¹³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²¹⁴ See *id.*

²¹⁵ Rostron, *Incrementalism*, *supra* note 153, at 514–17.

²¹⁶ *Id.*

²¹⁷ *Id.* at 517 (footnotes omitted) (citing Paul R. Schulman, *Nonincremental Policy Making: Notes Toward an Alternative Paradigm*, 69 AM. POL. SCI. REV. 1354, 1355–62 (1975)).

cessfully achieving the objective of reaching the moon required a massive, centralized effort undertaken at the national level; substantially reducing levels of gun violence in America may as well.²¹⁸

Political scientist Ian Lustick theorized that an incremental approach to policymaking is least likely to be successful “when a problem is ‘non-decomposable,’ meaning it cannot easily be broken up into parts to be handled separately.”²¹⁹ If the policies implemented in one state undercut those implemented in other places, that poses a non-decomposable problem. For example, if one state has a misguided approach to environmental regulation but its effects are limited so that it causes harm only within that state’s borders, the state hopefully will learn its lesson and imitate other states’ superior approaches.²²⁰ And if the state with the bad policies stubbornly refuses to change its ways, at least the adverse consequences will fall entirely on that state. As Justice Brandeis put it, that state can carry out its experiment, even if it proves to be disastrous, “without risk to the rest of the country.”²²¹ But if each state’s policy choices have a significant impact on other states, the need for a uniform national policy may be greater. For example, if bad environmental policy choices in just one state would create pollution that would imperil the entire nation, the idea of allowing state experimentation with a wide array of different policies suddenly becomes alarming.

Every state’s policy choices about guns have an effect in other states, for the simple reason that guns can and do move across jurisdictional borders. Data collected by law enforcement agencies has shown that “large numbers of guns sold in states with weak laws wind up in places with stricter controls.”²²² Rather than running experiments “without risk to the rest of the country,”²²³ states that dismantle their gun laws are essentially laboratories that pose a risk of inflicting harm far beyond those states’ borders. California requires a background check for all gun sales, for example, but the effectiveness of that policy may be substantially undercut if Californians who are legally disqualified from having guns have easy access to firearms through gun shows operating across the border in Arizona or Nevada.

Weak state gun laws pose another, broader sort of danger as well. They increase the risk of the public wrongly concluding that stronger gun laws can never be effective. If half the states tightened their gun laws and yet those changes seemed to achieve no substantial enhancement of public safety in those states, many might simply conclude that the stricter gun laws are useless without taking into account complexities like the possibility that the

²¹⁸ *Id.* at 517–18.

²¹⁹ *Id.* at 519 (quoting Ian Lustick, *Explaining the Variable Utility of Disjointed Incrementalism: Four Propositions*, 74 AM. POL. SCI. REV. 342, 342 (1980)).

²²⁰ *Id.* at 519–20.

²²¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²²² Rostron, *Incrementalism*, *supra* note 153, at 559.

²²³ *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

stronger state laws have been undercut by the lax policies maintained in the other half of the states.

Recent surveys of public opinion suggest that this may already be happening. Polls have long shown that Americans have complicated, conflicting beliefs about guns. Most believe in gun rights but also favor reasonable gun control measures.²²⁴ They do not see protecting gun rights and implementing sensible gun control as mutually exclusive objectives. At the same time, polls also indicate that “most of the public is skeptical of the effectiveness of gun control laws even while it favors their adoption.”²²⁵ For example, a Gallup survey in October 2015 found that eighty-six percent of those polled favored the enactment of laws that would require universal background checks for all gun purchases in the United States.²²⁶ Yet, less than half of those polled thought such a measure would do “a great deal” or even “a moderate amount” to reduce the number of mass shootings.²²⁷ And according to an ABC News poll conducted in December 2015 shortly after the San Bernardino shootings, when asked what is the better way to respond to terrorism, more Americans say the answer is to have “more people carry guns legally” rather than “stricter gun control.”²²⁸ Public support for stricter gun laws has been on the upswing,²²⁹ but it may reverse course if perceptions about the ineffectiveness of gun laws harden in the public mind. It would be an unfortunate shame if well-intentioned efforts to achieve at least some modest advances on gun policy on a state-by-state basis wound up backfiring by convincing more Americans that gun control is a futile endeavor and thereby dissipating support for broader policy changes at the national level.²³⁰

State experimentation with stricter and looser gun laws also underscores the importance of providing adequate funding for gun violence research. In 1996, Congress passed the “Dickey Amendment,” which

²²⁴ Rostron, *Justice Breyer's Triumph*, *supra* note 94, at 761; Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015), <http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx> [<https://perma.cc/B6EF-SWWE>] (“All of this research supports the conclusion that Americans believe they should be allowed to own and carry guns, but with more stringent background checks.”).

²²⁵ Rostron, *Incrementalism*, *supra* note 153, at 564.

²²⁶ Newport, *supra* note 224.

²²⁷ *Id.*

²²⁸ Gary Langer, *Most Now Oppose an Assault Weapons Ban; Doubts About Stopping a Lone Wolf Run High*, ABC NEWS (Dec. 16, 2015), <http://abcnews.go.com/Politics/now-oppose-assault-weapons-ban-doubts-stopping-lone/story?id=35778846> [<https://perma.cc/586T-CFJJ>] (finding that forty-seven percent chose “more people carry guns legally” and forty-two percent said “stricter gun control”).

²²⁹ Art Swift, *Americans' Desire for Stricter Gun Laws Up Sharply*, GALLUP (Oct. 19, 2015), <http://www.gallup.com/poll/186236/americans-desire-stricter-gun-laws-sharply.aspx> [<https://perma.cc/M3YS-NBHK>]; Art Swift, *Americans' Dissatisfaction with U.S. Gun Laws at New High*, GALLUP (Jan. 14, 2016), <http://www.gallup.com/poll/188219/americans-dissatisfaction-gun-laws-new-high.aspx> [<https://perma.cc/6WEG-HWHH>].

²³⁰ *Cf.* Rostron, *Incrementalism*, *supra* note 153, at 564 (expressing concern that “the existing gun laws are enough to reassure many people that something is being done, thereby defusing pressure for larger steps to be taken”).

prohibited the Centers from Disease Control and Prevention (CDC) from expending any funds “to advocate or promote gun control.”²³¹ The NRA lobbied for passage of this amendment because it was unhappy about CDC-funded research showing an increased risk of homicide in homes with firearms.²³² Although the amendment merely prohibited studies that advocate or promote gun control and therefore did not necessarily block all funding of research on gun violence, the amendment and related threats to slash CDC’s budget were a “shot fired across the bow” that intimidated researchers and deterred CDC from supporting any work that might be perceived as anti-gun.²³³ President Obama has told federal agencies that the Dickey Amendment merely prohibits advocacy of gun control and therefore should not be treated as barring research, but the CDC remains highly cautious.²³⁴ Jay Dickey, the former member of Congress from whom the amendment got its name, has expressed regret for pushing for restrictions on gun violence research.²³⁵ He observed that “scientific research helped reduce the motor vehicle death rate in the United States and save hundreds of thousands of lives—all without getting rid of cars.”²³⁶ Dickey called for dramatic increases in funding for research on means of preventing gun violence.²³⁷ As states experiment with varying legal approaches to guns, research is a crucial tool for determining those approaches’ effects.

CONCLUSION

When Justice Brandeis offered his eloquent ode to the virtues of state experimentation in *New State Ice Co. v. Liebmann*, he was outnumbered.²³⁸ The majority of the Supreme Court in that case struck down an Oklahoma law giving a state agency the authority to restrict entry into the business of manufacturing and selling ice if the agency determined that there was no real public need for an additional provider of ice.²³⁹ The Court found that Oklahoma did not have sufficient justification for infringing a company’s liberty interest in pursuing a chosen line of business.²⁴⁰ The majority scoffed at Brandeis’s suggestion that the Court should defer to Oklahoma’s experimentation with a novel regulatory approach, saying that unreasonable laws

²³¹ Todd C. Frankel, *Their 1996 Clash Shaped the Gun Debate for Years. Now They Want to Reshape It*, WASH. POST, Dec. 31, 2015, at A1.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See Jay Dickey & Mark Rosenburg, *Time for Collaboration on Gun Studies*, WASH. POST, Dec. 26, 2015, at A17.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see *supra* note 1 and accompanying text.

²³⁹ *New State Ice*, 285 U.S. at 271–72.

²⁴⁰ *Id.* at 278–79.

cannot be saved from constitutional condemnation “merely by calling them experimental.”²⁴¹

Today, *New State Ice* would almost certainly come out the other way. The majority’s opinion represented one of the last gasps of the anti-regulatory sentiments of the *Lochner* era.²⁴² The Court soon swore off the use of substantive due process as a ground for giving strong protection to economic rights and instead embraced Justice Brandeis’s brand of deference to legislative decisionmaking about how to regulate commercial matters.²⁴³ Judges who cite *New State Ice* today invariably embrace Brandeis’s observations about the perils of curtailing state experimentation with new legal approaches to problems.²⁴⁴ The value of fostering policy experimentation by the states is taken for granted.

State experimentation with a variety of different legal approaches to a problem may have valuable benefits in many instances. Perhaps it will help to generate at least some greater insight on or even consensus about the effects of different ways of regulating (or not regulating) firearm acquisition, possession, and use. But at the same time, the divergence of state laws on guns poses real risks. States that maintain stronger legal controls may see those measures undermined by guns flowing in from states with weaker laws. And in the process, public confidence in the potential effectiveness of gun laws may erode. States that strengthen their gun laws may essentially be undertaking an experiment that is rigged to fail because it occurs within the context of a nation that has a motley assortment of well-intentioned but half-hearted gun laws at the federal level and has a substantial number of states progressively weakening their already meager legal constraints on guns.

A sound federal system of firearm regulations, comprehensive in nature and national in scope, remains the ideal. But with the public divided and Congress deadlocked, that ideal is not going to be realized any time soon. For the time being, an era in which state laws diverge, with some states opting to strengthen their laws and others moving in the opposite direction, may be the best that gun control advocates can hope to see.

²⁴¹ *Id.* at 279.

²⁴² Dean Andrew Mazzone, Book Review, 93 MASS. L. REV. 411, 414 (2011) (observing that “*New State Ice* would prove to be the final instance of the Supreme Court invalidating a state economic regulation on the *Lochnerian* substantive due process ground”).

²⁴³ *See id.*

²⁴⁴ *See, e.g.,* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2673 (2015) (arguing for letting states experiment with alternative approaches to congressional redistricting); McDonald v. City of Chicago, 561 U.S. 742, 869 (2010) (Stevens, J., dissenting) (arguing for allowing state and local government experimentation with various approaches to gun issues); Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (arguing for letting states experiment with legalization of medical use of marijuana); United States v. Virginia, 518 U.S. 515, 600–01 (1996) (Scalia, J., dissenting) (arguing for allowing states to experiment with single-sex public institutions of higher education); United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (arguing for allowing states to experiment with different approaches to issues concerning guns and schools).