

THE TREE'S ACORNS AND THE GUN'S CLIPS: THE BATTLE BETWEEN GUN  
CONTROL ADVOCATES AND THE CONSTITUTIONS OF THE UNITED STATES,  
IRELAND, AND AUSTRALIA

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ABSTRACT

This Article operates under the central premise that the United States, Ireland, and Australia—each being former colonies of the United Kingdom—were at one point in time quite similar both in their law and culture. They were each “acorns” of the British “tree.” In light of the United States recent decision in *District of Columbia v. Heller*, just how far can it be said the acorns of the British tree have fallen? Scholars have extensively debated Justice Scalia’s originalist methodology in *Heller*. But relatively little has been written about the decision in the comparative constitutional law area. Comparing *Heller*’s impact on United States constitutionalism with the constitutional approaches to gun control in two of the United States’ closest common law cousins is intellectually useful. Doing so helps explain: a) the cultural and historical conditions giving rise to the *Heller* decision, and b) exactly where *Heller* places us on the global individual gun freedom spectrum. It is not until these inquiries are answered that the full meaning of *Heller* can begin to be appreciated.

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## I. INTRODUCTION

In the summer of 2008, the United States Supreme Court dropped a jurisprudential bombshell in the landmark case, *District of Columbia v. Heller*.<sup>1</sup> For the first time, the Court recognized that an individual's right to possess firearms unconnected with service in a militia, and to use for lawful purposes such as protection of one's home, is protected by the Second Amendment.<sup>2</sup> What might explain the United States' evolution toward such a position, while other former colonies of the United Kingdom are said to have moved steadily in the opposite direction, toward strict gun controls? Is the assertion that the "acorns" of the British tree have fallen in dramatically different places accurate? This Article attempts to test these assumptions and answer these questions through analysis of the constitutional systems and historical roots of two of the United States' common-law cousins: Ireland and Australia.

Part II of this Article begins with a highly-condensed account of Irish history. Ireland's basic governmental structure is also summarized, focusing on the judiciary. This is followed by an examination of the rise and continuation of gun controls in Ireland. This examination involves a discussion of those constitutional issues most likely to arise in the context of gun control. Particular emphasis is placed on case law dealing with the Firearms Act of 1925 and 1964—the primary

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> U.S. CONST. amend. II.

vehicles for gun control in Ireland. Finally, this Article surveys the statistical findings on gun ownership and violence rates.

A brief overview of Australian history begins in Part III—tracking the nation from its early origins as a penal colony to its official independence from Britain. The government and court structure are also reviewed. Next comes an account of the highly-publicized events leading to the enactment of stringent gun controls in the mid-1990s. This is followed by an examination of the constitutional concerns with regard to gun control. The different tests used by the Australian High Court to address those concerns are considered. A statistical examination of the prevalence of private firearms and gun violence concludes Part III.

Part IV analyses and compares the defining aspects of each country's constitutional approach to gun control.

Part IV assesses the overall state of gun control in Ireland and Australia and concludes by answering two questions: Is gun control really that different in the United States than in Ireland and Australia? If so, why? The short answer to the first question is a qualified “yes.” The unique historical, cultural, and constitutional experiences of each country answer the second inquiry.

## II. IRELAND

### A. *Irish History*

#### 1. *Beginnings*

A discussion of gun control in Ireland cannot be divorced from the country's bloody history. While it may appear overly ambitious to juxtapose the history and gun control laws of countries separated by thousands of miles, such an endeavor is intellectually intriguing considering the common law traditions and shared origins of our subjects. Those shared origins trace back to 1171

when King Henry II of England consolidated Norman victories over the Gaelic inhabitants of Ireland and declared himself its ruler.<sup>3</sup>

From that point forward, the Irish have willingly picked up arms, and there has been no shortage of bloodshed. Following King Henry's seizure of Ireland in 1171 the Normans and Gaels fought for over two hundred years for control.<sup>4</sup> Eventually the Gaels pinned the Norman invaders down in a small area near Dublin known as "the Pale."<sup>5</sup> After conquering Ireland, the English provincial government and early settlers limited their presence to this area—for a time.<sup>6</sup>

## 2. *Colonization*

As England rose to world superpower status in the 1500s, the whole of the Irish island became a strategic Achilles' heel.<sup>7</sup> With only the narrow Irish and Celtic Seas separating England and Ireland, the allegiances the Irish chose made their English rulers increasingly anxious. First, the Irish spitefully developed strong ties with the French, the long-time bitter enemies of the English.<sup>8</sup> Then in the 1580s, Irish rebels enlisted the aid of the Spanish in an uprising.<sup>9</sup> As punishment for Ireland's treasonous associations, English forces slaughtered thousands and expanded their control beyond the borders of the Pale.<sup>10</sup>

Due to these military developments, England began to see Ireland as "the back door for its European enemies and decided to close it by being present."<sup>11</sup> England's solution was colonization. First, colonizing Ireland with subjects loyal to the crown would provide an internal counterweight against those daring enough to revolt. Second, the presence of a large number of English colonists

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<sup>3</sup> See KEVIN J. KELLEY, *THE LONGEST WAR: NORTHERN IRELAND AND THE I.R.A.* 2 (2d ed. 1988).

<sup>4</sup> *Id.* at 1–32.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2–3.

<sup>7</sup> *Id.* at 2–4; Thomas Quinn, Note, *Judicial Interpretation of Silence: The Criminal Evidence Order of 1988*, 26 CASE W. RES. J. INT'L L. 365, 369 (1994).

<sup>8</sup> See J. FRANK BRIGHT, *2 A HISTORY OF ENGLAND: HENRY VIII TO JAMES V* 535–43 (1938).

<sup>9</sup> John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L.J. 967, 968 (1994).

<sup>10</sup> KELLEY, *supra* note 3, at 3.

<sup>11</sup> Hume, *supra* note 9, at 968.

would deter foreign powers like the France and Spain from attempting to gain a military foothold in Ireland. In 1608, England put this plan into action by encouraging Scottish Protestant settlement in six chiefly Catholic counties in the north—an area which today comprises Northern Ireland.<sup>12</sup>

Tensions in the north began almost immediately between the native Catholics and the Protestant settlers, who were accurately perceived by the Catholics as a foreign power's attempt to keep Ireland from ever becoming an independent nation.<sup>13</sup> The Irish lashed out, killing many of the new colonists.<sup>14</sup> England rushed to aid its Protestant colonists in Northern Ireland by enacting a series of “apartheid-like” laws that debilitated Catholics in the north.<sup>15</sup> Over the next two centuries, the Irish hatred for the English would only increase, enflamed by events such as the potato famine.<sup>16</sup>

### 3. *Partition*

Like the United States, Ireland's first constitution was enacted amidst a whirlwind of violence and political upheaval. Ireland's struggle for independence did culminate in the enactment of a constitution, but also in a division of its territory. By the early twentieth century, a majority of the Irish, through their representatives in the British Parliament, successfully voted for home rule in Ireland.<sup>17</sup> But the Protestants in the north revolted, fearful of becoming a religious minority in a predominantly Catholic island.<sup>18</sup> This revolt brought an Irish counter-reaction which led to a revolution for independence.<sup>19</sup> Several Irish nationalist groups actively seeking independence from

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<sup>12</sup> KELLEY, *supra* note 3, at 4. Over 100,000 protestant colonists had moved to Ireland by 1640, making up about one-tenth of the total Irish population. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> Hume, *supra* note 9, at 968. Hume describes this as “autonomy” but not “independence.” *Id.*

<sup>18</sup> *Id.* at 968. Some Protestants in Northern Ireland still have this fear. See Ian Paisley, *Political Viewpoint: Peace Agreement—or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J., 1273, 1284 (1999) (“We are being asked to commit an act of collective communal suicide by voting ourselves out of the Union.”).

<sup>19</sup> Hume, *supra* note 9, at 968.

England began to form, most notably the Fenians, the Irish Republican Brotherhood, and the Irish Republican Volunteers.<sup>20</sup>

In 1916, the Irish Republican Volunteers attempted an insurrection known as the Easter Rising, but were quickly quelled by British forces.<sup>21</sup> But in 1919, the pro-independence group reformed into the infamous Irish Republican Army (IRA).<sup>22</sup> Michael Collins, the IRA's Director of Intelligence, used guerilla tactics against the British with considerable success.<sup>23</sup> The difficulty in dealing with the IRA's attacks eventually convinced the British to at least discuss the possibility of an Irish free state.<sup>24</sup> With both sides at the bargaining table, the Anglo-Irish Treaty was signed in 1921. The treaty recognized the sovereignty of the twenty-six southern counties in Ireland, but with one major catch—the six northern counties were to remain under British rule.<sup>25</sup> This division was called the "Partition." Provisions of the Anglo-Irish Treaty were incorporated into Ireland's founding legal document, the Constitution of the Irish Free State, which would be replaced in 1937 by the Constitution of Ireland.<sup>26</sup>

Following partition, the English relegated the Catholics in the north to second-class citizenship.<sup>27</sup> The Protestant minority engaged in gerrymandering and discrimination in housing and employment—injustices that prompted a civil rights movement in the 1960s.<sup>28</sup> These events served to further drive a rift between Catholics and Protestants. Even today, the Protestant community regards itself as British, and conversely, the Catholic community regards itself as Irish.<sup>29</sup> Therefore,

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<sup>20</sup> KELLEY, *supra* note 3, at 18–20.

<sup>21</sup> *Id.* at 31–32.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 36.

<sup>24</sup> See J.J. LEE, IRELAND 1912-1985 42–55 (1989).

<sup>25</sup> James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doeberty*, 61 *FORDHAM L. REV.* 317, 322 (1992).

<sup>26</sup> IR. CONST., 1922.

<sup>27</sup> See ROBERT KEE, IRELAND, A HISTORY 237, 239 (1980).

<sup>28</sup> See Hume, *supra* note 9, at 976.

<sup>29</sup> *Id.* at 967.

the conflict in Northern Ireland is not accurately characterized as a religious feud; “[i]t is really a question of identity.”<sup>30</sup>

This identity crisis is present even within the Irish Constitution. The Constitution of 1937 claims sovereignty over the whole of Ireland, despite a 1925 boundary agreement between the Irish Free State, Northern Ireland, and Britain, confirming that partition of Northern Ireland would be upheld.<sup>31</sup> The Irish Constitution also states that every person born in Ireland, north or south, is an Irish citizen.<sup>32</sup> Furthermore, despite the island’s contentious religious history, the preamble to the Irish Constitution does not shy away from its religious commitments: “We, the people of *Éire* . . . acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . Do hereby adopt, enact, and give to ourselves this Constitution.”<sup>33</sup>

In 1949, the Irish Free State declared itself the Republic of Ireland, a state independent in all respects from the British Commonwealth.<sup>34</sup> But the north remained a part of the British Commonwealth.<sup>35</sup> The tensions also remained. According to a former member of the Northern Ireland Parliament speaking in 1994, “the last twenty-five years have in many ways been the worst twenty-five years of violence in our history.”<sup>36</sup> The factions that remained active in the conflict are the Unionists and the Nationalists.<sup>37</sup> The Unionists, or Loyalists, from a Protestant

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<sup>30</sup> *Id.* See also Zachary E. McCabe, *Northern Ireland: The Paramilitaries, Terrorism, and September 11<sup>th</sup>*, 30 DENV. J. INT’L L. & POL’Y 547, 549 (2002) (“Rather than religion, the conflict became one of identity, British or Irish.”).

<sup>31</sup> IR. CONST., 1937, art. III; Kelly, *supra* note 25, at 322. The Irish Constitution’s claim of sovereignty over Northern Ireland is seen as spurious by some. See Paisley, *supra* note 18, at 1288 (arguing that Article 2 and 3 of the Irish Constitution “form the basis of Dublin’s illegal claim”).

<sup>32</sup> See KEE, *supra* note 27, at 217.

<sup>33</sup> IR. CONST., 1937, Preamble.

<sup>34</sup> Kelly, *supra* note 25, at 322–23.

<sup>35</sup> See *id.* at 323.

<sup>36</sup> Hume, *supra* note 9, at 968. John Hume, co-founder and leader of Northern Ireland’s Social Democratic Labor Party served on the Northern Ireland Parliament from 1979–2001. He states that about one out of every 500 people in Northern Ireland has been killed in the conflict, and half of those killed have been civilians. *Id.*

<sup>37</sup> *Id.* at 969–70.



heritage, are committed to staying under England's wing.<sup>38</sup> The Nationalists, or Republicans, from a Catholic heritage, desire a unified and fully independent Ireland.<sup>39</sup>

On Good Friday, April 10, 1998, under the patient negotiation techniques of George Mitchell, the political parties in Ireland signed a peace agreement.<sup>40</sup> Sinn Fein reiterated its former pledge of a "complete cessation of military activities."<sup>41</sup> The Ulster Defense Association (UDA), the largest paramilitary group holding unionist prerogatives, also agreed to the cease-fire.<sup>42</sup> The "Good Friday Agreement" stipulated in its most relevant part that: (1) Northern Ireland's constitutional status is dependent on the consent of a majority of Northern Ireland's citizens (as opposed to all Irish citizens); (2) The Irish Constitution's claim to Northern Ireland will be amended to reflect the need for consent; and (3) the parties "reaffirm the commitment to the total disarmament of all paramilitary organizations."<sup>43</sup> Time proved, however, that disarming Ireland's many paramilitary groups was a daunting task.<sup>44</sup>

In 2006, the Irish and British governments developed and began to implement the St. Andrews Agreement, using the Good Friday Agreement as a launching point.<sup>45</sup> All major parties in Ireland agreed to support the police and uphold the rule of law.<sup>46</sup> The agreement also provided for devolution of power away from England toward Belfast.<sup>47</sup> At its core, the St. Andrews Agreement

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<sup>38</sup> *Id.* at 969. Proponents of a continued British presence in Ireland are found in the Democratic Unionist Party.

<sup>39</sup> *Id.* at 970. Those actively seeking a unified Ireland and independence from Britain are found in Sinn Fein, the political wing of the IRA. Sinn Fein is currently the fastest growing political party in Ireland. *See* BRIAN FEENEY, *SINN FEIN: A HUNDRED TURBULENT YEARS* (O'Brien Press 2002).

<sup>40</sup> McCabe, *supra* note 30, at 551.

<sup>41</sup> *Id.* (citing Irish Republican Army Cease-fire Statement, Aug. 31, 1994, *available at* <http://cain.ulst.ac.uk/events/peace/docs/ira31894.htm>).

<sup>42</sup> *Id.*

<sup>43</sup> Roger Mac Ginty, *The Irish Peace Process - Background Briefing* by Roger Mac Ginty, 1998, *available at* <http://cain.ulst.ac.uk/events/peace/bac.htm>.

<sup>44</sup> *See* McCabe, *supra* note 30, at 553-57; Ray Moseley, *IRA Keeping Arms*, *BBC Says*, Chi. Trib., Dec. 12, 1998, § 1, at 4; *N. Irish Group to Wage Violent Attacks*, *Xinhua English Newswire*, Jan. 29, 1999.

<sup>45</sup> Agreement at St. Andrews, *available at* <http://www.standrewsagreement.org/agreement.htm>.

<sup>46</sup> *Id.* at § 5-7.

<sup>47</sup> *Id.* at § 13.

was a power-sharing agreement.<sup>48</sup> On May 8, 2007, the Northern Ireland people elected Ian Paisley as First Minister and Martin McGuinness as Deputy First Minister.<sup>49</sup> Thus far, the power-sharing agreement has not been shaken by continuing sporadic terrorism in Northern Ireland.<sup>50</sup>

### B. *Irish Government Structure and the Supreme Court*

The Irish Constitution of 1937 created a three-branch government comprised of an executive, a bi-cameral legislature, and an independent judicial branch. The Irish Constitution created a hybrid system of government, combining elements of the United States' presidential system with the United Kingdom's parliamentary system of governance.<sup>51</sup> But in terms of its protection of individual rights, the Irish Constitution is much closer to the United States than the United Kingdom, where the will of the Parliament dominates.<sup>52</sup> Article 34 grants the Supreme Court and the High Court the power of judicial review, a role that contributes significantly to the protection of individual rights and serves as a check on the power of the Irish Parliament.<sup>53</sup>

The Supreme Court also has the power of abstract review. The Supreme Court can review bills and determine whether they are “repugnant” to the constitution before they are signed into law by the President.<sup>54</sup> However, under abstract review procedure, when the President refers a bill for

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<sup>48</sup> *Id.* at § 13 (“[A]ll the parties wish to see devolution restored. It is also clear to us that all parties wish to support policing and the rule of law. We hope they will seize this opportunity for bringing the political process in Northern Ireland to completion and establishing power-sharing government for the benefit of the whole community.”).

<sup>49</sup> Ian Paisley is the long-time leader of the Ulster Democratic Unionist Party. Martin McGuinness is a Sinn Fein politician and former IRA leader. On December 8<sup>th</sup>, 2007, while the pair visited the White House, Martin McGuinness told the press: “Up until 26 March this year, Ian Paisley and I never had a conversation about anything—not even about the weather—and now we have worked very closely together over the last seven months and there’s been no angry words between us. This shows we are set for a new course.” Martina Purdy, [‘Charming’ Ministers Woo President](#), BBC, Dec. 8, 2007.

<sup>50</sup> *See N. Ireland Leaders Promise to Keep Peace*, Chicago Sun-Times, Mar. 8, 2009, available at <http://www.suntimes.com/news/world/1466566,w-northern-ireland-real-ira-attack030809.article>.

<sup>51</sup> Bruce Carolan, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: The Search for Coherence in the use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 TULSA J. COMP. & INT’L L. 123, 126 (2004).

<sup>52</sup> *Id.*

<sup>53</sup> IR. CONST., 1937, art. 34.3.2. The constitution grants the Irish Supreme Court the final say on all matters decided by the High Court. *Id.* at 34.4.3.

<sup>54</sup> *Id.* at 26.1.1.

review to the Supreme Court and its constitutionality is upheld, its constitutional status can never be reviewed again, by any court.<sup>55</sup>

The Irish President appoints all judges in Ireland, including those on the Supreme Court.<sup>56</sup> Judges appointed to the Supreme Court may be removed by the legislature for misbehavior or incapacity.<sup>57</sup> The legislature has the power to determine the jurisdiction of Supreme Court, the age of retirement for judges, and the number of judges on the Supreme Court.<sup>58</sup> The legislature established a nine-member Supreme Court, comprised of a Chief Justice, the president of the High Court, and seven ordinary judges.<sup>59</sup> Judges sitting on the Supreme Court must retire at age seventy.<sup>60</sup> Judges or the Advocate-General from the Courts of First Instance and the Court of Justice (the lowest Irish courts) are qualified for appointment to the Supreme Court provided they have been a practicing barrister for at least twelve years.<sup>61</sup> Judges from the Circuit Court (an intermediate court) are qualified after sitting on the Circuit Court for four years, and are not required to be licensed barristers for a minimum period of time before appointment.<sup>62</sup>

In 1994, in *Heaney v. Ireland* the Supreme Court began using a proportionality test to balance legislation against individual rights.<sup>63</sup> Like other countries employing the proportionality test, the Ireland Supreme Court proportionality test proceeds on “the notion that the means chosen to pursue a legitimate legislative objective must “... impair the right as little as possible.”<sup>64</sup> As a common law country, the Irish Supreme Court, and the lower Irish courts adhere to the doctrine of

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<sup>55</sup> *Id.* at 34.3.3.

<sup>56</sup> *Id.* at 35.1.

<sup>57</sup> *Id.* at 35.4.1.

<sup>58</sup> *Id.* at 36.

<sup>59</sup> Courts and Court Officers Act, 1995 § 6 (Ir.) *available at* [http://www.bailii.org/ie/legis/num\\_act/1995/0031.html](http://www.bailii.org/ie/legis/num_act/1995/0031.html).

<sup>60</sup> *Id.* at § 47.

<sup>61</sup> *Id.* at § 28(d).

<sup>62</sup> *Id.* at § 28(e).

<sup>63</sup> *Heaney v. Ireland* [1994] 3 I.R. 593.

<sup>64</sup> Brian Foley, *The Proportionality Test: Present Problems*, 2008 JUD. STUD. INST. J. 67, 69 (2008).

stare decisis.<sup>65</sup> Finally, the Irish Supreme Court has on numerous occasions willingly cited to the United States Supreme Court and other foreign courts such as the European Court of Justice.<sup>66</sup>

### C. *Gun Controls Legislation in Ireland*

#### 1. *Controls under English Rule*

The English Declaration of Rights of 1689, responding to abuses by the English monarch, expressed a right to bear arms. However, the right was not absolute. Firearms were not available to everyone and were certainly not available without precondition. First, a person only had a right to bear firearms when it was “suitable to their Condition.”<sup>67</sup> Second, the right was subject to regulation by Parliament or “as allowed by law.”<sup>68</sup> Third, the right was explicitly limited to Protestants.<sup>69</sup>

Britain had a licensing system in place in Ireland under its colonial laws.<sup>70</sup> Thus, in 1920, the stage was set for the British Parliament to enact gun control laws severely limiting the right to bear arms in Ireland as well as England. Parliament passed “a comprehensive arms control measure that effectively repealed the right to be armed by requiring a firearm certificate for anyone wishing to ‘purchase, possess, use or carry any description of firearm or ammunition for the weapon.’”<sup>71</sup> The Firearms Act has been readopted in Britain and remains in force.<sup>72</sup> Since the devolution of power away from Westminster toward Belfast, Northern Ireland’s primary statute governing the licensing of firearms has been the Firearms Order 1981, promulgated by the Northern Ireland legislature.<sup>73</sup>

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<sup>65</sup> See Carolan, *supra* note 51, at 135 (discussing the precedential value of Irish Supreme Court cases).

<sup>66</sup> *Id.* at 133.

<sup>67</sup> English Bill of Rights of 1689.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 18 (1971).

<sup>71</sup> JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 170 (1994) (citing Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.)).

<sup>72</sup> Firearms Act, 1968, ch. 27 (Eng.).

<sup>73</sup> Firearms Order 1981 (N. Ir.). The Northern Ireland licensing system reads much like the Republic of Ireland’s system. See *infra* Part II.B.2. For a case dealing with the particulars of the Northern Ireland Firearms Order, see *In re An*

## 2. *Controls in the New Irish Republic*

Shortly after gaining autonomy in 1922, the Irish Free State enacted its own firearm licensing statutes contained in the Firearms Act of 1925.<sup>74</sup> The Act makes it unlawful to possess an uncertified firearm.<sup>75</sup> Firearm certificates can only be issued by the superintendent of the Garda Siochana.<sup>76</sup> Certificates are granted by the superintendent only after he is satisfied that an applicant: (1) has good reason for requiring the firearm, (2) can possess such firearm without danger to the public safety or peace, and (3) is not a person disentitled to hold a firearm certificate.<sup>77</sup>

### D. *Irish Gun Control Jurisprudence*

There is no mention of an individual right to possess firearms in the Irish Constitution.<sup>78</sup> In fact, the only mention of firearms in the Irish Constitution appears to disfavor their possession.<sup>79</sup> That there is no constitutional protection for an individual right to bear arms is a fact well-noted by the Irish courts.<sup>80</sup> Nor does it appear that a significant portion of the public believes there is a right

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Application by Chalmers Brown for Judicial Review, [2003] NICA 7 (Civ) (N. Ir.) *available at* <http://www.bailii.org/nie/cases/NICA/2003/7.html>.

<sup>74</sup> Firearms Act of 1925 (Ir.). The long title of the Act is as follows: “An Act to place restrictions on the possession of firearms and other weapons and ammunition, and for that and other purposes, to amend the law relating to firearms and other weapons and ammunition.”

<sup>75</sup> *Id.* at § 2(1).

<sup>76</sup> *Id.* at § 3(1). “Garda Siochana” is the Irish name for the police force of the Republic of Ireland.

<sup>77</sup> *Id.* at §4.

Disentitled persons include: (1) any person under 16 years old, (2) any person of “intemperate habits,” (3) any person of unsound mind, (4) any person sentenced for an offense in which a firearm or firearm imitation was used to intimidate or threaten another person within the past five years, (5) any person sentenced to at least three months of imprisonment for an assault within the past five years, (6) any person subject to police supervision, and (7) any person bound by a court order of good behavior. Firearms Act of 1968 § 17(b).

<sup>78</sup> Moreover, there is no provision providing for a right of self-defense that might arguably justify the possession of firearms.

<sup>79</sup> *See* IR. CONST., 1937, art. 40 (providing for “[t]he right of the citizens to assemble peaceably and without arms”).

<sup>80</sup> *See, e.g.,* McCarron v. Kearney, [2008] I.E.H.C. 195 (H. Ct.) *available at* <http://www.bailii.org/ie/cases/IEHC/2008/H195.html> (“There is no constitutional provision providing for any right to keep lethal firearms such as that in the Second Amendment to the United States . . .”).

to bear arms. Although some individuals in Ireland strongly believe there is such a right,<sup>81</sup> in general, the Irish seem to have negative feelings toward firearms, and appear to view the United States' stance on firearms as somewhat foolhardy.<sup>82</sup> A surprising sight to an American visitor in Ireland might be the fact that a majority of their uniformed Garda do not carry firearms.<sup>83</sup> Finally, compared to the United States and Australia, Ireland has fewer and weaker pro-gun groups. The few in existence are devoted primarily to sport shooting.<sup>84</sup>

Despite the fact that there is no express right to bear firearms within the Irish Constitution, several parties have successfully challenged a select few firearms regulations and certification decisions in the court system. One avenue has been to challenge directives passed by superiors of the superintendants as unjustifiably “fettering the discretion”<sup>85</sup> of superintendants in violation of the Irish Constitution’s strong commitment to the Irish Legislature’s exclusive power to make law.<sup>86</sup> This is the result of the Irish Supreme Court’s steadfast acceptance of separation of powers notions.<sup>87</sup> Another route has been to challenge a given Garda superintendant’s decision as “so illogical and unreasonable” and so “fundamentally at variance with reason and common sense,” that the decision is untenable.<sup>88</sup> Each avenue is discussed in turn below.

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<sup>81</sup> See Stephen Breen, *Sick Praise for Recent Slayings*, Sunday Life, Mar. 15, 2009 (reporting that an IRA prisoner stated: “The right to bear arms in the pursuit of a united Ireland cannot be taken away by anyone and it’s about time the people realised this.”).

<sup>82</sup> See, e.g., *Garda Inspectorate Head Backs Ban on Handgun Ownership*, Sunday Business Post, Dec. 28, 2008 (noting that the head of the Garda Síochána Inspectorate, a former police commissioner in Boston, “would ‘absolutely’ support a total ban on handguns, based on her experience of murders in the US . . . .”); Denis Staunton, *Plague of Gun Crime will not be Helped by Supreme Court Ruling*, The Irish Times, June 28, 2008 (stating that in “cities like Washington and Chicago, which [are] plagued by gun crime, local politicians fear a wave of lawsuits by gun rights advocates to remove restrictions, a danger Justice Stephen Breyer highlighted in his dissenting opinion [in *Heller*]”).

<sup>83</sup> This is pursuant to an Association of Garda Sergeants and Inspectors (AGSI) policy that uniformed Garda are not to carry firearms. See generally Valerie Robinson, *Arming Gardai ‘Not an Answer to Gun Crime’*, Irish News, Mar. 19, 2008 (noting the AGSI’s commitment to continuing this policy).

<sup>84</sup> Some of these include Target Shooting Ireland, the National Rifle Association of Ireland, and the Ulster Rifle Association based in Northern Ireland.

<sup>85</sup> *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.) available at <http://www.bailii.org/ie/cases/IESC/2002/35.html>.

<sup>86</sup> IR. CONST., 1937, art 15; see Carolan, *supra* note 51, at 127 (noting that the Irish Supreme Court is willing to strike down rather than enjoin government acts that violate the legislature’s exclusive law-making power).

<sup>87</sup> See Carolan, *supra* note 51, at 127.

<sup>88</sup> *O’Leary v. Maher*, [2008] I.E.H.C. 113 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H113.html>.

## 1. “Fettering the Discretion” of Superintendants

In *Dunne v. Donohoe*, the Irish Supreme Court heard a challenge to a directive set forth by an assistant commissioner of the Garda Siochana.<sup>89</sup> The directive required district officers to ensure an applicant had a secure firearms cabinet and satisfactory level of security before granting or renewing firearms certificates.<sup>90</sup> Martin Dunne had sought renewal of his firearms certificate, but was ordered to install a new firearms cabinet, pursuant to a new directive to which the Garda superintendant was adhering.<sup>91</sup> The directive, entitled “Security Arrangements for Licensed Firearms,” did not permit wooden firearms cabinets and required separate storage for the keys to firearms cabinets.<sup>92</sup> Even more stringent requirements applied to rifles with a higher caliber than .22.<sup>93</sup> The High Court granted relief to Dunne on two grounds: (1) the directive had the effect of fettering the discretion of the superintendant in the exercise of the relevant functions of the Firearms Act of 1925, and (2) the superintendant was not empowered to impose a fixed precondition requiring every applicant for a firearm certificate to keep the firearms in a locked firearms cabinet constructed in accordance with the requirements of the directive.<sup>94</sup>

In upholding the High Court, the Supreme Court emphasized the fact that the Oireachtas could have granted Garda commissioners the power to enact such directives, but it chose instead to give that power only to local Garda superintendants.<sup>95</sup> The legislature had conferred the power upon the superintendant in *Dunne* as a “persona designata.” According to the persona designata doctrine, when an individual is granted power, he or she must exercise that power independently from, and unconstrained by, any outside authority which seeks to exercise power in concert with the

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<sup>89</sup> *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.).

<sup>90</sup> *Id.*

<sup>91</sup> *Dunne v. Donohoe* [2001] I.E.H.C. 126 (H. Ct.) *available at* <http://www.bailii.org/ie/cases/IEHC/2001/126.html>.

<sup>92</sup> *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.).

<sup>93</sup> *Id.*

<sup>94</sup> *Dunne v. Donohoe* [2001] I.E.H.C. 126 (H. Ct.).

<sup>95</sup> *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.). “Oireachtas” is the term for the Irish Legislative Assembly.

individual who has been granted actual authority.<sup>96</sup> Therefore, the assistant commissioner of the Garda who set forth the directive had engaged in unlawful interference under the *persona designata* doctrine when he added requirements to the firearms licensing scheme.<sup>97</sup> The Supreme Court affirmed the High Court's decision to strike down the directive and quash the superintendent's decision to deny the applicant's application for a firearms certificate.<sup>98</sup>

## 2. *Separation of Powers Violations*

The Irish Supreme Court also accepted the High Court's second basis for granting relief to Dunne: the separation of powers doctrine. The court stated that by adding requirements to the certification process, the superintendent was acting **ultra vires** of the provisions of the Firearms Acts of 1925 and 1964.<sup>99</sup> Neither the commissioners nor the superintendants had been empowered by the legislature to impose additional prerequisites for firearm certifications.<sup>100</sup> Therefore, by doing so, the superintendent was in essence assuming the power of the legislature, a violation of the Constitution's explicit provision that only the Oireachtas can enact law.<sup>101</sup>

The Irish legislature knows how to adapt to the Irish Supreme Court's rulings. Four years after *Dunne*, legislators enacted the 2006 Criminal Justice Act.<sup>102</sup> The Act codified the requirement that a certificate holder have a secure place of storage for the firearm and ammunition, subject to inspection by a member of the Garda.<sup>103</sup> The Act also vested more power in the Garda hierarchy: "The Minister, in consultation with the Commissioner, may by regulations provide for minimum

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<sup>96</sup> See *Dunne v. Donohoe* [2001] I.E.H.C. 126 (H. Ct.) (describing the doctrine's applicability in Ireland).

<sup>97</sup> *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> IR. CONST., 1937, art. 15 ("The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas"); *Dunne v. Donohoe*, [2002] 2 I.R. 533 (Ir.).

<sup>102</sup> Criminal Justice Act of 2006 (Ir.) available at <http://www.oireachtas.ie/documents/bills28/acts/2006/A2606.pdf>.

<sup>103</sup> *Id.* at § 32.4(2)(d). The Act also introduced mandatory minimum sentences between five and ten years for certain firearms offenses. *Id.* at § 61.



standards to be complied with by holders of firearm certificates in relation to the provision of secure accommodation for their firearms.”<sup>104</sup>

Not surprisingly, in the wake of the 2006 Criminal Justice Act, courts examining certification decisions will often defer to superintendants’ determinations. An example of a decision extremely deferential to a Garda superintendant’s decisions in the wake of the Act is *McCarron v. Kearney*. In *McCarron*, the High Court rejected a challenge to a superintendant’s denial of a firearm certificate application on the basis that he was not satisfied that the applicant had a good reason for requiring the particular firearm he desired.<sup>105</sup> The applicant had attempted to certify a .40 caliber “glock” pistol, which he stated he required for target practice.<sup>106</sup> The superintendant informed the applicant that he considered the glock a combat weapon, and while it might be capable of use for shooting targets, it was not suitable for such a use when weighed against the inherent dangers of the weapon.<sup>107</sup> The court first discussed the effect of the 2006 Criminal Justice Act on the licensing system:

The purpose of licensing is to have control over firearms. It would not be right for this Court to construe the Act in such a way that the controls put in place by the legislature are abdicated in favour of a test of choice as if a firearm is not a lethal weapon and is something other than a most dangerous article. That is what the legislation is there to control. It is not within the legislative scheme to issue a firearm certificate to any individual simply having a genuine desire to hold a particular

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<sup>104</sup> *Id.* at § 32.4(5). Given Ireland’s strong adherence to the separation of powers doctrine, one might be curious as to whether such a grant of legislative power to an executive office is constitutional. The Irish Constitution does provide, however, that “[p]rovision may be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.” IR. CONST. art 15. *Compare with* *Bowsher v. Synar*, 748 U.S. 714 (1986) (striking down the Graham–Rudman–Hollings Act because the legislature retained too much control over a Comptroller General whom it granted the authority to make budget cut recommendations to the President, who was then required to follow the recommendations).

<sup>105</sup> *McCarron v. Kearney*, [2008] I.E.H.C. 195 (H. Ct.).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

weapon for sport, no matter what its calibre, the velocity of its projectile or its especial killing potential.<sup>108</sup>

The court next indicated that the Act made clear that considerations of public safety, the good order of the community, and the general proliferation of firearms could enter into a superintendent's individualized certification decision.<sup>109</sup> Furthermore, the court stated its version of the burden on firearms applications: "the more dangerous the weapon, the greater the burden born by a person applying for a firearm certificate to show that he or she has good reason for seeking to possess and use that particular weapon."<sup>110</sup>

Interestingly, rather than distinguishing its decision from *Dunne*—as it likely could have done by pointing out that the superintendent's decision in this particular case was not done pursuant to a superior's directive as in *Dunne*—the *McCarron* court set forth its own interpretation of *Dunne*. First, the court stated that interpreting *Dunne* as a determination that Garda superintendents could not enact their own licensing requirements was "an unfortunate misunderstanding."<sup>111</sup> Next, the court stated that under a determination of the "public good," a superintendent could create and adhere to policy it considered to advance the "public safety or peace" requirement of the 1925 Act.<sup>112</sup> The court seemed to imply that if *Dunne* stood for anything, it was that a superintendent had *more* discretion, not less, to set forth whatever licensing policy he or she desired.<sup>113</sup>

This is a questionable finding. While *Dunne* made it clear that a Garda superintendent retains control over his own discretion, *Dunne* also specified that superintendents are not vested with the authority to insert their own requirements into the certification calculus. To the extent that *Dunne* protected a superintendent's discretion, it did so from outside influence—the court was clear that a

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *McCarron v. Kearney*, [2008] I.E.H.C. 195 (H. Ct.).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

superintendent was still not free to promulgate non-statutory certification requirements. Next, it is unclear in *McCarron* how the superintendent's denial of a "glock" license can be characterized as a decision appropriately made under the "public" prong of the Firearms Act of 1925. In *Dunne*, the superintendent's enforcement of the storage unit requirement could just as easily have been defended on the ground that it was for the "public good," but was found an improper discretionary determination anyway.

Contrary to language in *McCarron* indicating otherwise, the Criminal Justice Act of 2006 did not give Garda ministers and superintendants free reign to set licensing policies. Under the Act, such policy-making power was confined to dealing with the "secure accommodation" of firearms.<sup>114</sup>

As discussed below, other judges on the High Court have more carefully abided by the Irish Supreme Court's decision in *Dunne*, carefully scrutinizing the decisions of Garda superintendants and simultaneously balancing the Criminal Justice Act's changes to gun licensing. But rather than distinguish those cases, the judge in *McCarron* merely stated: "In so far as my decision in this regard differs . . . I find myself unable to follow those decisions."<sup>115</sup>

### 3. "Illogical and Unreasonable" Licensing Decisions

A party may challenge a Garda superintendent's decision as "fundamentally at variance with reason and common sense."<sup>116</sup> This is essentially the Irish test for minimum rationality, akin to the rational basis test in the United States. The High Court's decision in *Goodison v. Shehan* is illustrative of the principles of this line of judicial review. *Goodison*, like *McCarron*, dealt with an applicant's challenge to a superintendent's refusal to issue a certificate on the basis that it presented a

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<sup>114</sup> Criminal Justice Act of 2006 § 32.4(5) (Ir.).

<sup>115</sup> *Goodison v. Sheahan*, [2008] I.E.H.C. 127 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H127.html>.

<sup>116</sup> *O'Leary v. Mahar*, [2008] I.E.H.C. 113 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H113.html> (citing *State v. Stardust Victims; Compensation Tribunal* [1986] I.R. 642. (Ir.)).

danger to the safety of the public.<sup>117</sup> But in *Goodison*, the applicant had already been granted licenses for two double barreled shotguns and a rifle.<sup>118</sup> Under these circumstances, the court stated: “There is nothing in [the Firearm Act’s provisions] which entitles the respondent to consider the applicant’s suitability in relation to a particular weapon where certificates are held in respect of others. Either the applicant is a person who can possess, use or carry a firearm or he is not. In this case he must be seen as a person who can.”<sup>119</sup> In other words, it was illogical for the superintendent to find that the applicant was incapable of holding a glock without endangering the public, while he had already been found qualified to hold other firearms that were just as deadly.

Under similar circumstances, in *O’Leary v. Mahar*, the High Court struck down a Garda superintendent’s decision to refuse an application for certification of a .308 caliber hunting rifle because he considered it a “military caliber weapon.”<sup>120</sup> The first problem was that the applicant already owned a certified .243 rifle.<sup>121</sup> Next, the superintendent informed him that although he could not certify his .308 rifle, he would be entitled to certify a 30-06, which, as it turned out, is more powerful firearm. The court analyzed the situation stating, “it is difficult to see how one rifle is deemed too dangerous to the public . . . to be licensed while the other which is favoured by the [superintendent] delivers its rounds at 100 feet per second faster.”<sup>122</sup> The court then held that “this case is one of those relatively rare cases of judicial review where . . . the decision sought to be impugned is so illogical and so unreasonable as to . . . [be] fundamentally at variance with reason and common sense.”<sup>123</sup>

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<sup>117</sup> *Goodison v. Sheahan*, [2008] I.E.H.C. 127 (H. Ct.).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *O’Leary v. Maher*, [2008] I.E.H.C. 113 (H. Ct.).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

E. *Statistical Findings*

1. *Gun Ownership*

Recently an Irish newspaper stated that the “Republic faces gun ownership rates as high as the United States unless decisive action is taken to curb the ‘alarming’ number of legally held handguns in circulation.”<sup>124</sup> The numbers tell a different story however. The United States has about 90 guns per 100 residents, the world’s highest gun-to-resident ratio.<sup>125</sup> As of 2006, there were 360,000 registered and unregistered civilian firearms in the Republic of Ireland.<sup>126</sup> That constitutes 8.6 guns for every 100 people in Ireland, the seventy-first largest ratio of guns-to-residents.<sup>127</sup>

But Northern Ireland’s ownership rate is nearly three times higher than the Republic of Ireland’s. In 2007, it had 21.9 guns per 100 people, ranking it thirty-first in the world.<sup>128</sup> The world average in this category is about 14 to every 100 people.<sup>129</sup>

Despite its promise to decommission its firearms under the 1998 Belfast Agreement, the IRA’s estimated 500 “active members” are believed to still own an arsenal of several hundred firearms, including assault rifles, machine guns, anti-aircraft missiles, and rocket launchers.<sup>130</sup> The largest Loyalist paramilitary group, the UDA, with several hundred members and several dozen “active members,” is believed to still own a few hundred rifles and Uzi machine guns.<sup>131</sup>

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<sup>124</sup> Conor Lally, *Gun Ownership will be as High as in US Without ‘Radical’ Reform –Minister*, The Irish Times, Nov. 20, 2008 (quoting Irish Minister for Justice Dermot Ahren).

<sup>125</sup> Geneva Graduate Institute of International Studies “Small Arms Survey: 2007” available at [http://www.smallarmssurvey.org/files/sas/publications/year\\_b\\_pdf/2007/CH2%20Stockpiles.pdf](http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2007/CH2%20Stockpiles.pdf).

<sup>126</sup> *See id.* at 44.

<sup>127</sup> *Id.* at 39.

<sup>128</sup> *Id.* at ch.2 annex 5.

<sup>129</sup> *Id.*

<sup>130</sup> McCabe, *supra* note 30, at 553. Other armed Republican paramilitary groups include: The Real Irish Republican Army (rIRA), The Continuity Irish Republican Army (CIRA), and The Irish National Liberation Army (INLA). *Id.* at 553–55.

<sup>131</sup> *Id.* at 555. Other armed Loyalist paramilitary groups include: The Ulster Volunteer Force (UVF), The Loyalist Volunteer Force (LVF), and The Red Hand Defenders (RHD). *Id.* at 555–57.

## 2. *Gun Violence*

Somewhat surprisingly considering its large number of paramilitary groups, when compared with most countries, Ireland has little gun violence.<sup>132</sup> Previous studies showed that from 1972 to 1992, about 19% of homicides in Ireland were committed with a firearm.<sup>133</sup> From 1972 to 1992, Ireland had an overall homicide rate per 100,000 of .99.<sup>134</sup>

In 1999, the date of the most recent available data, Ireland's total intentional homicide rate per 100,000 was 1.01, slightly higher than from 1972–1992, and its intentional homicide by firearm rate just .32 per 100,000 individuals.<sup>135</sup> In 1999, England had an intentional homicide by firearm rate of just .12 per 100,000, but had a higher overall intentional homicide rate than Ireland.<sup>136</sup> Also in 1999, 24% of all homicides in Ireland were committed with a firearm, again slightly higher than from 1972–1992. As a points of comparison, firearms were used in just 8% of homicides in England and a whopping 65% of homicides in the United States.<sup>137</sup>

## III. AUSTRALIA

### A. *Australian History*

#### 1. *English Settlement*

In 1770, James Cook led the HMS *Endeavor* to the eastern coastline of Australia, and annexed New South Wales in the name of King George the III.<sup>138</sup> After losing its American colonies, Britain attempted to restructure its dwindling overseas empire and decided to form

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<sup>132</sup> See Geneva Graduate Institute of International Studies “Small Arms Survey: 2007” 44.

<sup>133</sup> See ENDA DOOLEY, HOMICIDE IN IRELAND 1972–1992 14 available at [http://www.crimecouncil.gov.ie/documents/Dooley\\_Homicide\\_in\\_Ireland\\_1972-1991.pdf](http://www.crimecouncil.gov.ie/documents/Dooley_Homicide_in_Ireland_1972-1991.pdf).

<sup>134</sup> See *id.* at 8.

<sup>135</sup> Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, 1998–2000 [http://www.unodc.org/pdf/crime/seventh\\_survey/7sc.pdf](http://www.unodc.org/pdf/crime/seventh_survey/7sc.pdf). The United States' intentional homicide by firearm rate was 2.97 in 1999. *Id.*

<sup>136</sup> *Id.* The U.N. study indicates that England's data should be used as a proxy for Northern Ireland.

<sup>137</sup> *Id.*

<sup>138</sup> FRANK G. CLARK, HISTORY OF AUSTRALIA 22 (Greenwood Publishing Group, 2002).

Australia into a penal colony.<sup>139</sup> This restructuring was motivated by the fear that France would colonize at a faster rate and further undermine Britain's super-power status.<sup>140</sup> Exiled convicts under death sentences were regarded as legally dead and possessed no rights.<sup>141</sup> The first Australians were simply not in any kind of a position to demand rights like their American cousins. However, in addition to exiled convicts came significant numbers of free settlers, and in 1829, an agricultural colony comprised of non-convicted persons was founded in Western Australia.<sup>142</sup>

Like the United States, there was a significant native population in Australia when the first British settlers arrived. But unlike the Native Americans, Aborigines did not put up any serious resistance to early settlement.<sup>143</sup> This is apparently because the Aborigine population was particularly susceptible to smallpox.<sup>144</sup> "Because both the cities and the frontier were so much more secure, guns were not necessary as a means of self-defense against humans."<sup>145</sup> Interestingly, conflict from Ireland reached Australia. After a failed Irish rebellion in 1798, hundreds of Irish were sent to Australia as punishment.<sup>146</sup> In 1804, the Irish convicts, led by William Johnston attempted a revolt at Castle Hill, but were easily put down by English authorities.<sup>147</sup>

During the 1800s, the French continued to drive the conquest decisions of the British. By 1839, the English had annexed most of the Australian mainland in an effort to curtail any Napoleonic designs on the Australian continent.<sup>148</sup>

From its founding days, stark societal divisions arose in Australia. Free settlers believed themselves the moral superiors to those whose family had arrived in Australia as a result of criminal

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 37.

<sup>143</sup> *Id.* at 26.

<sup>144</sup> FRANK G. CLARK, HISTORY OF AUSTRALIA 25, 26 (Greenwood Publishing Group, 2002).

<sup>145</sup> DAVID KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 194–95 (Prometheus Books, 1992).

<sup>146</sup> CLARK, *supra* note 138, at 27.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 28.

wrongdoing.<sup>149</sup> Britain looked upon all Australians as somehow tainted with criminality, and refused to allow any native-born Australians to take any official positions in the colony in the first few decades after the colony's settlement.<sup>150</sup>

During the early 1800s, although most convicts served their jail sentence with few privileges, upon their release, they received a tract of land and seed to start a farm.<sup>151</sup> This was an interesting twist of fate considering that these convicts usually came from lower socio-economic positions in England, where they were very unlikely to ever own land.<sup>152</sup>

## 2. *Early Signs of Autonomy*

In 1820, gold was discovered in Victoria.<sup>153</sup> Authorities attempted to suppress discussions of the find because they feared what could result if word of a gold strike spread, given the colony's substantial ex-convict populace.<sup>154</sup> But by 1851, news of the discovery of gold reached a fever-pitch, and Australia's subsequent gold rush took Victoria's population from 80,000 in 1851, to more than 500,000 just a decade later.<sup>155</sup> Shifting populations presented serious administrative issues which caused the state governments tremendous strain. Yet the gold rush presented the Australian state governments with an opportunity to prove themselves autonomous.

In 1854, a group of gold miners, embittered by their inability to compete with increasingly corporatized and large-scale mining efforts in Victoria, decided to stage a symbolic rebellion against the Victorian government who they viewed as corrupt.<sup>156</sup> Led by Irish immigrant Peter Lalor, the miners engaged in hand-to-hand combat with the Victorian police, but were easily defeated.<sup>157</sup>

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<sup>149</sup> *Id.* at 31.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 32.

<sup>152</sup> CLARK, *supra* note 138, at 32.

<sup>153</sup> *Id.* at 55.

<sup>154</sup> *Id.* at 56.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*



Although it was short-lived, The Eureka Stockade, as it became known, “brought to light one interesting facet of the developing national character, in that it showed clearly that native-born Australians would not take up arms for their political beliefs. . . . Events in the next decades were to show that colonists would take up arms to enhance their own individual welfare, but they would not do so in significant numbers for any political or social cause.”<sup>158</sup>

The gold rush showed that Victoria and New South Wales were not only able to self-govern, but were financially independent.<sup>159</sup> This development was crucial because Australia’s financial reliance on Britain had long been Britain’s reason to keep power in Westminster.<sup>160</sup> By 1861, each of the Australian colonies, minus Western Australia, had bicameral legislatures and voting rights for colonists.<sup>161</sup>

Unlike the Irish, Australians “saw no conflict in being both Australian and British simultaneously.”<sup>162</sup> Solidarity is incredibly strong between the two countries. Australia stepped in to aid the British in their conflict in Sudan in 1885, as they would again in World War I and II.<sup>163</sup> Calls to break all ties with Britain were consistently rejected by a majority of Australians in the 1800s.<sup>164</sup>

### 3. *Achieving Independence*

Overall, Australia’s move toward independence was a slow and nonviolent process, as distinguished from their American and Irish counterparts. But despite their commitment to Britain, the Australian colonies began to discuss joining together into a federation in the late nineteenth century. Although smaller colonies feared a lack of power in a new federation, all six states would

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<sup>158</sup> CLARK, *supra* note 138, at 56-57.

<sup>159</sup> *See id.* at 59.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 70–71.

<sup>163</sup> *Id.* at 71.

<sup>164</sup> CLARK, *supra* note 138, at 71.

finally agree to join the federation, and a constitution was enacted in 1901.<sup>165</sup> Still, Australia remained tied to the British government. It was not until 1942 that Australia would take its next step toward independence. In 1942, Australia adopted the Statute of Westminster, which had been enacted by the English Parliament in 1931.<sup>166</sup> The Statute set out as law the constitutional independence of Australia, Canada, New Zealand, and other British colonies.<sup>167</sup> The Statute also defined these former British colonies as having equal sovereign status as Britain itself.<sup>168</sup> Finally, in 1980, Australia cut all significant ties to Britain in the Australia Act, though the Queen of England remains the Australian Head of State.<sup>169</sup> The Act also ended all constitutional provisions providing for appeal from Australian courts to English courts, and ended the inclusion of Acts of the British Parliament into Australian law.<sup>170</sup>

#### B. *Australian Government Structure and the High Court*

Australia's governmental structure has aptly been described as a "Washminster" system, blending parliamentary and presidential aspects into its constitution.<sup>171</sup> Similar to the United States' federalist system, the Australian government is divided vertically between a federal government and the state government.<sup>172</sup> The federal government's power is divided horizontally by the constitution into an executive, legislative, and judicial branch.

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<sup>165</sup> See *id.* at 79–94.

<sup>166</sup> Statute of Westminster, 1931 (Eng.) available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1081723>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Australian Act of 1986 available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/aa1986114/](http://www.austlii.edu.au/au/legis/cth/consol_act/aa1986114/).

<sup>170</sup> *Id.*

<sup>171</sup> Elaine Thompson, A Washminster Republic, *in* WE, THE PEOPLE 91–113 (George Winterton ed., 1994). Australia is quite similar to Ireland in the manner its combines presidential and parliamentary elements. See *supra* Part II.B.

<sup>172</sup> See generally AUSTL. CONST. §§ 106–109.

Section 71 of the Australian Constitution vests ultimate judicial authority in a High Court.<sup>173</sup> The High Court has the power to review the constitutionality of laws.<sup>174</sup> It does not, however, have the power of abstract judicial review like the Irish Supreme Court. The High Court does have a significant level of appellate jurisdiction. It can hear appeals from the federal courts, and even from the highest state courts, on purely state issues.<sup>175</sup> This is an intriguing fact considering Australia's commitment to federalism.

Technically the Governor-General, the Queen's representative in the Parliament and ceremonial executive, appoints the High Court Justices.<sup>176</sup> In practice however, Justices are appointed by the Prime Minister on advice from the Attorney-General and Cabinet.<sup>177</sup> The constitution requires a minimum of only three Justices to sit on the High Court,<sup>178</sup> but the Parliament has provided for a Chief Justice and six other Justices.<sup>179</sup> The constitution requires no formal legal qualifications for Justices, but that he or she already be a judge or have at least five years experience as a barrister or solicitor.<sup>180</sup> The constitution requires that High Court Justices retire at age seventy.<sup>181</sup>

The High Court strictly adheres to a textualist approach when it interprets constitutional powers issues.<sup>182</sup> Conversely, when analyzing rights issues, the Australian High Court has "rejected any semblance of textualism," finding rights rooted in the background and purposes of the

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<sup>173</sup> *Id.* at § 71, 73.

<sup>174</sup> *Id.* at § 76.

<sup>175</sup> *Id.* at § 73(ii); James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627, 667–68 (1997).

<sup>176</sup> AUSTL. CONST. § 72(i).

<sup>177</sup> See JACKSON & TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 499 (Foundation Press 2nd ed. 2006) (1999).

<sup>178</sup> AUSTL. CONST. § 71.

<sup>179</sup> High Court of Australia Act 1979 § 5.

<sup>180</sup> *Id.* at § 7(a)-(b).

<sup>181</sup> AUSTL. CONST. § 72.

<sup>182</sup> Mayer & Schweber, *Does Australia Have a Constitution? – Part II The Rights Constitution*, 25 UCLA PAC. BASIN L.J. 265, 271–72 (2008).

constitution.<sup>183</sup> Beginning the 1990s, the High Court began analyzing rights issues using the doctrine of proportionality.<sup>184</sup>

### C. *Gun Controls in Australia*

#### 1. *Pre-1996*

Prior to 1996, gun control was mainly effectuated at the state level by each state, without regard to the laws of other states.<sup>185</sup> New South Wales imposed the first gun registration scheme in 1802.<sup>186</sup> In the 1920s and 1930s, each Australian state jurisdiction enacted its own form of firearm registration.<sup>187</sup> But each state enacted different registration laws, leading to conflicts over which state law, if any, could take preeminence over others.<sup>188</sup>

#### 2. *The 1996 National Agreement on Firearms*

On April 28, 1996, a 28-year-old Australian went on a killing spree in Tasmania, killing 35 and wounding 21 others in the Port Arthur Massacre.<sup>189</sup> Following the tragedy, then-Prime Minister John Howard urged the states to form a coalition and adopt an agreement on firearms.<sup>190</sup> This was necessary because Howard's federal government could not constitutionally enact such legislation.<sup>191</sup>

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<sup>183</sup> *Id.* at 272.

<sup>184</sup> See Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 39 (2005).

<sup>185</sup> KOPEL, *supra* note 145, at 195.

<sup>186</sup> Malcolm Brown, *A Nation Won by Guns*, Sydney Morning Herald, Feb. 27, 1988, 68.

<sup>187</sup> Firearms Act 1921 (Victoria); Gun License Act 1920 (New South Wales); Firearms Licence Act 1927 (Queensland); Pistol Licence Act 1929 (South Australia); Firearms Act 1931 (Western Australia); Firearms Act 1932 (Tasmania); Firearms Registration Ordinance 1932 (Northern Territory). KOPEL, *supra* note 145, at 195, citing RICHARD HARDING, FIREARMS AND VIOLENCE IN AUSTRALIAN LIFE: AN EXAMINATION OF GUN OWNERSHIP AND USE IN AUSTRALIA 167 n.2 (University of Western Australia Press, 1981).

<sup>188</sup> See KOPEL, *supra* note 145, at 195.

<sup>189</sup> See *Port Arthur Tragedy Remembered*, The Sydney Morning Herald, Apr. 28, 2008 available at <http://www.smh.com.au/news/national/australias-worst-mass-murder-remembered/2006/04/28/1145861514613.html>.

<sup>190</sup> *Tasmania's Tragedy: Our Lax Gun Laws*, The Australian, Apr. 30, 1996.

<sup>191</sup> This is due to the Australian Constitution's Commerce Clause, discussed *infra*, Part III.D.1.

On May 10, 1996, the Australasian Police Ministers' Council adopted numerous resolutions with the goal of more effective firearms control.<sup>192</sup> The regulations were designed to ensure uniform control of the circulation of firearms.<sup>193</sup> Its principle provisions included: (1) a ban on automatic firearms, most semi-automatic firearms, and handguns, (2) the exclusion of the need for self-protection as a legitimate reason for owning a firearm, (3) a classification scheme based on firearm type and need for the firearm,<sup>194</sup> (4) mandatory safety training, (5) a 28-day waiting period before obtaining a firearm,<sup>195</sup> (6) standards for the storage of firearms and (7) the recording of all sales by firearms dealers.<sup>196</sup> The state governments also provided for a "buyback program" in which the government would purchase newly-banned firearms from owners.<sup>197</sup> From 1996 to 1997, the Australian state governments collected 643,726 prohibited firearms.<sup>198</sup> The cost was approximately \$A320 million, or about \$U.S. 230 million.<sup>199</sup>

### 3. *Internal Influences*

Americans are often advised to enact stringent gun control laws like other democracies.<sup>200</sup> Meanwhile, others "warn Australians about America."<sup>201</sup> As in Ireland, the Australian press often depicts the United States as a lawless, uncivilized, "gun-toting" culture that should serve as a vivid

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<sup>192</sup> See Chief Executive Officer of Customs v. Granite Arms Party, 221 A.L.R. 137 (2005) available at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/51.html> (discussing the enactment of the Agreement).

<sup>193</sup> *Id.*

<sup>194</sup> For example, under the classification system, most handguns are placed in Category H, a completely restricted category. Semiautomatic rifles with a magazine capacity of less than 10 rounds are in Category C, which prohibits ownership except for occupational purposes, i.e. security employees and rural farmers who need to protect livestock from predators.

<sup>195</sup> Note that this is in direct distinction to one of *Heller's* key rationales: the need for self-defense. See District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

<sup>196</sup> Australian Police Ministers Council, Special Firearms Meeting, Resolution, available at <http://www.austlii.edu.au/au/other/apmc/>.

<sup>197</sup> For an extensive discussion of the Australian buyback, see Router & Mouzos, *Australia: A Massive Buyback of Low-Risk Guns*, in LUDWIG & COOK, EVALUATING GUN POLICY 121–53 (Brookings Institution Press, 2003).

<sup>198</sup> *Id.* at 130.

<sup>199</sup> *Id.* Exchange rate as of September 25, 1997. *Id.* at n.33.

<sup>200</sup> See KOPEL, *supra* note 145, at 11 (describing such rhetoric).

