Universitat Pompeu Fabra Barcelona

NO MORE THOUGHTS AND PRAYERS:
Evaluating Constitutional Routes to Gun Control in the United States

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To my Mom and Dad: For raising me to know what is right, and voting for leaders that value my life before a magazine of ammunition. Thank you for sending me here to make our country a better place. I love you endlessly.

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The countless victims, whose names we cannot possibly keep count, of gun violence in America. Those of Sandy Hook, Parkland, Buffalo, Atlanta, Uvalde, Aurora, Columbine, and too many more to list on a single page; this is for the little boys and girls of the American school system who are systematically neglected by the people who are supposed to fight for a safe world for them to grow into. I think of you as I write these pages, and I hope one day my work, my generations work, our work, will create a place where no one else may meet your fate.

ABSTRACT

This thesis aims to expose potential constitutional routes to gun control in the United States. Although this topic has been covered by many academics, legal scholars, lawyers, and judges before, here will be evaluated several different methods of constitutionally achieving regulation. This will include background of the issue facing the United States and how it differs from that in other areas of the world, specifically Europe due to the similarity in wealth. Further, the two battling methods of constitutional Interpretation in the United States will be thoroughly explained and discussed, one method reigning supreme. This method is also used in Europe to interpret the European Convention of Human Rights. The following section will compare the ways the living instrument doctrine works in the European context, and how it and the idea of European Consensus could be reasonably applied in an American context. From there the bipartisan viewings of the living tree doctrine will be analyzed, the common arguments of the right-wing version being refuted. Application of regulation will also be discussed as it is inspired by constitutional regulations on the First Amendment of the United States Constitution, the right to Freedom of Speech. Finally, I will reveal my proposal for constitutional regulation and gun control, while explaining the roadblocks that may be faced on the way there. I conclude by acknowledging now may not be the time for implementation, despite the death toll that continues to grow; but that the United States government and courts must see the statistics for what they are and implement strict, federally regulated controls.

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NO MORE THOUGHTS AND PRAYERS

Introduction

'Amy and I are praying for the victims and families of those devastated by today's horrific act of violence in Texas. This is a heartbreaking tragedy. Please keep the Uvalde community in your thoughts tonight'.[1] This is a tweet from Republican Congressman Scott DesJarlais, representing Tennessee's fourth district regarding the mass school shooting at Robb Elementary School on May 24th, 2022, that left 19 children and 2 teachers dead. Despite his calls for prayer and apparent shock, his twitter bio reads: 'Individual Rights. Small Government. Strong Defense'.[2] He also explains to his 21,900 followers that he voted against several bills in Congress that aimed at protecting children from firearm violence in schools – one of which is the Protecting Our Kids Act.[3] His reasoning? He believes in the hardening of schools with firearms in the hands of teachers and the individual Second Amendment right in the United States Constitution – the right to bear arms.

Congressman DesJarlais is not the only Representative or government official who views the amendment in this light. The Second Amendment poses a serious conundrum for lawyers, academics, judges, and citizens alike. Different interpretations allow for different permissions within the right, and this lack of cohesive understanding has led to what has become a victim-laden bloodbath as well as a war of egos within the bipartisan American political system. With so many conflicting opinions across a geographically and culturally vast country, it is difficult to implement universal change and regulation. It is impossible to deny there is a problem with the Second Amendment in the United States – the fact that there is so much oppositional information, as well an intense debate between the parties at all levels of federal and state government proves the severity of this problem. The ideal solution is amending the Second Amendment to determine the individual does not in fact have the right to keep and bear arms, and implementing restrictive controls to eliminate - or at least greatly decrease - gun violence incidents, similar to what many countries have done in Europe. If this were a plausible route, my suggestions would be almost

[1]DesJarlais, Scott. