
**THE BAN DOWN UNDER: UNITED STATES
SHOULD ADOPT AUSTRALIAN-STYLE
GUN REGULATIONS TO CURB RISING
RATE OF ELDERLY SUICIDES**

Daniel Burley

United States seniors commit suicide at an alarming rate. Their primary killing method: easily accessible firearms. This Note proposes that the federal government implement strict gun controls that address the growing epidemic of elderly suicides. These policies should emulate Australia's, a world leader in progressive gun controls. In the United States, the Australian policies would face a constitutional minefield. But case law indicates regulations other than outright gun removal are likely constitutional. Voluntary regulations—gun buybacks, self-reporting gun bans, and purchasing bans for seniors with mental illnesses—will likely overcome constitutional challenges. Involuntary regulations, such as Australia's mandatory gun buybacks, would face tougher Second Amendment tests. However, these restrictions would greatly decrease elderly suicides and inch America toward sensible gun policies accepted worldwide.

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Ruth Bain was resting on her couch when her husband shot her to death.¹ She was eighty-two.² Her husband, seventy-nine-year-old Joe William Bain, shot himself after killing her.³ He died the following day in a hospital near their Denton, Texas home.⁴

Joseph Goeke feared he would need a wheelchair after suffering from heart-surgery complications.⁵ Along with his exacerbating physical disability, he had a history of depression and alcohol abuse.⁶ His wife found the sixty-nine-year-old dead behind their New Jersey home.⁷

He killed himself with an old shotgun that the couple owned to stop groundhogs from destroying their garden.⁸

Jack and Nancy Wright were married for fifty years before Jack killed Nancy in their Los Angeles home and then turned the gun on himself.⁹ He left a lengthy note describing their murder-suicide pact to end her suffering from dementia.¹⁰ The retired high school teachers were "lifelong best friends," neighbors said.¹¹

1. Julian Gill & Matt Payne, *Elderly Woman Slain at Home*, DENTON RECORD-CHRONICLE (Mar. 5, 2017), <http://www.dentonrc.com/local-news/local-news-headlines/20170305-couple-in-denton-shooting-identified.ece>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Paula Span, *Suicide Rates are High Among the Elderly*, N.Y. TIMES (Aug. 7, 2013, 5:00 AM), https://newoldage.blogs.nytimes.com/2013/08/07/high-suicide-rates-among-the-elderly/?_r=0.

6. *Id.*

7. *Id.*

8. *Id.*

9. Angie Crouch, *'Lifelong Best Friends': Senior Couple Dead in Murder-Suicide*, NBC LOS ANGELES (July 27, 2016), <http://www.nbclangeles.com/news/local/Elderly-Couple-Found-Dead-in-Palms-388398212.html>.

10. *Id.*

11. *Id.*

Seniors commit suicide at an alarming rate. White men older than sixty-five are more likely to commit suicide than any other demographic group.¹² Often they are mentally ill, suffering from Alzheimer's, or other forms of dementia.¹³ Many times they also kill their spouses.¹⁴

Firearms are their primary killing method.¹⁵ Nearly 75% of elderly suicides involve guns.¹⁶ With seniors more likely to be gun owners than any other group of Americans,¹⁷ the issue of elderly suicide by firearm has turned into a public health crisis. Rather than address the problem, the federal government has moved backwards. In February 2017, Congress repealed the Obama Administration's rule barring individuals classified as "mentally defective," for purposes of Social Security, from buying a gun.¹⁸ Currently, the Republican-led Congress is unlikely to pass gun-control measures.¹⁹ Gun ownership remains a fiercely protected right in the United States. The federal government must find a way to balance liberty with public safety.

12. Suzanne Allard Levingston, *The High Suicide Rate Among Elderly White Men Who May Suffer From Depression*, WASH. POST (Dec. 8, 2014), https://www.washingtonpost.com/national/health-science/the-high-suicide-rate-among-elderly-white-men-who-may-suffer-from-depression/2014/12/05/2bad6ea0-222e-11e4-958c-268a320a60ce_story.html?utm_term=.ce8670170fe4.

13. See generally Richard J. Bonnie et al., *The Evolving Position of the American Psychiatric Association on Firearm Policy (1993-2014)*, 33 BEHAV. SCI. & L. 178 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559944 [hereinafter Bonnie et al.].

14. Katie Kustura, *Murder-Suicide Rates Among Elderly Driven By Illness, Depression*, THE DAYTONA BEACH NEWS-JOURNAL (Oct. 11, 2015, 10:17 AM), <https://www.news-journalonline.com/news/20151011/murder-suicides-among-elderly-driven-by-illness-depression>.

15. *Quickstats: Percentage of Suicide Deaths, by Mechanism and Age Group—United States*, CTRS. FOR DISEASE CONTROL (Sept. 26, 2014), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6338a8.htm>.

16. *Id.*

17. See generally L. Hepburn et al., *The US Gun Stock: Results From the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 15–19 (2007).

18. David Sherfinski, *Senate Votes to Repeal Obama's Ban On Gun Sales For Certain Social Security Recipients*, WASH. TIMES (Feb. 15, 2017), <http://www.washingtontimes.com/news/2017/feb/15/senate-votes-undo-obama-administration-gun-rule/>.

19. Mike DeBonis, *Amid Mass Shootings, GOP-controlled Congress Remains Focused on Loosening Gun Laws*, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/pwperpost/amid-mass-shootings-gop-controlled-congress-remains-focused-on-loosening-gun-laws/2017/10/02/f3122414-a77a-11e7-850e-2bdd1236b25d_story.html?utm_term=.t3d60f3468c8.

This Note proposes that the federal government implement strict gun controls that directly address the growing epidemic of senior suicides in the United States. These policies should emulate Australia's, a worldwide leader in progressive gun control. In the United States, the Australian policies would face a constitutional minefield. But case law indicates regulations other than outright gun removal are likely constitutional.²⁰ Voluntary regulations—gun buybacks, self-reporting gun bans, and purchasing-bans for seniors with mental illnesses—will likely overcome constitutional challenges.²¹ Involuntary gun regulations, such as Australia's mandatory gun buybacks, would face tougher constitutional tests.²² These progressive regulations would greatly decrease elderly suicides and move American gun laws toward successful gun policies that are already accepted in nearly every other developed country.²³

This Note proceeds in four parts. Part I describes the problems facing senior gun owners. It recounts the history of gun rights for the elderly and mentally ill in America, and explores the dangers associated with elderly gun ownership. It also details Australia's effective, compulsory gun regulations and explains why Australia provides a useful comparison to the United States because of cultural similarities. Part II lays out the current status of the Second Amendment. Then it assesses the effectiveness and the constitutionality of three potential United States gun regulations aimed at preventing elderly suicide. The analysis advances from least restrictive regulation to most restrictive regulation. It begins with seniors reporting themselves or voluntarily turning over their firearms to the government. It moves to President Obama's repealed regulation, which was a more restrictive approach that marked an important first step in curbing elderly suicide. Last, the

20. See generally Jon S. Vernich & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193 (2000).

21. Winnie Stachelberg et al., *Constitutionality of Proposed Firearms Legislation*, CTR. FOR AM. PROGRESS (Feb. 12, 2013, 8:29 AM), <https://www.americanprogress.org/issues/courts/reports/2013/02/12/52833/constitutionality-of-proposed-firearms-legislation/>.

22. Christopher Ingraham, *What Happened When Australia Actually Did Something to Stop Gun Violence*, WASH. POST (June 22, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/22/what-happened-when-australia-actually-did-something-to-stop-gun-violence/?utm-term=.c6323chaIc82>.

23. *Id.*

analysis evaluates Australian-style mandatory gun buybacks for seniors, and asks whether the United States has the constitutional precedent or cultural willpower to enact such stringent regulations. Part III recommends the United States apply a mix of President Obama's failed approach and more progressive Australian policies to keep guns away from seniors who pose a danger to themselves and those around them. Part IV provides a brief conclusion.

I. Background

A. Gun Regulations in the United States

Americans love guns. Despite having less than 5% of the world's population, the United States has between 35% and 50% of the world's civilian-owned firearms.²⁴ It ranks first in guns per capita.²⁵

But the United States is no longer the Wild West. Federal and state laws regulate gun ownership, purchases, and carrying rights.²⁶ While the federal government provides a minimum standard for gun regulations, most controls exist at the state level, with New York, California, Illinois, New Jersey, Massachusetts, Maryland, Hawaii, and Rhode Island being the most restrictive.²⁷

Federal law prohibits certain people from owning firearms.²⁸ The list includes those with particular criminal records or mental illnesses; drug addicts; immigrants without legal status; veterans who left the military with a dishonorable discharge; anyone with a permanent restraining order keeping them from a partner or a partner's children,

24. *Small Arms Survey 2007*, GRADUATE INST. OF INT'L STUDIES (2007), <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2007.html>.

25. *Id.*

26. See generally William S. Harwood, *Gun Control: State Versus Federal Regulation of Firearms*, 11 ME. POLICY REV. 58 (2002).

27. See *Guns Laws: Guide to the Interstate Transportation of Firearms*, NAT'L RIFLE ASS'N (Mar. 14, 2017), <https://www.nraila.org/gun-laws/> [hereinafter NRA Gun Laws].

28. *Identify Prohibited Persons*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 22, 2016), <https://www.atl.gov/firearms/identify-prohibited-persons>.

among others.²⁹ There are minimum age requirements for gun ownership,³⁰ but there is no maximum age after which one may not buy or own a gun.

The Federal Gun Control Act of 1968 is the most relevant regulation for elderly gun owners with dementia or other mental illnesses. The act bars ownership by anyone who has been adjudicated as “mentally defective” or who has been committed to a mental institution.³¹ Most people with serious mental illnesses never receive such adjudication, and those who do can petition courts to reverse it.³² Many mass shootings have been carried out by people who were recognized by those around them as being deeply disturbed, yet owned guns legally.³³

The federal government also regulates gun purchases. Licensed gun dealers must conduct a background check through an F.B.I. database to see if the customer is among those prohibited from owning a

29. See Eve Bender, *Most States Say Mental Illness Is Reason to Bar Gun Ownership*, 41 PSYCHIATRIC NEWS 17 (2006) (stating that the Gun Control Act of 1968 prohibits nine classes of people from possessing firearms: those convicted of a crime punishable by imprisonment for more than one year; fugitives from justice; drug users or addicts; persons adjudicated mentally defective (i.e. legally incompetent) or committed to mental institutions; unauthorized immigrants; those dishonorably discharged from the military; those who have renounced U.S. citizenship; persons with restraining orders related to domestic violence; and persons convicted of misdemeanor domestic violence. Various state laws also prohibit gun ownership by people with mental illness, including those in outpatient treatment or civilly committed to treatment, substance abusers, and individuals found not guilty by reason of insanity).

30. See, e.g., *The National Rifle Association's Citizen's Guide to Federal Firearms Laws*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Mar. 24, 2004), <https://www.nra.org/gun-laws/> (providing that one must be eighteen to own a shotgun or rifle and twenty-one for other firearms, including handguns.).

31. See Gun Control Act of 1968, P.L. 90-618, 82 Stat. 1213 (1968) (as amended in 18 & 26 U.S.C.) (stating that the Federal Gun Control Act serves as a minimum standard; state laws may exceed these mandates. The definition of “adjudicated as a mental defective” is a person who is found by a court to be a danger to himself or others or unable to manage his own affairs (i.e., legally incompetent).).

32. Bonnie et al., *supra* note 13, at 180.

33. See Joseph R. Simpson, *Bad Risk?: An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 330, 333 (2007).

gun.³⁴ Some states have tougher background checks than the federal system.³⁵ For example, some states require background checks before private sales, like those at gun shows,³⁶ while others require a license or permit to own a gun.³⁷ Most do not.³⁸

Federal law no longer bans the sale of high-powered weapons.³⁹ From 1994 to 2004, federal law outlawed the sale of many types of assault rifles and high-capacity magazines, but the law expired and has not been renewed.⁴⁰ A few states have assault-weapons bans that remain in place.⁴¹

Laws on carrying weapons vary across states. A few states do not require a permit to carry a concealed gun.⁴² But most states require a concealed-carry permit, and the majority of those states grant the permits automatically to legal gun owners.⁴³ States also differ in their rules on gun possession in specific settings, like school campuses and houses of worship.⁴⁴

Seniors with mental illnesses abide by different laws in different states. Currently, thirty-four states (and the District of Columbia) prohibit, in varying degrees and for varying periods, the mentally ill from possessing firearms in some form, while twelve states prohibit the mentally ill from obtaining a license to carry a concealed weapon.⁴⁵ Four states have no laws prohibiting the possession of guns by the mentally ill.⁴⁶ No law, however, addresses the diminished capacity in an elderly

34. See *The National Rifle Association's Citizen's Guide to Federal Firearms Laws*, (March 14, 2017), <https://www.nra.org/gun-laws/>.

35. NRA Gun Laws, *supra* note 27 (from hyperlink, click on states for information or distinct state gun laws, including background check requirements).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Brad Plumer, *Everything you need to know about the assault weapons ban, in one post*, WASH. POST. (Dec. 17, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/?utm_term=.c81ec3de3893.

41. See NRA Gun Laws, *supra* note 27.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

person who owns a firearm that he or she bought when he or she was younger.⁴⁷

B. Aging Gun Owners Face Mental Illnesses

The average American is getting older. With age comes the increased chance of mental illness, a primary factor in elderly gun suicides.⁴⁸ In the next few decades, the United States will experience unprecedented growth in the elder population.⁴⁹ By 2050, the population of people sixty-five and older will be an estimated 83.7 million, almost double the estimated population of 43.1 million in 2012.⁵⁰ The growth reflects a pattern of increased life expectancy.⁵¹ For instance, in 1913, the average male lived fifty years, while the average female lived fifty-three years.⁵² By 2013, the average male lived seventy-six years, while the average female lived eighty-one years.⁵³

With an older population comes more of age-related mental illnesses.⁵⁴ The aging process can cause significant cognitive decline.⁵⁵ Dementia is one of the most common threats leading to mental decline.⁵⁶ In fact, experts estimate that dementia is present in approximately 5% to 10% of people sixty-five and older, and 30% to 39% of people eighty-five and older.⁵⁷

The term “dementia” describes symptoms such as mental confusion, memory loss, personality changes, confusion, disorientation, and intellectual impairment.⁵⁸ Alzheimer’s disease is the most common

47. Ellen Pinholt et al., *“Is There a Gun in the Home?” Assessing the Risks of Gun Ownership in Older Adults*, 62 AM. J. GERIATRICS SOC. 1142, 1142–46 (2014).

48. Brian Mertens et al., *Current Considerations About the Elderly and Firearms*, 102 AM. J. PUB. HEALTH 396, 397 (2008) [hereinafter Mertens et al.].

49. Wan He et al., *An Aging World: 2015 International Population Reports*, U.S. CENSUS BUREAU (Mar. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p95-16-1.pdf>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *The State of Mental Health and Aging in America*, CTNS. FOR DISEASE CONTROL (2008), https://www.cdc.gov/aging/pdf/mental_health.pdf.

55. *Id.*

56. *2016 Alzheimer’s Disease facts and figures*, ALZHEIMER’S ASS’N 1, 17 (2016), https://www.alz.org/documents_custom/2016-facts-and-figures.pdf.

57. *Id.*

58. *Id.* at 5.

form.⁵⁹ There are, however, lesser known disorders, such as Alcohol Abuse Associated Dementia and Lewy Body Dementia.⁶⁰ Even common physical health conditions, such as high blood pressure, high cholesterol, diabetes, and heart problems, can result in dementia.⁶¹ Regardless of the clinical diagnosis, dementia and cognitive impairment statistics, as they relate to aging, are grim. Although dementia before the age of sixty is rare, the rate steadily climbs as one ages.⁶² By seventy-five, the rate is about 10%.⁶³ By eighty, the rate is 20% to 30%.⁶⁴ At ninety, the dementia rate is between 30% to 50%.⁶⁵

The symptoms of dementia raise questions about the sufferer's ability to adequately own and maintain a firearm. The initial symptoms appear gradually, and include forgetfulness, difficulty in remembering, and impaired judgment.⁶⁶ In the advanced stages, a patient suffers what is known as "uncharacteristic and increased aggressiveness," which can result in violent behavior.⁶⁷ As more Americans age and suffer from dementia, gun owners with diminished capacity will increasingly become a public safety issue.

C. The Elderly: America's Top Gun Owners

Perhaps no group of Americans loves guns more than the elderly. Those sixty-five and older have the highest rate of gun ownership in the United States.⁶⁸ About 27% of Americans sixty-five and older own a firearm, compared to 16% of eighteen to twenty-five year-olds.⁶⁹ Among the nearly 38 million Americans sixty-five and older, an estimated 17.5 million own a firearm, and about 11 million of these owners own a handgun.⁷⁰ Availability—the access to a gun—is more prevalent among the elderly persons than younger groups.⁷¹ Roughly 37% of people sixty-

59. *Id.*

60. *Id.* at 5–6.

61. *Id.* at 11.

62. *Id.* at 10.

63. *Id.* at 22.

64. *Id.* at 16–24.

65. *Id.*

66. *Id.* at 5.

67. *Id.* at 33.

68. See L. Hepburn et al., *The US gun stock: results from the 2004 National Firearms Survey*, 13. INJ. PREV. 15 (2007).

69. *Id.* at 17.

70. Mertens et al., *supra* note 48, at 396.

71. *Id.*

five or older live in a home with a firearm, compared to 25% of those thirty or younger.⁷² That means more than a third of seniors have easy access to guns.

Some seniors also arm themselves outside the home. From 2006 to 2010, a review of applications for concealed-carry permits in Kansas documented a concentration among older persons: although people sixty and older made up 18% of the adult population, they accounted for 31% of the permit applications.⁷³ Media reports also have noted an increase in elderly citizens applying for concealed weapons.⁷⁴

Why do the elderly carry guns? Many handgun owners say that self-protection is their primary reason for having a gun.⁷⁵ Despite being far less likely than younger people to be the victim of a violent crime, studies show fear of crime is high among the elderly.⁷⁶

D. Elderly Gun Owners and Gun Violence

Suicide is the top gun-violence issue among the elderly. In 2005, more than 5,000 people sixty-five or older committed suicide with a gun.⁷⁷ Elderly men commit far more firearm suicides than elderly women.⁷⁸ Firearms, however, also contribute to suicides among elderly women. From 1990 until 2005, when suicide-by-poisoning rates decreased, firearms became the leading cause of suicide among elderly women.⁷⁹ Suicide among the elderly is higher, as is gun ownership, in rural areas.⁸⁰

Often, elderly suicides and homicides happen together. Murder-suicides among people older than fifty-five increased from 21% in 2002

72. *Id.*

73. *Concealed carry applications by age and gender*, July 1, 2006-Feb. 1, 2011 (34,287), KAN. ATT'Y GEN. (2011), http://www.ksag.org/files/concealed_carry/CCH_Age_Gender_Chart.pdf (last updated Dec. 3, 2011).

74. Julie Turkewitz, *Another Delicate Topic With Aging: When Is It Time to Give Up Guns?*, N.Y. TIMES (June 11, 2016), <http://www.nytimes.com/2016/06/11/us/guns-elderly-dementia-alzheimers.html?rref=collection%2Ftimestopic%2FElderly> [hereinafter Turkewitz].

75. Edith Greene et al., *Granny (Don't) Get Your Gun: Competency Issues in Gun Ownership by Older Adults*, 25 BEHAV. SCI. & L. 405, 405–08 (2007) [hereinafter Greene et al.].

76. *Id.* at 410.

77. *See generally* Turkewitz, *supra* note 74.

78. Mertens et al., *supra* note 48, at 397.

79. *Id.* at 397–98.

80. *Id.* at 398.

to 25% in 2011 of the total murder-suicides in the United States.⁸¹ Researchers estimate that twenty older Americans die each week from murder-suicide.⁸² A firearm is the weapon of choice in 85% of the cases.⁸³

Moreover, 92% of murder-suicides with a victim older than sixty-five involve intimate partners, most often a man killing his female partner.⁸⁴ Incidents are sometimes characterized as mercy killings in which one or both partners decide to end their suffering, often from long bouts of illness.⁸⁵ The killers often are depressed, and the homicides frequently come after a major crisis.⁸⁶ Murder-suicide among the elderly might be out of desperation, compassion, or the result of long-standing domestic violence.⁸⁷

This is not to suggest elderly people are more violent than their younger counterparts. Elderly people commit far fewer gun homicides than other age groups and make up a small percentage of total homicide offenders.⁸⁸ People sixty-five or older made up merely 1.9% of the 15,670 suspects in homicides committed in 2009 in the United States.⁸⁹ Nevertheless, elderly people who commit homicides are more likely than younger age groups to kill with a gun.⁹⁰

E. Australia: America's Cultural Cousin

The world's most progressive gun ban exists in Australia. Since the country outlawed semi-automatic weapons in 1996, it has seen a massive reduction in gun deaths, including suicides among the elderly.⁹¹

81. VIOLENCE POL. CTR 8, AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES (4th ed. May 2012) <http://www.vpc.org/studies/amroul2012.pdf>.

82. Diana Reese, *Murder-suicide disturbing trend among the elderly*, WASH. POST: SHE THE PEOPLE (Jan. 26, 2013), https://www.washingtonpost.com/blogs/she-the-people/wp/2013/01/26/murder-suicide-disturbing-trend-among-the-elderly/?utm_term=.b2d614a4e9dd.

83. Mertens et al., *supra* note 48, at 398.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See S. Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without a Mass Shooting*, 12 AUSTRALIAN BUREAU OF STAT: INJURY PREVENTION 365 (2006); see also Austin Ramsy et al., *How Conservatives Led Australia Ended Mass Killings*, N.Y. TIMES: AUSTRALIA (Dec. 4, 2015),

Australia's cultural similarities with the United States make its gun controls a useful comparison. Both the United States and Australia are former colonies of the United Kingdom.⁹² Thus, the countries share legal and cultural frameworks that helped shape their views on firearms.⁹³ Like the United States, Australia boasts a federalist system consisting of national and state governments.⁹⁴ Similarly, Australia's federal government is divided into three branches: judicial, legislative, and executive.⁹⁵ Australian lawmakers deal with the same issues seen in America, such as checks and balances and the enduring questions involving states' rights.⁹⁶

Australia's colonial period was also similar to the United States. Australia inherited a large, indigenous population and experienced a frontier phase similar to the American Wild West.⁹⁷ For these reasons, Australia's gun culture mirrors the United States'. It remains in the top-tier of all nations in terms of gun ownership—in sixteenth place—though it has never approached first-place United States.⁹⁸

Modern Australians' political philosophy resembles conservative America. Australians pride themselves on a rugged individualism, are conservative compared to Europeans, and dislike government involvement in their affairs.⁹⁹ Those attributes align with traditional American right-leaning viewpoints.

Despite the similarities, Australia has found unprecedented success reducing gun violence. On May 10, 1996, a gunman shot and killed thirty-five people and seriously wounded eighteen at Port Arthur, Tasmania.¹⁰⁰ Less than two weeks later, the conservative-led national government pushed through uniform gun-control laws in cooperation with the country's six states and two territories.¹⁰¹ The National Agreement

https://www.nytimes.com/2015/12/05/world/australia/australia-gun-ban-shooting.html?_r=0 [hereinafter Ramsy et al.].

92. See Ricardo N. Cordova, *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*, 13 *TOURO. INT'L L. REV.* 59, 81 (2010).

93. *Id.* at 87–90.

94. *Id.* at 84.

95. *Id.*

96. *Id.* at 86.

97. *Id.* at 81–83.

98. *Id.* at 94.

99. *Id.* at 80–97.

100. *Id.* at 86.

101. Ramsy et al., *supra* note 91.

on Firearms all but prohibited automatic and semiautomatic assault rifles, strengthened licensing and ownership rules, and created a gun buyback program that took 650,000 weapons out of public circulation.¹⁰²

Gun owners needed a genuine reason for owning firearms, such as recreational shooting and hunting, gun-collecting, or sport shooting with a valid membership to an approved club.¹⁰³ Self-protection is not a genuine reason.¹⁰⁴

Australia's gun prohibitions have been a success. In an often-cited study, two leading gun-death statisticians found "the buyback led to a drop in the firearm suicide rates of almost 80%, with no significant effect on non-firearm death rates."¹⁰⁵ The study found suicides dropped from 2.2 per 100,000 people in 1995 to 0.8 per 100,000 in 2006.¹⁰⁶ Firearm homicides dropped from 0.37 per 100,000 people in 1995 to 0.15 per 100,000 people in 2006.¹⁰⁷ Those are reductions of 65% and 59%, respectively.¹⁰⁸

The numbers concerning gun deaths and the elderly are also encouraging. Suicide rates involving firearms among those fifty-five and older decreased after the gun buyback.¹⁰⁹ At the same time, suicide rates by hanging increased, but not enough to equal the amount of firearm suicides before the buyback.¹¹⁰ Thus, the gun ban was instrumental in decreasing gun suicides.

II. Analysis

A. The State of the Second Amendment

An understanding of the current status of the Second Amendment is critical to evaluating potential gun regulations. Gun control measures must avoid Second Amendment roadblocks to be enacted. In general,

102. *Id.*

103. *Id.*

104. *Id.*

105. Andrew Leigh & Christine Neill, *Do Gun Buybacks Save Lives? Evidence from Panel Data*, 12 AM. L. AND ECON. REV. 509, 509 (2012) [hereinafter Leigh & Neill].

106. *Id.* at 519.

107. *Id.*

108. *Id.*

109. Xin Qi et al., *Dynamic Pattern of Suicide in Australia, 1986–2005: A Descriptive-Analytic Study*, 4 BEHAV. MED. J. 1, 1 (2014).

110. *Id.*

the Bill of Rights does not consider rights to be absolute.¹¹¹ And the Supreme Court, in interpreting constitutional guarantees of rights, has repeatedly said rights are not absolute.¹¹² The Second Amendment “right to keep and bear arms” was never formally declared to be a personal right from the time it was added to the Constitution in 1791.¹¹³ The almost universal understanding was that the right only applied to state militia organizations, like the modern National Guard.¹¹⁴ In 2008, however, the Supreme Court ruled in *D.C. v. Heller*, that the right was a personal right, conferred by the Second Amendment to help assure a right of self-defense.¹¹⁵

But the *Heller* decision left open exceptions to the personal right.¹¹⁶ Indeed, the majority explicitly said: “Like most rights, the right secured by the Second Amendment is not unlimited.”¹¹⁷ The opinion cited a “historical tradition of prohibiting the carrying of dangerous and unusual weapons,”¹¹⁸ and it added that nothing in the decision casts doubt prohibiting such weapons, or on the power of legislatures to adopt “reasonable” restrictions on the Second Amendment right.¹¹⁹

Thus, many gun regulations turn on whether they are a “reasonable” restriction. The Court’s interpretation of the Fourth Amendment demonstrates its understanding of “reasonable.”¹²⁰ The Fourth Amendment protects against “unreasonable searches and seizures.”¹²¹ The Court has interpreted “unreasonable” in interpreting what searches and seizures it does not allow,¹²² and has found various police practices

111. See U.S. CONST. amends. I–X.

112. See generally *Rust v. Sullivan*, 500 U.S. 173 (1991) (discussing First Amendment rights are not absolute); see also *Montejo v. Louisiana*, 556 U.S. 778 (2009).

113. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

114. See generally Johathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 *YALE L. J.* 1486 (2014) (discussing history of Second Amendment) [hereinafter Meltzer].

115. *Heller*, 554 U.S. at 626.

116. See generally Meltzer, *supra* note 114 (discussing gun rights after *Heller*).

117. *Heller*, 554 U.S. at 626.

118. *Id.* at 628.

119. See *id.* at 627.

120. *Katz v. United States*, 389 U.S. 347, 347–52 (1967) (discussing what is “reasonable” and “unreasonable” under the Fourth Amendment).

121. U.S. CONST. amend. IV.

122. See *Katz*, 389 U.S. at 347 (discussing the “reasonable expectation of privacy test”).

are reasonable.¹²³ For example, the Court allows police to make searches when they do not have a court-approved warrant if the public need is strong enough.¹²⁴

The broad interpretation of “reasonable” can be applied to gun regulations. So far, the Court has found just one kind of gun control that it has declared to be unreasonable and therefore a violation of the Second Amendment: a total ban on possessing a handgun, in any place and for any purpose whatsoever.¹²⁵ But the Court said it struck down the ban to only protect the right to have a gun in one’s home for self-defense.¹²⁶ That means no definitive rights have been recognized outside of owning a gun in one’s home for self-defense.