<sup>201</sup> See *id.* at 208.

example of why gun controls should be upheld. The United States is frequently described by the Australian press as “a country beholden to the gun lobby.”<sup>202</sup> Lately, the Australian press has employed the Columbine and Virginia Tech massacres as poster children in the campaign to show that the United States has failed to curb violence because of a lack of proper gun controls.<sup>203</sup>

In 2002, a student armed with five loaded handguns killed two fellow students and wounded five others at Monash University in Victoria.<sup>204</sup> In response, the Australian state governments promised heavier penalties for firearms violations.<sup>205</sup> Almost twenty years ago, in “*The Samurai, the Mountie and the Cowboy*,” David Kopel compared the gun controls of the United States with seven other democracies, including Australia, and concluded: “[A]s long as any guns exist in civilian hands, there will always be . . . massacres that arouse the press and inflame public fears.”<sup>206</sup> Time has proven Kopel right. Many in the Australian media used Port Arthur and Monash as springboards to sound the call for increased gun controls.<sup>207</sup> This is fairly typical in other democracies as well: “[G]un-control laws are enacted predominantly in times of public hysteria over an exaggerated and often nonexistent threat.”<sup>208</sup>

Media coverage of the mass shootings in Australia has drawn the ire of the many pro-gun groups in Australia. Perhaps sensing the power of the media as a moving-force in the gun control dialogue, these groups have lashed back against the media. The Coalition of Law Abiding Sporting Shooters (CLASS), a small pro-gun group, has made biting criticisms of the media’s lax scrutiny of

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<sup>202</sup> Alan Howe, *Howard’s Bold Bullseye has Saved Thousands*, Herald Sun, Apr. 13, 2009, available at <http://www.news.com.au/heraldsun/story/0,21985,25324460-5000117,00.html>.

<sup>203</sup> *Id.*

<sup>204</sup> See Pdraic Murphy, *Two Die as Gunman Attacks His Own Class*, The Sydney Morning Herald, Oct. 23, 2002 <http://www.smh.com.au/articles/2002/10/21/1034561446759.html>.

<sup>205</sup> Crabb et al., *PM Flags Tougher Gun Laws*, The Age, Oct. 23, 2002, <http://www.theage.com.au/articles/2002/10/22/1034561495101.html>.

<sup>206</sup> KOPEL, *supra* note 145, at 209.

<sup>207</sup> See, e.g., *Total Ban is Best Form of Protection*, Daily Telegraph Apr. 30, 2001, 20 (Editorial) (“There is no reason for anyone to be allowed to carry a gun on the streets of Sydney or any other Australian city . . . the Port Arthur massacre changed the national psyche.”); *Tasmania’s Tragedy: Our Lax Gun Laws*, The Australian, Apr. 30, 1996 (“Now is the time to unite to decisively defeat the gun lobby.”).

<sup>208</sup> KOPEL, *supra* note 145, at 209.

the government: “[m]any reporters will repeat word for word, right down to the headline, any media release issued by government press secretaries without even the most cursory checking of the contents for accuracy. Some journalists often mistake opinion for fact.”<sup>209</sup>

The Sporting Shooters Association of Australia (SSAA), Australia’s largest pro-gun group, “roughly comparable”<sup>210</sup> to the National Rifle Association, has also been critical of the Australian Media.<sup>211</sup> The SSAA’s main objective is to preserve the ability of Australians to hunt, collect, and use firearms for target shooting.<sup>212</sup> SSAA is not very influential, compared with the NRA, but its National President Bob Green states, “[w]e spend hundreds of thousands of dollars lobbying politicians, liaising with academics, issuing press releases and publishing books, magazines and journals that state our case for sports shooting and recreational hunting, and then, of course, there is our work at the international level and the United Nations.”<sup>213</sup> SSAA has indeed turned its sights to an international level of partnership, joining a coalition of pro-gun groups in The World Forum on Sport Shooting Activities (WFSA), an official United Nations Non-Governmental Organization.<sup>214</sup>

The Australian equivalent to United States pro-gun control group Handgun Control, Inc. is Gun Control Australia, Inc.<sup>215</sup> This group integrates a “let’s not be like America” argument into their mission statement and online articles.<sup>216</sup> The group also fears that SSAA might be bolstered by the NRA or other pro-gun organizations from America: “Australians should be concerned about

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<sup>209</sup> Coalition of Law Abiding Sporting Shooters, *Spinning a Tale—Media Bias and Government Spin: Working Together for a “Safer” Australia* [http://www.class.org.au/spinning\\_a\\_tale.htm#\\_edn](http://www.class.org.au/spinning_a_tale.htm#_edn).

<sup>210</sup> Router & Mouzos, *supra* note 197, at 142.

<sup>211</sup> See Sporting Shooters Association of Australia Press Release, *Australia Post Misses Out on Golden Opportunity*, Mar. 21, 2006 <http://www.ssaa.org.au/newssaa/pressreleases/pr210306.html> (“it is ironic that Australia Post will be commemorating gold medalist shooters while simultaneously prohibiting the carriage of items needed for those champions”).

<sup>212</sup> See generally Sporting Shooters Association of Australia: Aims and Objectives of the Association <http://www.ssaa.org.au/newssaa/aims/Aims%20and%20Code%20of%20Ethics.htm>.

<sup>213</sup> Sporting Shooters Association of Australia: A word from National President Bob Green <http://www.ssaa.org.au/> (last visited April 24, 2009).

<sup>214</sup> World Forum on the Future of Sport Shooting Activities: About WFSA <http://www.wfsa.net/about.html>.

<sup>215</sup> Router and Mouzos, *supra* note 197, at 142.

<sup>216</sup> Gun Control Australia: Our Task Ahead (warning against the “American path” and stating that American has a “gun problem”) <http://www.guncontrol.org.au/index.php?article=3>.

the close relationship between some shooter groups and extremist American gun organisations. . . . We don't need American gun values and gun policies in Australia any more than we need America's 20 times greater rate of gun homicide."<sup>217</sup>

#### D. *Australia Gun Control Jurisprudence & Constitutional Issues*

Australia, like Ireland, has no express provision in its constitution guaranteeing a right to bear arms. In fact, the Australian Constitution contains no bill of rights whatsoever.<sup>218</sup> Of course it must be remembered that it is possible to have constitutional rights in the absence of written text explicitly providing those rights. Constitutionalism is possible without a constitution. Because of the absence of a textual right to bear arms in their constitution, Australia's gun advocates argue that their right to bear arms comes from the 1689 English Bill of Rights' right to bear arms provision.<sup>219</sup> Although rejected by the High Court, this is not a completely untenable position.<sup>220</sup> After all, the High Court has recognized a right similar to habeas corpus,<sup>221</sup> a freedom of expression,<sup>222</sup> and a right to vote,<sup>223</sup> despite the absence of express text providing those rights.<sup>224</sup> Even so, Australia is regarded as having relatively weak individual rights due to the lack of a textual foundation.<sup>225</sup> Not

<sup>217</sup> Gun Control Australia, *Will the Horror Eventuate: Will America Come to Australia?*, <http://www.guncontrol.org.au/index.php?article=98>. Indeed, in 1999, the U.S. homicide by firearm rate was 2.97 per 100,000 residents compared with .33 per 100,000 in Australia. Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, 1998–2000 [http://www.unodc.org/pdf/crime/seventh\\_survey/7sc.pdf](http://www.unodc.org/pdf/crime/seventh_survey/7sc.pdf). However, the group's assertion of causation is, of course, debatable. *See infra* Part III.E.

<sup>218</sup> For some of the arguments about the possible implementation of a bill or rights to the Australian Constitution, *see* Mayer & Schweber, *supra* note 182; *see also* Stone, *supra* note 182.

<sup>219</sup> *See* KOPEL, *supra* note 145, at 209. The High Court has never accepted the argument that the Magna Carta and Declaration of Rights of 1689 are a source of rights in Australia. Mayer & Schweber, *supra* note 182, at 298.

<sup>220</sup> Mayer & Schweber, *supra* note 182, at 298.

<sup>221</sup> *Chu Kheng Lim v. Minister for Immigration*, (1992) 176 C.L.R. 1.

<sup>222</sup> *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, 559–62.

<sup>223</sup> *Roach v. Electoral Commissioner* (2007) H.C.A. 43, 26.

<sup>224</sup> *See* Mayer & Schweber, *supra* note 182, at 298 (discussing these cases as ones in which the High Court found “substantive rights,” even in the absence of explicit constitutional text). In *Lange* however, the High Court indicated that constitutional analysis must have at least some textual foundation. *See* Stone, *supra* note 184, at 35. Thus in *Lange*, the High Court found the freedom of expression was based on the constitutional guarantee of representative government, and in *Roach*, it found that the right to vote is founded on the constitution's statement that the legislature must be “directly chosen by the people.” Mayer & Schweber, *supra* note 182, at 301–02.

<sup>225</sup> Stone, *supra* note 184, at 39–46.



surprisingly, constitutional issues with regard to gun control in Australia have a distinctive flavor of federalism and constitutional power structure rather than individual rights issues.

### 1. *Federal Gun Controls*

The federal government's role in gun control is limited primarily to customs controls.<sup>226</sup> In 1991, the federal government was able to use its customs power to ban importation of many semi-automatic weapons.<sup>227</sup> The limitations on the federal government in all other areas of gun control are the result of the fact that the Australian Constitution contains a Commerce Clause which confines the national parliament to acting in interstate commerce.<sup>228</sup> Although its level of adherence has ebbed and flowed,<sup>229</sup> the Australian High Court has a history of judicial commitment to federalism and state sovereignty.<sup>230</sup> Early in the twentieth century, the Australian High Court stated that the parliament could only act in areas which have a "direct, substantial and proximate" effect on commerce.<sup>231</sup> This was revised in *Airlines of NSW Pty Ltd v. NSW (No.2)*,<sup>232</sup> where the High Court adopted a direct-indirect effect test—a much narrower test than the United States Supreme Court's "significant effect" test.<sup>233</sup> In fact, a few members of the High Court specifically rejected the United States Supreme Court's substantial effect test.<sup>234</sup> Under the Australian High Court's direct-indirect test, the national legislature's target must "directly and causally" affect interstate commerce.<sup>235</sup>

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<sup>226</sup> See KOPEL, *supra* note 145, at 196. The federal government is also free to enact legislation in Canberra, which, as the capital of Australia, is a federal jurisdiction. *Id.*

<sup>227</sup> AUSTL. CONST. § 86.

<sup>228</sup> The Australian Constitution provides: "The Parliament shall . . . have power to make laws . . . with respect to: (i) Trade and commerce with other countries, and among the States . . ." AUSTL. CONST. § 51(i).

<sup>229</sup> Mayer & Schweber, *supra* note 182, at 302–13.

<sup>230</sup> See generally Jeremy Philips, *United States v. Lopez: Constitutional Interpretation in the United States and Australia*, 18 UNIV. N. S. WALES L. J. 532, 532–54 (1995).

<sup>231</sup> *Federated Amalgamated Gov't Ry. and Tramway Serv. Ass'n v. NSW Ry. Traffic Employees Ass'n* (1906) 4 C.L.R. 488.

<sup>232</sup> *Airlines of NSW Pty. Ltd. v. NSW (No. 2)* (1965) 113 C.L.R. 54.

<sup>233</sup> Philips, *supra* note 229, at 532–54.

<sup>234</sup> *Id.* (citing *Airlines*, at 113-15, 127, 149–50).

<sup>235</sup> *Airlines of NSW Pty Ltd v. NSW (No. 2)* (1965) 113 C.L.R. 54.