B. Voluntary Gun Buybacks and Self-Reporting

Before analyzing more controversial restrictions, a logical starting point is provisions that do not implicate the Second Amendment. Two potential regulations that avoid constitutional concerns are voluntary gun buybacks and allowing seniors to self-report themselves as incapable of owning a gun. Both have the benefit of removing guns from seniors’ hands before debilitating mental illness sets in. Unfortunately, neither type of regulation adequately targets senior gun owners.¹²⁷

Gun buybacks in the United States began in the 1970s.¹²⁸ Most follow a similar script. Government officials offer incentives, such as cash or gift certificates, in exchange for weapons.¹²⁹ On the day of the buyback, gun holders hand over their weapons to the police, no questions

123. See *id.* (discussing the “reasonable expectation of privacy test,” the Court found all searches and seizures under Fourth Amendment must be reasonable. Reasonableness is the ultimate measure of the constitutionality of a search or seizure. Searches and seizures with a warrant satisfy the reasonableness requirement. Warrantless searches are presumed unreasonable unless they fall within a few exceptions.).

124. See *Katz*, 389 U.S. at 347.

125. *Heller*, 554 U.S. at 595.

126. *Id.* at 626.

127. *Id.* at 626–30.

128. Lawrence Sherman, *Reducing Gun Violence: What Works, What Doesn’t*, 1 CRIMINOLOGY & CRIM. JUST. J. 11, 11–15 (2001).

129. *Id.*

asked.¹³⁰ The police keep the guns that were stolen or used to commit a crime.¹³¹ The rest are destroyed for scrap metal.¹³²

Gun buybacks have largely failed.¹³³ Research shows the guns featured in the buybacks are not those typically used in violent crimes.¹³⁴ Moreover, the results suggest those most likely to commit violent crimes are the least likely to voluntarily turn in weapons.¹³⁵ Most importantly, gun buybacks typically target young males in inner cities.¹³⁶ There is little evidence that a gun buyback would compel seniors most likely to commit violent crimes to hand over their weapons.¹³⁷

For buybacks to work, the program would need to be advertised toward seniors. For example, a police department could partner with the American Association of Retired People—one of the United States' largest lobbying groups—to educate members about gun buybacks. Mailing a pamphlet with information about the buyback and the dangers of elderly gun ownership could encourage seniors to participate. Another problem with buybacks is that they do not take place near seniors.¹³⁸ To remedy this, police departments might consider offering buybacks in neighborhoods with large senior populations or holding buybacks in senior-living communities. Still, it seems unlikely enough seniors would participate to make a dent in the alarming number of suicides and murder-suicides.

Another non-controversial gun policy is self-reporting. For this, the federal government would allow seniors to report themselves to the National Instant Criminal Background Check Database. If seniors fear their capacity to own and safely operate a gun is diminishing, they could inform the federal government and add their names to the no-

130. *Id.* at 12.

131. *Id.* at 19–20.

132. *Id.*

133. Evelyn Kuhn et al., *Missing the Target: A Comparison of Buyback and Fatality Related Guns*, 8 INJ. PREVENTION 143, 143 (2002).

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.* (discussing who participates in gun buybacks).

138. *See generally id.*

sell list. Congress could easily implement this proposal by making minor changes to the current national-background-check legislation.¹³⁹ Further, the proposal raises no constitutional issues because Second Amendment rights can be voluntarily waived.¹⁴⁰

Buybacks and self-reporting plans can gain traction. One study showed that close to a third of the general population and more than 40% of those with previously diagnosed mental health concerns indicated they would be willing to add their names to such a list.¹⁴¹ The study did not distinguish among age groups, so it is not clear how seniors responded, but the results are promising.¹⁴² The proposal, however, would likely face public-awareness issues similar to gun buybacks and would need a strong advertising campaign to encourage participation.¹⁴³ Still, the voluntariness of the proposal means many seniors may not sign up. While the self-ban could potentially save a few lives, it is not likely to decrease gun ownership in a way that beats back the epidemic of senior suicide. Further, the proposal only stops seniors from buying guns. It does not take away guns from those who purchased them years before and are now losing the ability to safely own and operate firearms. To fight senior suicide, stricter regulations are necessary.

C. President Obama's Repealed Gun Restriction

In May 2016, President Obama proposed a regulation that would ban selling guns to seniors deemed as “mentally defective” by the Social Security Administration.¹⁴⁴ Unlike gun buybacks or self-reporting, the ban was not voluntary for those who receive Social Security and thus took regulations a step further.¹⁴⁵ If they wanted Social Security payments, seniors with psychiatric disabilities no longer had a choice about their right to own a gun. Though it has been repealed, the ban is a critical starting point for understanding potential gun regulations in

139. Fredrick E. Vars, *Not Young Guns Anymore: Dementia and The Second Amendment*, 25 *ELDER L. J.* 65 (2017) The Interdisciplinary Center for Economic Science, George Mason University (2007) (discussing how the legislation easily be changed—in less than 500 words—to accommodate the provision).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

145. *See id.*

the United States. The ban provides insight into the type of gun regulations that would likely be introduced in the future. Thus, the effectiveness and constitutionality of the ban is worth analyzing before considering stricter regulations.

The law likely would have survived constitutional challenges, despite heavy protest from gun-rights supporters.¹⁴⁶ Yet, medical researchers and law enforcement officials are split on whether the regulations would have enhanced public safety.¹⁴⁷ Many mental health advocates fear regulations based on mental diagnoses would contribute to the stigma of seniors with mental illnesses being prone to violence—a conclusion many scholars refute¹⁴⁸—without improving public safety.¹⁴⁹ These policy perspectives must be considered before pushing for more stringent, Australian-style gun regulations for seniors.

1. THE SOCIAL SECURITY GUN BAN

Obama issued the proposal as part of his broader plan—created a month after twenty-year-old gunman Adam Lanza killed twenty children and six adults at Sandy Hook Elementary School in Connecticut—to use executive actions to close gun-law loopholes.¹⁵⁰

The ban had a basic premise: Social Security beneficiaries with psychiatric disabilities who are assigned a money manager for their disability benefits would be reported to the FBI's background check database as people ineligible to purchase firearms.¹⁵¹ The regulation was

146. Alan Zarembo, *Obama Pushes to Extend Background Checks to Social Security*, L.A. TIMES (July 18, 2015), <http://www.latimes.com/nation/politics/la-na-gun-law-20150718-story.html> [hereinafter Zarembo].

147. Paul Appelbaum & Jeffrey Lieberman, *Gun Violence: Is Obama Right to Cite Mental Illness?*, NEWSWEEK (Jan. 17, 2016), <http://www.newsweek.com/gun-violence-obama-mental-illness-416414>.

148. Michael S. Rosenwald, *Most Mass Shooters Aren't Mentally Ill. So Why Push Better Treatment as the Answer?*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/local/most-mass-shooters-arent-mentally-ill-sowhy-push-better-treatment-as-the-answer/2016/05/17/70034918-1308-11e6-8967-7ac733c56f12_story.html?postshare=5211463529178043&tid=ss_fb.

149. Heather Stuart, *Violence and Mental Illness: An Overview*, 2 J. WORLD PSYCHIATRY 121, 122 (June 2003).

150. Remarks by the President and Vice President on Gun Violence, DAILY COMP. PRES. DOC. (Jan. 16, 2013, 11:52 AM), <https://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence>.

151. Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban, in One Post*, WASH. POST (Dec. 17, 2012), https://www.washingtonpost.com/news/wonk/up/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/?utm_term=.c8lec3de3893.

built on the National Instant Criminal Background Check Systems Improvement Act of 2007.¹⁵² The background check system gets its records from local, state, and federal police agencies, and many mental-health authorities.¹⁵³ The Veterans Administration sends in records too, and about 177,000 veterans and survivors with mental health disorders and benefits are in the gun-check system.¹⁵⁴ The Social Security Administration does not report its beneficiaries.¹⁵⁵

Under the rule, the Social Security Administration would have provided an individual's name, date of birth, gender, and Social Security number to the Justice Department for inclusion in the gun-check database.¹⁵⁶ In addition to being labeled mentally defective, the recipient needed to meet two other factors: the recipient must have filed a claim for disability and the recipient must have been older than eighteen.¹⁵⁷ The administration did not confiscate firearms already owned by those deemed mentally defective.¹⁵⁸ Instead, they created a no-buy list with the collected information.¹⁵⁹

Being included on the no-buy list did not mean recipients were permanently prohibited from purchasing firearms.¹⁶⁰ The rule provided an appeals process.¹⁶¹ Affected recipients could apply for a "request for relief" to be removed from the no-buy list any time after the proceeding at no charge.¹⁶² The recipient could submit evidence to support the request for relief.¹⁶³ The evidence is reviewed by an impartial decision-

152. NICS Improvements Act of 2007, Pub. L. 110-180, 121 Stat. 2559, 2561, at tit. I, § 101 (Jan. 8, 2008) (codified at 18 U.S.C. § 922). The Act builds on the Brady Handgun Violence Prevention Act that allows the attorney general to establish a national system for instantly checking prospective handgun purchasers. *See* Pub. L. 103-159, 107 Stat. 1536, (Nov. 20, 1993).

153. *See* FEDERAL BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS, 2014, at 1 (defining the NICS Index, "a database created specifically for the NICS, contains information contributed by local, state, tribal, and federal agencies pertaining to persons prohibited from receiving or possessing a firearm pursuant to state and /or federal law").

154. Zarembo, *supra* note 146.

155. *Id.*

156. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*; *see id.* at § 421.150(b).