Two cases decided by the Australian High Court dealing with the regulation of air travel are illustrative of the direct–indirect test. In the first case, legislation regulating air travel from one state to another state (i.e. interstate) was found properly enacted under the Commerce Clause.<sup>236</sup> In the second case, legislation permitting the federal government to transport passengers by air within a state (i.e. intrastate) was found to be beyond the scope of the Commerce Clause, despite the fact that such legislation might be conducive “to the efficiency, competitiveness and profitability of . . . interstate activity[.]”<sup>237</sup>

The narrow test adopted by the Australian High Court means that the Australian Parliament has long faced significant barriers to enacting nationwide legislation, barriers felt by the United States Congress only when *United States v. Lopez* struck down its attempt to regulate firearms near schools.<sup>238</sup> Thus, it is widely recognized that any attempts by the Australian Parliament to enact national gun control laws would be found unconstitutional.<sup>239</sup>

## 2. *State Gun Controls*

On the reverse of the Commerce Clause coin lays the issue of individual state measures that touch or “burden” interstate commerce. In the United States the Dormant Commerce Clause, inferred from the Commerce Clause, strikes down state laws which overly burden interstate commerce, thereby guarding Congress’ exclusive power to regulate interstate commerce.<sup>240</sup> The Australian Constitution, unlike the United States Constitution, explicitly provides that “customs, trade, commerce and intercourse among the States . . . shall be absolutely free.”<sup>241</sup> This has had a

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<sup>236</sup> *Id.*

<sup>237</sup> Attorney-Gen. (WA) v. Australian Nat’l Airlines Comm’n (1972) 138 C.L.R. 492.

<sup>238</sup> 514 U.S. 549 (1995). *See generally* Philips, *supra* note 229, at 532–54.

<sup>239</sup> *See* Sandra Egger and Rebecca Peters, *Firearms Law Reform: The Limitations of the National Approach*, available at <http://www.aic.gov.au/publications/proceedings/17/egger-peters.pdf> (“The Federal Government does not have the constitutional power to enact laws regulating possession, other than in the narrow federal and territorial jurisdiction and thus a cooperative state/federal arrangement is the only possible option.”).

<sup>240</sup> *See* Pike v. Burch Church, Inc., 397 U.S. 137 (1970).

<sup>241</sup> AUSTL. CONST. § 92.

similar effect as the United States' Dormant Commerce Clause, and has prevented each individual state from enforcing their gun registration laws in other states.<sup>242</sup>

The Australian High Court is very protective of this “complete freedom of trade.”<sup>243</sup> For example, in *Chapman v. Suttie*, Victoria attempted to prosecute a Victorian firearms dealer who sold guns via mail to buyers in another state who were not registered under the Victoria licensing scheme.<sup>244</sup> The High Court held that Victoria could not force buyers outside its borders to obtain Victoria gun licenses.<sup>245</sup> The court quashed the convictions of the firearms dealer and stated that imposing an obligation on gun dealers to require a purchaser to produce a Victorian firearm certificate “strikes directly and immediately at the very heart of the trade and must be taken to constitute an infringement of s. 92.”<sup>246</sup>

It would be interesting to see if this result might be any different if the High Court were deciding the issue today. This is because the High Court has changed its approach to reviewing § 92 violations. In *Cole v. Whitfield*, the High Court held that the wording “absolutely free” in § 92 guaranteeing freedom of trade was not an absolute freedom from all restrictions on trade.<sup>247</sup> The High Court then set forth its test for determining whether § 92 had been violated. First, a law or measure is only invalid if it imposes “discriminatory burdens of a protectionist kind.”<sup>248</sup> Second, a law or measure can be “saved” if it does not have a protectionist purpose and any burden on trade is limited and the approach is tailored to the purpose it serves.<sup>249</sup>

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<sup>242</sup> See KOPEL, *supra* note 145, at 198.

<sup>243</sup> *Chapman v. Suttie*, 110 C.L.R. 321 (1963) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1963/9.html>.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> [1988] 165 C.L.R. 360.

<sup>248</sup> See Gonzalo Puig, *Abridged Proportionality in Australian Constitutional Review: A Doctrinal Critique of the Cole v. Whitfield Saving Test for Section 92 of the Australian Constitution*, 3 available at <http://www.enelsyn.gr/papers/w15/Paper%20abstract%20by%20Gonzalo%20Villalta%20Puig.pdf>.

<sup>249</sup> *Id.*

### E. *Statistical Findings*

A look at the statistical evidence from Australia is of particular interest considering the highly-publicized mass shootings at Monash University and Port Arthur that “sparked” strict gun controls in Australia.<sup>250</sup> In the Australian press, these incidents are frequently referred to in the same context as the Columbine and Virginia Tech shootings.<sup>251</sup>

#### 1. *Gun Ownership*

Legislation in the wake of the Port Arthur Massacre does appear to have reduced the prevalence of private firearms in Australia. Pursuant to the National Firearms Agreement, from 1997–1998 over 643,000 prohibited firearms were collected and destroyed in Australia, making it the largest civilian small-arms destruction program in history.<sup>252</sup> That number constituted about twenty percent of the total stock of private firearms in Australia.<sup>253</sup>

In 1979, there were sixteen to twenty guns for every 100 Australians.<sup>254</sup> That number rose to twenty-five guns per 100 residents in 1988.<sup>255</sup> Eight years after the National Agreement on Firearms, a 2003 study estimated there were eleven guns for every 100 people.<sup>256</sup> However, that number rose back to fifteen guns for every 100 people in 2007.<sup>257</sup>

Australia ranks sixteenth in the world based on its current rate of 15 guns per 100 people.<sup>258</sup> Compared with its pacific neighbors, Australia’s rate is well below some, such as New Zealand’s at twenty-two guns per 100 residents, but well above others, such as the Cook Islands at 3 guns per

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<sup>250</sup> Jamie Berry, *How a Shooting Spree Changed the Nation’s Gun Laws*, The Age, September 12, 2003, <http://www.theage.com.au/articles/2003/09/11/1063268520184.html>.

<sup>251</sup> See, e.g., Alex Robson, *Gunning for the Wrong People Over Massacre*, The Daily Telegraph (Sydney), Apr. 25, 2007 available at <http://www.ssaasa.org.au/alerts2.htm>.

<sup>252</sup> Geneva Graduate Institute of International Studies “Small Arms Survey: 2002”

<sup>253</sup> Router & Mouzos, *supra* note 197, at 130.

<sup>254</sup> KOPEL, *supra* note 145, at 210.

<sup>255</sup> *Id.*

<sup>256</sup> Geneva Graduate Institute of International Studies “Small Arms Survey: 2004” available at [http://www.smallarmssurvey.org/files/sas/publications/year\\_b\\_pdf/2004/2004SASCh9\\_summary\\_en.pdf](http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2004/2004SASCh9_summary_en.pdf).

<sup>257</sup> Geneva Graduate Institute of International Studies “Small Arms Survey: 2007”.

<sup>258</sup> *Id.* The United States leads this category with an estimated 90 guns per 100 residents. *Id.*

100 residents.<sup>259</sup> In sheer numbers, Australia has an estimated 3.2 million civilian firearms, for a world-ranking of twenty-sixth.<sup>260</sup>

## 2. *Gun Violence*

In 1998, two years after the Port Arthur Massacre, the Australian Institute of Criminology released a study detailing the impact of the National Agreement of Firearms on gun violence rates.<sup>261</sup> The study found a decline in firearm-related deaths in 1997, mostly due to declines in suicides and firearms accidents.<sup>262</sup> The homicide rate fell from .59 per 100,000 people in 1996 to 4.3 per 100,000 in 1997.<sup>263</sup> However, the 1996 level included the Port Arthur victims, skewing that year's data.<sup>264</sup> Furthermore, the 1997 homicide rate was higher than the 1994 level, and near to the 1995 level.<sup>265</sup> The study also found preliminary evidence that in some situations, such as suicide and armed robbery, other methods or weapons had replaced firearms.<sup>266</sup> But the study was unable to gauge the overall success of the National Agreement: "As a result of the many issues associated with evaluation research, it is still too soon to determine definitively whether Australia's uniform firearms laws have achieved their aim in reducing firearm-related violence and misuse."<sup>267</sup>

In 2000, 16% of intentional homicides in Australia were committed with a firearm.<sup>268</sup> In the same year, Australia's intentional homicide by firearm rate per 100,000 was .31, just .01 lower than

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<sup>259</sup> Geneva Graduate Institute of International Studies "Small Arms Survey: 2004".

<sup>260</sup> *Id.* The United States leads this category as well, with an estimated 250 to 290 million total civilian firearms. *Id.* There is a significant drop-off between the United States and India, the country with the second highest number of firearms at 42 million. *Id.*

<sup>261</sup> Jenny Mouzos, *Firearm-related Violence: The Impact of the Nationwide Agreement on Firearms*, 116 Australian Institute of Criminology available at [http://www.smallarmssurvey.org/files/portal/spotlight/country/asia\\_pdf/asia-australia-1999.pdf](http://www.smallarmssurvey.org/files/portal/spotlight/country/asia_pdf/asia-australia-1999.pdf).

<sup>262</sup> *Id.* In 1997, the suicide rate dropped to 1.76 per 100,000, down from about 2.3 per 100,000 from 1993–1996. The study also found that there were 85 fewer firearm-related deaths in Australia. *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See id.*

<sup>267</sup> *Id.*

<sup>268</sup> Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, 1998–2000 available at [http://www.unodc.org/pdf/crime/seventh\\_survey/7sc.pdf](http://www.unodc.org/pdf/crime/seventh_survey/7sc.pdf).

Ireland's rate.<sup>269</sup> However, Australia's total intentional homicide rate per 100,000 was 1.57, about 50% higher than Ireland's.<sup>270</sup>

Today, the statistical impact of Australia's gun control measures is a source of serious debate in Australia, and accounts of the 1996 National Agreement on Firearms' efficacy vary widely. Some state that homicides decreased and that the rate of suicide was noticeably reduced.<sup>271</sup> But more and more studies have concluded that violent crime, including homicides, actually increased,<sup>272</sup> and that the suicide rate was unchanged.<sup>273</sup> The National Center for Policy Analysis states that Australia's violent crime rate rose by a staggering 42.2% from 1995 to 2007.<sup>274</sup> Other researchers conclude that

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<sup>269</sup> *Id.*<sup>270</sup> *Id.*

<sup>271</sup> See Mouzos, *supra* note 260.

<sup>272</sup> See Router & Mouzos, *supra* note 197, at 123; See also Don Kates, *Genocide, Murder and the Fundamental Human Right to Defend One's Life*, 2 J. L. ECON. & POL'Y 309, 315 (2006) (stating that Australia's "violent crime rates now far exceed those in the U.S. . . . despite having severely restricted guns for decades, and banning and confiscating hundreds of thousands of guns from those who were law abiding enough to comply in the 1990s").<sup>273</sup> Lee, Wang-Sheng; & Suardi, Sandy (2008-8). [The Australian Firearms Buyback and Its Effect on Gun Deaths](http://www.melbourneinstitute.com/wp/wp2008n17.pdf), Melbourne Institute Working Paper No. 17/08 (Melbourne Institute) <http://www.melbourneinstitute.com/wp/wp2008n17.pdf>. ("the NFA did not have any large effects on reducing firearm homicide or suicide rates").<sup>274</sup> National Center for Policy Analysis: Daily Policy Digest: Australia: More Violent Crime Despite Gun Ban, (citing article by Austin Nemerov) [http://www.ncpa.org/sub/dpd/index.php?Article\\_ID=17847](http://www.ncpa.org/sub/dpd/index.php?Article_ID=17847). Over the same period, the United States rate dropped by 31.7%, without similar nationwide restrictions. *Id.* Bureau of Justice Statistics show a significant drop-off in the total number of serious violent crimes (including homicides) in the United States from 4,190,000 in 1993 to 1,823,000 in 1995. Bureau of Justice Statistics: Four Measures of Serious Violent Crime <http://www.ojp.usdoj.gov/bjs/glance/tables/4meastab.htm>.<sup>275</sup> See Router & Mouzos, *supra* note 197, at 141 ("For those interested in gun buyback proposals as a means of reducing violent crime, the results provide little insight.").

the effects are indeterminable.<sup>275</sup> Finally, some academics assert that the measures had no effect on an already existing trend of decreasing violence.<sup>276</sup>

Statistics from Australia and Ireland seem to prove accurate the growing consensus that “[g]un cultures’ do not automatically translate into armed conflict.”<sup>277</sup> At the very least, the statistics reveal that any purported correlation between gun controls and decreasing violence is tenuous at best. Rates of gun violence in Ireland have remained fixed, despite increasing gun controls, and there is a strong indication that Australia’s efforts have only exacerbated violent crime rates.