162. *Id.*

163. *Id.* at § 421.151.

maker who was not involved in making the original mental-defective determination.¹⁶⁴ The evidence includes a relief application form, a current statement from the recipient's primary mental health provider that assessed the applicant's mental health status for the past five years, including a statement addressing whether the recipient has ever been a danger to himself or others, and whether the recipient would pose a danger to himself or others if he or she could purchase firearms and ammunition.¹⁶⁵ The impartial decision-maker also reviews the recipient's criminal history.¹⁶⁶ An applicant who is denied relief can appeal in federal district court.¹⁶⁷

The Obama administration said as many as 75,000 recipients each year with mental health issues would have been legally prohibited from buying firearms.¹⁶⁸ But the regulation never got off the ground. Two weeks into Donald Trump's presidency, Congress voted to repeal the law.¹⁶⁹

2. THE SOCIAL SECURITY BAN AND THE SECOND AMENDMENT

President Obama's proposal raised Second Amendment concerns. It teed up a question that has vexed courts and lawmakers: how extensive is the Second Amendment's protection of gun ownership rights? While the answer to that question remains far from clear, the Social Security proposal likely would have passed the Second Amendment test outlined by the Supreme Court.¹⁷⁰

164. *Id.* at § 421.165(a).

165. *Id.* at § 421.151.

166. *Id.* at § 421.150(b).

167. *Id.* at § 421.165(b).

168. Stephen Koff, *Rule could keep guns from Social Security disability recipients, and it's taking heat*, CLEV. PLAIN-DEALER (June 20, 2016, 9:57 PM), http://www.cleveland.com/open/index.ssf/2016/06/social_security_gun-ban_propos.html [hereinafter Koff].

169. Jessica Taylor, *House Votes to Overturn Obama Gun Rule Restricting Gun Sales to the Severely Mentally Ill*, NPR (Feb. 2, 2017, 9:03 PM), <http://www.npr.org/2017/02/02/513126985/house-votes-to-overturn-obama-rule-restricting-gun-sales-to-mentally-ill>.

170. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008); JEFFERY W. SWANSON ET AL., *Preventing Gun Violence Involving People with Serious Mental Illness*, in *REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS* (Daniel W. Webster & Jon S. Vernick eds., 2013) [hereinafter SWANSON ET AL.].

The Supreme Court's language in *Heller* points toward the Social Security ban being "reasonable."¹⁷¹ The Court explicitly mentions "prohibitions on the possession of firearms . . . by the mentally ill," as a valid prohibition.¹⁷² In fact, Justice Antonin Scalia wrote that the rule is one of the "longstanding prohibitions" that stops the Second Amendment from being an absolute right.¹⁷³ The rationale for linking legal gun restrictions to severe mental illness rests on several historical assumptions. First, the law assumes that serious mental illnesses, of the sort that landed people in mental hospitals against their will, were strongly and causally associated with risk of violent behavior.¹⁷⁴ Second, it assumes that people with these dangerous mental health conditions would inevitably come to the attention of psychiatrists, who could then reliably discern risk of violence and would confine the appropriate patients to a mental hospital.¹⁷⁵ Third, it assumes that discharged involuntary psychiatric patients would always carry with them some risk of relapse of their dangerous mental health conditions and thus should be prohibited indefinitely from obtaining firearms.¹⁷⁶ The fact that the Court explicitly mentions mental illness as a constitutional example of gun regulations signals there is likely no Second Amendment issue with the Social Security proposal.¹⁷⁷ Judging by the Court's language, the Social Security ban on seniors deemed "mentally defective" from purchasing firearms was reasonable.

3. THE SOCIAL SECURITY BAN AND EQUAL PROTECTION

The law also likely would have survived an equal protection claim. Some critics argued that singling out seniors who receive Social Security benefits would violate their equal protection rights under the Constitution.¹⁷⁸ But such a charge was derived from a fundamental misunderstanding of the proposal. The proposal did not single out age

171. *Heller*, 554 U.S. at 626.

172. *Id.*

173. *Id.*

174. SWANSON ET AL., *supra* note 170, at 36.

175. *Id.*

176. *Id.*

177. *Heller*, 554 U.S. at 626.

178. Jeffrey Swanson, *Commentary: Why Obama's gun policy for mentally ill is flawed*, CHI. TRIB. (Feb. 13, 2017, 7:00 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-mentally-ill-gun-buying-ban-20170213-story.html> [hereinafter Swanson].

groups, nor did it categorize and treat individuals who are similar situated differently.¹⁷⁹ Thus, it would not have violated the Equal Protection Clause.

Equal protection rights are rooted in the Fifth and Fourteenth Amendments. The Fifth Amendment component applies to the proposal at issue because it governs what the federal government can do to citizens. The amendment states: "No person shall be deprived on life, liberty, or property, without due process of law."¹⁸⁰ In *Bolling v. Sharpe*, the Supreme Court read equal protection rights into the Fifth Amendment's due process clause.¹⁸¹ The Court reasoned it would be unthinkable that the Constitution would impose a lesser duty on the federal government than on the states, which are prohibited from violating the equal protection rights embedded within the Fourteenth Amendment.¹⁸²

Depending on the alleged violations, courts use different standards of review to determine equal protection claims. Claims involving religion, race, national origin, or fundamental rights receive a strict-scrutiny review, which means the government's proposal must be narrowly tailored to serve a compelling government interest.¹⁸³ The Social Security proposal would not have received strict-scrutiny review, since it was established in *Heller* that purchasing firearms is not a fundamental right and no other category could be implicated by the government classification.¹⁸⁴ The next standard of review is intermediate scrutiny, in which the government's action must be substantially related to an important interest.¹⁸⁵ Thus far, only equal protection claims involving gender receive this standard of review,¹⁸⁶ so the Social Security proposal would not have been implicated. Thus, a challenge to President Obama's proposal would have received the third standard of review: rational review. Rational review encompasses all equal protection claims that do not trigger strict or intermediate review. Under rational

179. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

180. U.S. CONST. amend. V.

181. 347 U.S. 497 (1954).

182. *Id.* at 499.

183. See *Washington v. Davis*, 426 U.S. 229 (1976).

184. See *Heller*, 554 U.S. at 570 (2008).

185. See *Craig v. Boren*, 429 U.S. 190 (1976).

186. *Id.* at 211-12.

review, the court must find the federal government's measure is rationally related to a legitimate government interest.¹⁸⁷ Courts almost never strike down equal protection claims under rational review.¹⁸⁸ This lax standard places the burden on the plaintiff to prove an underlying discriminatory intent.¹⁸⁹ That would have been bad news for challengers of the Social Security provision.

Challengers looking to invalidate the Social Security proposal for an equal rights violation would have run into roadblocks. First, they needed to sufficiently allege the federal government has made a discriminatory classification.¹⁹⁰ Age has been recognized as a possible classification.¹⁹¹ In this case, however, the challengers might not even have been able to state a claim. The government would argue the Social Security proposal does not classify based on age. The criteria used by the government to decide if a person receiving benefits is mentally defective includes beneficiaries who have filed a claim for disability.¹⁹² The criteria, however, allows for the government to inspect anyone older than eighteen who fits the mental-defective designation.¹⁹³ That means, in theory, the government could restrict an eighteen-year-old from purchasing a firearm if that eighteen-year-old met the other four classifications under the proposal. This likely eviscerates any possible equal protection claim. A challenger could have argued that the government will never actually use the Social Security provision to restrict an eighteen-year-old—other federal background laws might relate to that person—and thus the law affects only seniors, but the mere fact that an eighteen-year-old *could* be prohibited under the law destroys the equal protection claim based on age.

Even if a challenger states a sufficient claim, a court would not have found an equal protection violation in the proposed regulation.

187. See *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955).

188. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071 (2015).

189. *Id.* at 2074.

190. See *id.*

191. See generally *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

192. See Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

193. *Id.*

Rational basis review is a lax standard.¹⁹⁴ A court must only find the government's age-based classification is rationally related to a legitimate government interest.¹⁹⁵ The Supreme Court has ruled a much more stringent age-based classification is valid.¹⁹⁶ In *Gregory v. Ashcroft*, the Court considered whether a Missouri law requiring state judges to retire at seventy violated the Age Discrimination Employment Act, which makes it unlawful for an employer to discharge any individual older than fifty because of his or her age.¹⁹⁷ The Court ruled the mandatory retirement age was valid because it was rationally related to the government interest in keeping sharp judges on the bench.¹⁹⁸ If maintaining younger-than-seventy-year-old judges is a legitimate government interest, than keeping guns out of the hands of Social Security recipients with mental disabilities is a rational interest, especially considering the Supreme Court explicitly mentioned restricting guns from the mentally ill as a legitimate example of a valid firearm prohibition.¹⁹⁹ The government would have argued mentally ill seniors should not be able to buy guns. Precedent supports this as a legitimate government interest.²⁰⁰ Thus, an equal protection challenge to the Social Security proposal would have failed.

4. THE SOCIAL SECURITY BAN AND THE PROCEDURAL RIGHT TO DUE PROCESS

Another potential constitutional issue with the proposal was whether the decision-making process underlying the rule violates the Fifth Amendment right to procedural due process. Since a recipient receives an adjudicatory process and has the opportunity to appeal, the Fifth Amendment due process right is likely not implicated and the proposal is therefore constitutional.

The Fifth Amendment states: "No person shall be deprived on life, liberty, or property, without due process of law."²⁰¹ The Supreme Court

194. Michael Parsons, *The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause*, 11 GEO. J. L. & PUB. POL'Y 177, 206-07 (2013).

195. See *Craig v. Boren*, 429 U.S. 190, 190 (1976).

196. *Gregory*, 501 U.S. at 452.

197. *Id.*

198. *Id.*

199. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

200. *Id.*

201. U.S. CONST. amend. V.

applies different procedural due process standards in different situations, but, generally, the rule is that the government must provide a citizen with notice and a hearing.²⁰² The government provides both in this case, and avoids constitutional issues.

The government provides written notice to the recipient once the adjudication on whether they can purchase firearms begins.²⁰³ Thus, recipients can protest the adjudication before their names are shared with the National Background Check System and added to the no-buy list.²⁰⁴ One could argue that since the recipient is mentally defective, he or she is not capable of protesting. The recipient, however, has already established a financial dependence on another individual to help with Social Security. The government would send notice to that caretaker so the recipient would have complete notice of the potential regulation.²⁰⁵

The government also provides a hearing. A recipient who challenges the results of the adjudication or wants to be removed from the ban list can request to be removed and also request a hearing.²⁰⁶ The law also allows recipients to file a petition seeking judicial review if a request to be removed from the list is denied.²⁰⁷ Therefore, the government provides both notice and a hearing, and thus adequate procedural due process.

The Social Security proposal to limit some recipients from purchasing firearms does not seem to violate the Second Amendment or the Fifth Amendment. Thus, it seems to pass constitutional muster. The bigger question is whether it would have cut down on elderly violence and therefore serve as a building block for future gun regulations?

5. WOULD THE SOCIAL SECURITY BAN REDUCE ELDERLY VIOLENCE?

The constitutional issues surrounding the proposal seem to be settled. What is less clear is whether the proposal would reduce gun violence among seniors. Research suggests it could.²⁰⁸ But, for a future proposal such as the Social Security ban, the costs of enacting it could

202. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

203. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. See generally *id.*

include stigmatizing those with mental illnesses, a majority of whom are no more prone to violence than those without mental illnesses.²⁰⁹

Recent research indicates keeping guns out of the hands of seniors will reduce the risk of suicide, which affects seniors at a level higher than the average population.²¹⁰ A recent study in Switzerland found that a long-term decrease in the suicide rate was attributable to an army reform that halved the number of firearms available in the homes of former military reserve personnel.²¹¹ Moreover, it was estimated that only about one in five of the prevented gun suicides resulted in a substitution of suicide by other means.²¹²

The research in the United States has not been as extensive as overseas. But, several studies point to gun ownership among the elderly greatly affecting suicide rates. A study of state firearm regulations from 1996 to 2004 found gun permit and licensing requirements significantly reduced suicide among males.²¹³ Another study examined the effects of the Brady Law, which mandated federal background checks on firearm purchasers, and found that background checks and waiting periods in all states significantly reduced suicide among those older than sixty-five.²¹⁴

Despite its potential effectiveness, mental health advocates are weary of such a ban.²¹⁵ They fear it could set a precedent that restricts other rights for the mentally ill.²¹⁶ They argue that accessing a representative Social Security payee is a common procedure for people with a wide variety of cognitive, developmental, and psychiatric disabilities.²¹⁷ It means the Social Security recipients designate a friend, family member, or other person to assist them in managing their finances.²¹⁸

209. *See generally id.*

210. *See* Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 *ANNALS EPIDEMIOLOGY* 366, 366–76 (2015).

211. *See* Thomas Reisch et al., *Change in Suicide Rates in Switzerland Before and After Firearm Restriction*, 170 *AM. J. PSYCHIATRY* 977 (2013).

212. *Id.*

213. *See* Angel Rodriguez, *Gun Control and Suicide: The Impact of State Firearm Regulations in the United States, 1995-2004*, 101 *HEALTH POL'Y* 95 (2013).

214. *See* Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 *J. AM. MED. ASS'N* 585 (2000).

215. *See generally* Swanson, *supra* note 178.

216. *Id.*

217. *Id.*

218. *Id.*

Some mental health advocates argue a representative payee does not imply an individual is incapacitated.²¹⁹ Instead, a representative payee is often used as a less restrictive alternative to a court declaration that an individual is incompetent to manage his or her own affairs.²²⁰ Representative payees are used in a variety of circumstances—from an aging grandmother delegating finances, to an autistic young adult, or a middle-aged man with an anxiety disorder.²²¹ Most choose a representative payee to help make sure their rent and utility bills get consistently paid on time.²²² Mental health advocates say little research supports the premise that seniors who use representative payees, for reasons of mental impairment or any other, are more likely to be perpetrators of gun violence than members of the general population.²²³ The statute authorizing representative payees explicitly allows people to make use of the program “regardless of the legal competency or incompetency of the qualified individual.”²²⁴ Thus, mental health advocates say there is scant evidence that seniors who use representative payees are dangerous and deserving of losing their rights to purchase a gun.

The public policy arguments surrounding Obama’s failed proposal are not moot points. They are likely to resurface when another gun proposal emerges. Moreover, the research that indicates the Social Security purchase ban could reduce some elderly suicides is encouraging but does not seem to predict a steep enough decline in elderly suicides.²²⁵ After all, at most 75,000 seniors would be affected by the ban,²²⁶ an estimated 17.5 million seniors own guns.²²⁷ The federal government must be more proactive in stopping senior suicide. Rather than to simply restrict buying, it should remove guns from seniors who can no

219. Ari Ne’eman, *Why Disabilities Rights Activists Like Me Sided with the NRA on an Obama Gun Control Rule*, VOX (Feb. 6, 2017, 12:20 AM), <http://www.vox.com/the-big-idea/2017/2/6/14522132/gun-control-disabilities-republicans-nra-obama>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* (quoting Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016)).

225. Swanson, *supra* note 178.

226. Stephen Koff, *Rule Could Keep Guns from Social Security Disability Recipients, and It’s Taking Heat*, CLEV. PLAIN-DEALER (June 20, 2016), http://www.cleveland.com/open/index.ssf/2016/06/social_security_gun-ban_propos.html.

227. Lisa Hepburn et al., *The US Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 2007 15, 15 (2007).

longer safely own them. For guidance, the federal government should look to Australia.

D. Australia's Gun Laws and Involuntary Gun Restrictions

Australia ushered in the world's most progressive firearm laws when it passed sweeping regulations in 1996.²²⁸ This section explores whether two primary provisions of the laws—a requirement that a senior purchaser have a genuine reason to buy a gun, and a mandatory gun buyback program for elderly with mental illnesses—are constitutional in the United States. The answer: likely not. Despite Australia's cultural similarities, the United States Constitution, particularly the Second Amendment, looms as an imposing barrier to compulsory gun regulations.²²⁹ Moreover, public sentiment and established cultural norms in the United States would likely block politicians from proposing such laws.²³⁰ It is useful, however, to analyze the Australian provisions in the United States' constitutional context to identify the hurdles such regulations would face and attempt to find legal grounds for future gun regulations aimed at seniors.

1. AUSTRALIA LACKS A RIGHT TO BEAR ARMS

Before analyzing Australian law, it is critical to identify the differences between the hurdles a gun bill faces in Australia compared to the United States. Notably, a gun law in Australia faces no Second Amendment-type barrier. Australia's constitution contains no bill of rights.²³¹ In addition, their constitution does not contain an explicit individual right to bear arms.²³² The country's gun advocates have pointed out it is possible to have constitutional rights without explicit text providing those rights.²³³ They claim the High Court (Australia's version of the Supreme Court) has recognized a right to *habeas corpus*, a freedom of expression,

228. Will Oremus, *In 1996, Australia Enacted Strict Gun Laws: It Hasn't Had a Mass Shooting Since* (Oct. 2, 2017), https://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html.

229. See U.S. CONST. amends. II, V.

230. Jeffery M. Jones, *Americans in Agreement With Supreme Court on Gun Rights*, GALLUP NEWS (June 26, 2008), <https://mws.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx>.

231. *Australian Constitution* s 51. xxxi.

232. *Id.*

233. See Cordova, *supra* note 98, at 90.

and a right to vote, despite no express text providing those rights.²³⁴ Legal scholars, however, regard Australia as having weak individual rights due to the lack of textual foundation in their constitution.²³⁵ Compare that to the United States: the Supreme Court has interpreted the Second Amendment as protecting an individual's fundamental right to own and carry a weapon for purposes of self-defense.²³⁶ There is no such right to own a firearm for self-defense in Australia.²³⁷ Therefore, any Australian bill curtailing an individual right to bear arms is not automatically considered unconstitutional and thus faces fewer barriers from the outset.

234. *Id.*

235. *Id.*

236. *District of Columbia v. Heller*, 544 U.S. 570, 626 (2008).

237. *Cordova*, *supra* note 98, at 100.

2. SENIORS MUST HAVE A GENUINE REASON TO PURCHASE A FIREARM

A primary component of Australia's gun law is that a purchaser must have a genuine reason for owning, possessing, or using a firearm.²³⁸ The government defined a "genuine reason" as gun-owning related to sport shooting, recreational shooting and hunting, gun collecting, and occupational requirements.²³⁹ The regulation specified that "personal protection" would not be regarded as a genuine reason for owning a gun.²⁴⁰

The United States government could tailor this approach to target seniors. Anyone older than sixty-five must have a "genuine reason," as defined by Australian law, to own, possess, or use a gun.²⁴¹ The measure would cover far more citizens than the Social Security ban because it would forbid seniors from owning a gun for illegitimate reasons, even if they were not deemed mentally defective. It also would remove guns from the hands of those who have dementia and no genuine reason to possess a weapon. Moreover, it would be politically palatable because hunters and recreationalists could still buy and use guns.

Such a measure, however, would never survive a constitutional challenge. Classifying the genuine reasons to own, possess, or use a firearm would directly contradict the Second Amendment as the Supreme Court interpreted it in *Heller* and *McDonald v. Chicago*.²⁴² In those decisions, the Court prohibited state and federal governments from abridging the individual right to possess, own, or use firearms such as handguns and those "in common use."²⁴³ Although the federal government may limit the individual right through regulatory measures—such as prohibiting guns in sensitive places like schools or airplanes—it cannot abridge the right to possess a gun in one's home and cannot require a prospective gun owner to provide a genuine reason to own a

238. Australian Police Ministers' Counsel, *Special Firearms Meeting*, Canberra, May 10, 1996: Resolutions, res 3 (Austl.).