#### IV. ANALYSIS OF CONSTITUTIONAL ISSUES

##### A. *United States*

In the United States, the right to bear arms is now a substantive right. By any account, *Heller* was a momentous decision in United States constitutional law because it put to rest the long debated question of whether the Second Amendment right to bear arms should be treated as protection for individuals or a collective right for militias. It also struck down one of the most restrictive gun control laws to ever be attempted in the United States.

Although its full impact is yet to be determined, and the critics are already abundant,<sup>278</sup> *Heller*, if incorporated,<sup>279</sup> will be instrumental at preventing states from “experimenting” with methods of

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<sup>276</sup> See Matthew Moore, *Buyback Has No Effect on Murder Rate*, The Sunday Morning Herald, Oct. 24, 2006, <http://www.smh.com.au/news/national/buyback-has-no-effect-on-murder-rate/2006/10/23/1161455665717.html> (“statistics gathered in the decade since Port Arthur showed gun deaths had been declining well before 1996 and the buyback . . . made no difference in the rate of decline.”).

<sup>277</sup> Stephanie Schwandner-Sievers, “Gun culture” in *Kosovo: Questioning the Origins of Conflict*, in SMALL ARMS SURVEY, ch. 8 (2005).

<sup>278</sup> See, e.g., William G. Merkel, *District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009) (accusing Justice Scalia of “manipulate[ing] outlying evidence to dress up his claim in ill-fitting pseudo academic garb” to reach the decision that the framers intended to protect private gun ownership); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 625 (2008) (arguing that Justice Scalia’s use of history was arbitrary and results-oriented). Indeed, the criticism of *Heller* has even come from some unlikely sources, including a conservative judge on the Fourth Circuit. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (comparing *Heller* to *Roe v. Wade*, 410 U.S. 113 (1973), and arguing that the decision improperly presses a political agenda in the courts, thereby stunting the political process).

crime control that venture into the spheres of home-protection and self-protection, the two best reasons for having a right to bear arms.<sup>280</sup> Unlike the District of Columbia's outright ban on handguns and stringent trigger-lock requirement, most licensing schemes in the United States will likely remain constitutional. Although *Heller* was novel, it was not actually radical in its result.<sup>281</sup> First, it made it clear that the right to bear arms is not an absolute right; there are several places, such as in "schools and government buildings," where the government has a stronger interest in prohibiting possession.<sup>282</sup> There are also certain persons, such as insane persons or felons, who may yet be disqualified from bearing arms.<sup>283</sup> Next, it did not hold that every weapon, such as "M-15 rifles and the like," would be allowed.<sup>284</sup> The right to bear arms extends to only those weapons "in common use at the time."<sup>285</sup>

These limitations on the Second Amendment right to bear arms are consistent with the Court's self-defense and home-protection rationales. Not every type of gun is needed to protect the home, and the need to protect one's home is not applicable in several of the areas excused from the Court's holding. For example, when a person is in a government building or a school, he or she obviously does not need to protect his or her home. The Court's holding is also well-tailored to its self-defense rationale—the limitations on who can bear arms are not likely to undermine this rationale in any significant way. Insane persons or felons are two types of individuals unlikely to use

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<sup>279</sup> Currently, the circuits are split as to incorporation, with the Ninth Circuit finding the Second Amendment is incorporated, and the Second and Seventh Circuits finding that it is not. *See Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) (applying the Second Amendment to the states but holding that local governments may exclude weapons from public buildings and parks.); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009) (stating that the Second Amendment applied only to limitations the federal government sought to impose); *National Rifle Association v. Chicago*, 567 F.3d 856 (7th Cir. 2009) (noting that the Supreme Court has rebuffed requests to apply the [Second Amendment](#) to the states).

<sup>280</sup> *See* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (holding that "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" outweighs state interest in preventing handgun violence).

<sup>281</sup> *See* Allen Rostron, *Protecting Gun Rights and Improving Gun Control after District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383 (2009) (praising *Heller* for "confirming that reasonable gun regulations will not lead to extreme measures like prohibition of all guns" and surmising that "*Heller* may turn out to be an important victory for both gun control and gun rights.").

<sup>282</sup> *Id.* at 2799.

<sup>283</sup> *Id.* at 2816–17.

<sup>284</sup> *Id.* at 2817.

<sup>285</sup> *Id.* (citing *United States v. Miller*, 301 U.S. 174, 179 (1939)).



a gun for self-defense in the first place. In sum, the Court's decision accomplishes what it sets out to do—protecting law-abiding citizens in their homes from governmental experimentation with gun controls, while recognizing a limited state role in gun control.

### B. *Ireland*

The primary checks on gun control in Ireland come from constitutional structure doctrines. Ireland's separation of powers doctrine is a powerful tool against gun controls. Irish case law shows that police commissioners are not free to employ whatever policy they desire, but rather must only act where the legislature has explicitly granted authority. This is particularly important in terms of the right to bear arms because those most in favor of disarming citizens are most likely to be among the police ranks.

Irish case law also shows a heartening level of judicial examination of each individual decision made by licensing authorities. A licensing decision with even the slightest amount of inconsistency or illogic is likely to be overturned by the courts. Demanding uniform and well-reasoned decisions from licensing authorities fosters respect for the law.

On the other hand, the legislature has shown that it has the ability to adapt to the courts. Following *Dunne*, it passed the Criminal Justice Act, reinstating many of the provisions the Supreme Court had struck down. The bad news for individuals in Ireland is that constitutional powers issues involve a tug-of-war match in which individuals essentially do none of the tugging. There is a strong argument that relying on the separation of powers and "persona designata" doctrines to limit the expansion of gun control in Ireland only has the effect of buying time.

But while a reasonable mind might believe that the only thing preventing a total ban on firearms in Ireland is mere hesitation on the part of legislature, it would be premature to assume that the Irish judiciary would accept such wholesale legislation at face value. The Irish Supreme Court

has on occasion found that there are certain unenumerated substantive rights held by the people.<sup>286</sup> Furthermore, it seems doubtful that the Irish, successful in their struggle for independence because they were willing to take up arms against their oppressors, would be quick to forget their struggle for history was facilitated by firearms. It is also seems doubtful the Irish legislature would ignore classic thinkers like Blackstone, who embraced the individual right to bear arms as inherent in the common law.<sup>287</sup>

On the other hand, it would be understandable if Ireland's bloody experience with domestic terrorism eventually drives them in the opposite direction. The rate of legislation enacted certainly supports the assertion that gun controls are stiffening in Ireland as a result of paramilitary activity.

### C. *Australia*

Case law shows that in Australia, the freedom of trade and the Commerce Clause are the primary barriers to gun control. Practically speaking, the freedom of trade does little to help an Australian citizen who just wants to keep a gun at home for self-protection. The freedom of trade most likely benefits firearms dealers. Amongst firearms dealers, the freedom of trade will only be of assistance to those selling guns to residents from other states. Narrowing the window further, the freedom of trade is now subject to proportionality review, which is more likely to uphold state infringement of the right. Moreover, shielding firearms dealers from government action is largely ineffective in advancing the personal self-defense rationale that *Heller* found so important in the United States. The Australian state legislatures have even determined that self-defense is not a legitimate need for owning a firearm.

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<sup>286</sup> The Irish Supreme Court found that the constitution's enumerated rights section was a non-exhaustive list of the rights guaranteed Irish citizens in *Ryan v. The Attorney General* [1965] I.R. 294 *available at* <http://www.bailii.org/ie/cases/IESC/1965/> (“To attempt to make a list of all the rights which may properly fall within the category of ‘personal rights’ would be difficult”).

<sup>287</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*136–39. Blackstone classified “having arms for . . . defence” as one of his five “auxiliary” rights. *Id.*

The Commerce Clause is equally inadequate at protecting firearm ownership. Although the Australian Supreme Court does closely scrutinize national legislation passed pursuant to the Commerce Clause, in practice this does little to restrict the expansion of gun controls. Policing in Australia, like the United States, is mainly done at the state level. Thus, the states are the entities most likely to enact gun controls in the first place, not the federal government. The federal government is also able to employ its customs power to prevent the imports of many firearms into Australia.

Australia is a case study of the importance of express rights. Without a bill of rights in the Australian Constitution, the courts have been reluctant to extend even the most basic rights. It was not until 1992 that the Australian High Court found an implied freedom of expression in the constitution. Considering the slow evolution of other individual rights, it is not surprising that extending a right to bear arms is low on the High Court's priority list. Australia's slow evolution of rights itself is somewhat of a contradiction to Australia's strong individualist tradition. Considering Australia's origins as a penal colony, where rights were near absolute zero, it seems odd that Australians would again allow their liberty to be eclipsed.

## V. CONCLUSION

The answer to our first question, "Is gun control really that different in the United States than in Ireland?" is "no."

While a total ban on firearms in Ireland is conceivable, actual gun licensing in Ireland is done in a manner not unlike many United States licensing schemes left intact even in *Heller's* wake.<sup>288</sup> In fact, most of Ireland's restrictions on gun ownership fall well within *Heller's* express exceptions to

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<sup>288</sup> *Heller*, 128 S. Ct. at 2816–17 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive areas such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."). The Court also made clear that this was its non-exhaustive list of "lawful regulatory measures." *Id.* at 2817 n.26.

the right to bear arms. For example, Ireland's gun restrictions on "persons of unsound mind" or violent felons are among the exceptions to the right to bear arms outlined in *Heller*.

History provides strong reasons for similar gun control attitudes in the United States and Ireland. As colonies, both were subjected to serious abuses at the hands of the British government. The Irish revolutionaries in the early 1900s, like the American colonists in the 1770s, realized that one of the few ways to break their colonial chains was through violence.

No doubt, in Ireland the right to bear arms is not recognized as an esteemed individual "right" in the same sense that it is in the United States. But even in light of *Heller*, the actual gun controls in place in Ireland do not differ significantly from many schemes left intact in the United States. Gun controls in Ireland pale in comparison to those in England. Irish court decisions show that although there is no express constitutional right to bear arms in Ireland, gun control is not as free-wheeling as some might contend. Indeed, this Article has established that there are in fact significant constitutional barriers to gun controls in Ireland, although the source of those checks is quite different than the source of barriers to gun control in the United States.

The answer to the question: "Is gun control really that different in the United States than in Australia?" is a qualified "yes."

Although there remain a considerable number of firearms in Australia, and while the limitation on the federal government via its federalism system is noteworthy, gun owners are nearly completely exposed to the will of each state government and the local police administrators. The restraints on the state governments through the constitution's freedom of trade do little for the private citizen who would simply like to keep a firearm at home for self-protection. Moreover, the right of self-defense was excluded as a legitimate reason for owning a firearm, in direct contradistinction to the rationale in *Heller*. It can only be concluded that the ability of Australians to bear arms is slight vis-à-vis Americans.

That takes us to our follow-up question: “Why are gun controls so different in Australia?”

Australia’s position is partially explained by the swell of media calls for the complete disarmament of citizens following several mass-shootings over the past two decades. Though these conditions exist to some extent in Ireland, Australia seems to have experienced a sharper increase in such events over the past twenty years, spurring the enactment of more gun controls. Next, the state of gun control in Australia is also attributable to the lack of a bill of rights.

Overall, Australia’s divergence from Ireland and the United States is best explained by history. Australia has not had the same tumultuous revolutionary experiences with tyrannical government as Ireland and the United States. Australia had a gradual, peaceful separation from Britain, not facilitated by firearms. It therefore never felt compelled to develop the same bond with firearms that the United States and Ireland did. Perhaps then, to bring this Article’s metaphorical title home, Australia is different because it naturally fell from the British tree, whereas the United States and Ireland are better characterized as acorns forcibly plucked from the tree.