239. *Id.*

240. *Id.*

241. *Id.*

242. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (holding that citizens are permitted to use firearms "for the core lawful purpose of self-defense"); see also *McDonald v. Chicago*, 561 U.S. 742, 750 (2010).

243. *Id.*

gun.²⁴⁴ There is no need to question whether this regulation would pass an equal protection test. The proposal is dead where it stands.

3. MANDATORY BUYBACKS AND CONFISCATION PROGRAMS

The gold standard for preventing suicides is Australia's 2002 Trafficking and Handgun Agreement.²⁴⁵ The Agreement ushered in a compulsory national buyback program of handguns.²⁴⁶ The Australian constitution prevents the taking of property without just compensation.²⁴⁷ Consequently, "owners were compensated for their newly illegal firearms at market prices."²⁴⁸ The government funded the buyback scheme by a 2% increase in healthcare tax to generate about \$500 million, of which \$304 million was spent on compensation.²⁴⁹ The program reduced Australia's firearms stock by around one-fifth, or more than 650,000 firearms, which amounts to the government buying 3,500 guns per 100,000 people.²⁵⁰ Analysts point to this measure as being crucial to dropping suicide rates across the board by almost 80%.²⁵¹

Would Australia's compulsory buyback be constitutional in the United States? Before considering whether the United States government can compel a senior to surrender his or her gun, it is necessary to answer whether the government can compel a citizen to do anything in the first place. In some instances, Congress may compel a citizen to act.²⁵² Article I of the Constitution gives Congress the power to legislate.²⁵³ Congress is limited in scope to the list contained within Article I and can only exercise those "enumerated powers" granted by the Constitution.²⁵⁴ Some scholars argue Congress holds implied powers through the

244. *Id.*

245. See Andrew Leigh and Christine Neill, *supra* note 105; Steven Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Death, Firearm Suicides, and a Decade Without Mass Shooting*, 12 J. OF INJURY PREVENTION 365, 365-72 (2006) [hereinafter Chapman et al.].

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. See Leigh & Neill, *supra* note 105, at 462-508.

252. U.S. CONST. art. 1.

253. *Id.*

254. Michael Parsons, *The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause*, 11 GEO. J.L. & PUB. POL'Y 177, 179 (2013).

Necessary and Proper Clause within Article I to carry out its enumerated powers.²⁵⁵ On the other hand, those in favor of state power argue that the federal government is limited to only its enumerated powers.²⁵⁶ *McCulloch v. Maryland* partially validates both arguments.²⁵⁷ The Supreme Court held that Congress may legislate and force individuals to act as long as it did not violate the Constitution.²⁵⁸ Meanwhile, the Supremacy Clause allows federal laws passed through Congress' implied powers to overrule state laws.²⁵⁹ The precedent was relied on in *National Federation of Independent Business v. Sebelius*, a case in which the Court held the federal government may compel an individual to buy something, such as health insurance, through Congress' Article I taxing power.²⁶⁰

On other occasions, the Due Process Clause forbids Congress from forcing citizens to act.²⁶¹ As previously explained, due process guarantees fairness to an individual, protecting citizens against arbitrary denials of life, liberty, or property by federal and state governments.²⁶² In *United States v. Salerno*, the Supreme Court stated substantive due process forbids government conduct that "interferes with rights that are deemed fundamental or shocks the conscience."²⁶³

Coupled with the Second Amendment, the Due Process Clause likely prevents the federal government from confiscating weapons. The aftermath of Hurricane Katrina proves this point. Lawlessness swept the city immediately following the hurricane.²⁶⁴ To combat looters, residents formed neighborhood associations and carried firearms to protect their communities.²⁶⁵ The New Orleans police department ordered officers to confiscate all firearms belonging to New Orleans residents, including guns held lawfully.²⁶⁶ The order was struck down on Second

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. U.S. CONST. amends. V, XIV.

262. *Id.*

263. 481 U.S. 739, 746 (1987).

264. David B. Kopel, *The Right to Arms in the Living Constitution*, CARDOZO L. REV. DE NOVO 99, 129 (2010).

265. *Id.*

266. *Id.*

Amendment and due process grounds.²⁶⁷ Soon after, Congress and twenty-six states passed legislation forbidding gun confiscation during natural disasters or emergencies.²⁶⁸ Thus, it is likely neither state nor federal government may confiscate a gun from a senior holding it lawfully.

Under the current background-check system, a national confiscation program also likely would violate the Fourth Amendment. The Fourth Amendment prohibits unreasonable searches and seizures.²⁶⁹ It also requires a warrant to be judicially approved and supported by probable cause.²⁷⁰ Currently, no comprehensive gun registration system exists in the United States, and federal law prohibits using the National Instant Background Check System to create a registration system of firearms or firearm owners.²⁷¹ Since police cannot search a home without a warrant, and police do not know who has a weapon, a confiscation program would require police to obtain a warrant and search every home for a firearm. This would be costly, cumbersome, and would likely result in Fourth Amendment unreasonable-search-and-seizure violations.²⁷² Thus, a national confiscation program aimed at seniors will likely be halted by the Constitution.

There also are cultural reasons why the program would not work. The public sentiment within America stacks the deck against a compulsory buyback.²⁷³ The United States' gun lobby, the country's apathetic response to gun deaths, and its lack of Australia's geographic advantages make it unlikely to emulate Australia's mandatory confiscation program.

One barrier to mandatory gun legislation for seniors is the strength of America's gun advocacy groups. For example, the National Rifle Association currently has more than four million members, and though it does not release its membership demographics, a random

267. *Id.* at 130.

268. *Id.*

269. U.S. CONST. amend. IV.

270. *Id.*

271. *Registration of Firearms*, GLIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/federal-law/gun-owner-responsibilities/registration-of-firearms/> (last visited Oct. 30, 2017) [hereinafter *Registration*].

272. U.S. CONST. amend. IV.

273. See, e.g., Douglas Weil & David Hemenway, *I Am the NRA: An Analysis of a National Random Sample of Gun Owners*, 8 VIOLENCE AND VICTIMS, 353 (1993).

sampling showed about a quarter of members are older than fifty.²⁷⁴ Prospective members sixty-five and older receive a discount for signing up.²⁷⁵ The group has been referred to as “the most powerful lobbying group in Washington,” and pours millions each year into lobbying funds, giving it significant leverage over the passage of state and federal gun legislation.²⁷⁶ Australia, on the other hand, has nothing similar to the strength of American gun advocacy groups.²⁷⁷ The Australian gun lobby lost favor in the eyes of the public after the Port Arthur Massacre, and the public shift has nixed any attempt by the lobby to reduce restrictions.²⁷⁸ Thus, any gun legislation in the United States will receive much greater resistance.

Further, the public’s response to shooting deaths in the United States is drastically different. For Australia, the 1996 Port Arthur massacre was the last straw. Polls conducted after the event showed the nearly 95% of residents approved stricter gun laws.²⁷⁹ Resistance to gun control was condemned by the media.²⁸⁰ United States citizens are not as easily convinced. After the Sandy Hook shooting, when public outrage surrounding guns was simmering, polls still showed 52% of Americans believed it was more important to protect the right to own a gun than it was to pass gun control laws.²⁸¹ Since, public outrage has dwindled, and the general consensus now, according to polling, is that most Americans think gun rights are more important than gun control.²⁸² Americans simply do not care about controlling guns as much as Australians.

Finally, Australia has geographic advantages that make its gun laws easier to implement. The fact that its gun policy applied across the

274. *Id.*

275. *National Rifle Association of America Membership Application*, NAT’L RIFLE ASS’N, <http://www.nysafe.org/Apps3.htm> (last visited Oct. 30, 2017).

276. DENNIS A. HENIGAN, *LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY*, 6–7 (Potomac Books Inc., 1st ed. 2009).

277. See Cordova, *supra* note 98, at 89–90.

278. *Id.*

279. Chapman, *supra* note 245, at 371.

280. *Id.*

281. Emily Badger, *Gun-control advocates are seriously losing public opinion*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/10/gun-control-advocates-are-seriously-losing-public-opinion/?utm_term=.cd0aabba2e48.

282. *Id.*

island nation meant that gun owners could not simply travel across jurisdictions to purchase a replacement firearm, which is different than the buybacks typical in the United States.²⁸³ Plus, the ability of an island nation to restrict illegal gun imports, coupled with Australia's lack of domestic gun manufacturers, means that legal restrictions on gun ownership are more likely to work in Australia than would be the case in countries with open borders, such as the United States.²⁸⁴

Australia's conservative former prime minister John Howard nicely summarized Australia's cultural and legislative advantages, and the tough road ahead for American gun advocates.²⁸⁵ In regards to Australia's program, he said, "[f]ew Australians would deny that their country is safer today as a consequence of gun control."²⁸⁶ Yet, he distinguished Australia from the United States, writing that the United States faced more challenges in enacting such a ban:

Our challenges were different from America's. Australia is an even more intensely urban society, with close to 60 percent of our people living in large cities. Our gun lobby is not as powerful or well-financed as the National Rifle Association in the United States. Australia, correctly in my view, does not have a Bill of Rights, so our legislatures have more say than America's over many issues of individual rights, and our courts have less control. Also, we have no constitutional right to bear arms. (After all, the British granted us nationhood peacefully; the United States had to fight for it.)²⁸⁷

III. Recommendation: Blending President Obama's Repealed Regulation with Australia's Mandatory Buyback

Current United States gun regulations fail to address the rising problem of senior suicides and murder-suicides. The government can decrease elderly homicides by taking several steps. First, the government should create a federal gun registry that includes seniors who own weapons. The government could collect this information by asking about it on Medicare forms. Next, both state and federal governments

283. Leigh & Neill, *supra* note 105, at 510–11.

284. *Id.* at 511.

285. John Howard, Opinion, *I Went After Guns. Obama Can, Too*, N.Y. TIMES (Jan. 16, 2013) <https://www.nytimes.com/2013/01/17/opinion/Australia-banned-assault-weapons-america-can-too.html>.

286. *Id.*

287. *Id.*

should encourage physicians to question their older patients about access to firearms in the home. Physicians should inform their patients—especially those with mental illnesses—about gun dangers, and might be held to a tortious standard of care for failing to do so. Finally, the government should blend President Obama’s repealed regulation with Australia’s mandatory buyback. The government should confiscate weapons from those deemed “mentally defective” by the Social Security Administration. The constitutional basis for confiscation rests on the language in *Heller* that explicitly mentions “prohibitions on the possession of firearms . . . by the mentally ill,” as a valid regulation.²⁸⁸ While such a regulation would face intense political resistance, it would mark an important first step toward a progressive plan to decrease elderly suicides and move the United States closer to its peer countries’ strict gun regulations.

1. CASTING A WIDER NET: CREATING A FEDERAL REGISTRY FOR SENIOR GUN OWNERS

Before the United States can confiscate weapons from seniors who are no longer able to safely use them, the government must know who owns the guns. Part of the problem with any confiscation scheme is knowing whom to target. The federal government should ask seniors on their Medicare forms whether they own a weapon. Creating such a database is likely constitutional and would generate a depository of information for future gun regulations.

Currently, no comprehensive gun registration system exists in the United States, and federal law prohibits using the National Instant Background Check System to create a registration system of firearms or firearm owners.²⁸⁹ Medicare could, however, function as a workaround because the law does not prohibit the government from generating a firearm registry as long as it does not use information from the National Instant Background Check System.²⁹⁰ The collection method would be simple: A separate set of questions on a seniors’ annual Medicare form that asks if they legally own a gun or live in a home with guns.

The method would cast a much wider net than President Obama’s plan to document senior gun owners deemed mentally defective by the Social Security Administration. In terms of sheer numbers, 46.3 million

288. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

289. *Registration*, *supra* note 271.

290. *Id.*

Americans aged sixty-five and older receive Medicare;²⁹¹ only 75,000 would have been categorized as mentally defective and thus monitored by the Social Security ban.²⁹² Moreover, the Medicare question is broader—it asks both whether the recipient owns a gun and whether they live in a home with guns. That will collect information about gun owners and those who have a gun accessible. The Medicare question also solves another information issue for the government. While the Social Security ban focuses only on buying guns, and thus does not account for seniors who already own guns, the Medicare question would collect information about seniors who currently own or live with guns. Thus, the government now knows about the senior who purchased a gun at thirty-five and is no longer able to safely possess it at seventy-five. The onset of dementia is not a problem.

While the Supreme Court has not directly ruled on the constitutionality of gun registrations, the *Heller* opinion suggests registrations would likely comply with the Second Amendment.²⁹³ Justice Scalia's majority opinion noted that, because plaintiffs conceded at oral argument that they "do not have a problem with . . . licensing," that the Court would not address the issue.²⁹⁴ The appeals court in *Heller* addressed the issue and affirmed the regulation: "Reasonable restrictions also might be thought consistent with a 'well-regulated militia.' The registration of firearms gives the government information as to how many people would be armed for militia service if called up."²⁹⁵ The fact that the Supreme Court ignored the registration question after the appeals court approved of it, and the plaintiffs conceded it, points toward constitutionality. Moreover, a case one year after *Heller* directly addressed registrations and found them constitutional.²⁹⁶ In *Justice v. Town of Cicero*, the Seventh Circuit found a town ordinance requiring the registration of firearms did not violate the Second Amendment.²⁹⁷ The court noted that registration does not prohibit gun possession, it simply regulates

291. *Fast Facts About Medicare*, NAT'L COMMITTEE TO PRESERVE SOC. SECURITY AND MEDICARE (Feb. 2017), <http://www.ncpssm.org/Medicare/MedicareFastFacts> [hereinafter *Fast Facts*].

292. Koff, *supra* note 168.

293. See *Heller*, 554 U.S. at 626.

294. *Id.* at 570.

295. *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007).

296. *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009).

297. *Id.*

that possession.²⁹⁸ The Supreme Court did not review the case—another sign that registration is acceptable.²⁹⁹

The Medicare question also would likely survive an equal protection challenge. Anyone older than eighteen who is disabled can apply for Medicare.³⁰⁰ Therefore, the Medicare question would not classify based on age since, in theory, an eighteen-year-old could respond.

The federal registry would not capture all seniors. Some seniors do not apply for Medicare benefits.³⁰¹ Others would likely lie or decline to answer the question. But it would collect a sizable portion of senior gun owners and those who live in homes with guns. Such information is necessary for effective regulations.

2. ENCOURAGE PHYSICIANS TO ASK PATIENTS ABOUT GUNS

State governments should encourage physicians to ask older patients about guns. Also, state governments should consider duty-to-protect laws that hold doctors liable if they have knowledge and do nothing about a potentially dangerous situation involving seniors and guns.

Asking senior patients about guns would help solve a glaring issue involving elderly suicide: most seniors do not know about the skyrocketing problem.³⁰² Doctors could inform their patients, especially those with dementia, about the risks. Moreover, they could educate their patients about voluntary gun buybacks and self-reporting programs. This would help advertise voluntary gun-confiscation programs that do not implicate the Second Amendment.

Doctors likely could not be compelled to tell their patients.³⁰³ The First Amendment probably limits the authority of governments to force doctors to speak.³⁰⁴ But, as public health advocates, most physicians

298. *Id.*

299. *Id.* at 768; *Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://www.lowcenter.giffords.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/> (last visited Oct. 30, 2017).

300. *Fast Facts*, *supra* note 291.

301. *See id.*

302. Turkewitz, *supra* note 74.

303. *See generally* Samantha Rauer, *When the First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech*, 38 AM. J. L. & MED. 690, 692–93 (2012).

304. *Id.* at 712.

would probably have no problem informing their older patients about the risks of owning or having access to a gun.

A duty-to-protect law, styled after the California Supreme Court's decision in *Tarasoff v. Board of Regents of the University of California*, would likely avoid constitutional issues. In *Tarasoff*, the court imposed on California physicians a legal duty to warn foreseeable victims about the credible dangers posed by mentally ill patients.³⁰⁵ Following the ruling, a number of states enacted statutes compelling health care professionals to warn or protect third parties about suspected risks posed by mentally ill patients.³⁰⁶ A physician who knows about a mentally ill senior's gun possession could thus be compelled to warn either family members or authorities. This would help fill the gap in the Social Security ban for seniors who purchased guns long before they developed dementia.

3. MANDATORY BUYBACKS FOR SENIORS SUBJECT TO OBAMA'S SOCIAL SECURITY BAN

For a progressive approach to gun rights that still respects Second Amendment principles, the government should mix President Obama's Social Security ban with Australian-style mandatory buybacks. Under the scheme, a Social Security beneficiary deemed mentally defective would not only be prohibited from buying weapons, they also would be forced to turn in their weapons for just compensation. The measure would mark the first federal gun removal law, and serve as an important step in advancing gun control and public safety rights.

As previously explained, Obama's ban has a simple premise: Social Security beneficiaries with psychiatric disabilities who are assigned a money manager for their disability benefits would be reported to the FBI's background check database as people ineligible to purchase firearms.³⁰⁷ The Australian-style addition would allow the federal government to take the beneficiaries' weapons. Using the Medicare database, the government would know who possessed firearms and have probable cause to search their homes.

305. *Tarasoff v. Regents of the Univ. of California*, 529 P.2d 553, 555 (Cal. 1974).

306. See generally Mark A. Rothstein, *Tarasoff Duties After Newton*, 42 J. L. MED. & ETHICS 104, 109 n.24 (2014).

307. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 27059 (proposed May 5, 2016).

The mandatory confiscation reveals competing ideas in the *Heller* opinion.³⁰⁸ On one hand, the Court prohibited state and federal governments from abridging the individual right to possess, own, or use firearms such as handguns and those “in common use.”³⁰⁹ On the other hand, it suggested prohibitions on possession of firearms are acceptable as long as they are “reasonable.”³¹⁰ Justice Scalia, writing for the majority, specifically stated prohibiting firearms to the mentally ill is an example of a reasonable prohibition.³¹¹ This leaves the Australian-style measure at a crossroads: Can the government restrict the individual right to a gun if it is a reasonably prohibiting a mentally ill senior from possessing it? The answer forces America to make a choice between gun rights and gun control. The federal government should follow Justice Scalia’s advice and reasonably prohibit mentally ill seniors from possessing guns. Public safety depends on it.

IV. Conclusion

The problems related to senior suicides and firearms are well-documented. The potential solutions, however, are untested. The United States could implement a variety of restrictions. The least restrictive regulation allows seniors to report themselves to authorities or voluntarily turn in their firearms. A more restrictive regulation, modeled after President Obama’s overturned Social Security gun ban, would allow the federal government to bar any senior deemed mentally defective by the Social Security Administration from buying a gun. The most restrictive regulations come from our cultural cousin down under, and include mandatory gun buybacks and firearm removal.

The United States should implement a blend of these regulations. First, it should create a national registry of senior gun owners to ascertain the enormity of the problem and document the information for further regulations. Next, it should encourage physicians to help advertise voluntary buybacks and self-reporting. Finally, it should reenact Obama’s repealed gun ban and add an Australian-style provision that removes guns from seniors deemed mentally defective. These measures will not altogether stop senior suicides and murder-suicides.

308. Cf. Meltzer, *supra* note 114, at 1491–95.

309. *Heller*, 554 U.S. 570, 627 (2008).

310. *Id.* at 626–27.

311. *Id.*

But, as America ages, the measures would begin to address a problem that desperately needs to be solved.

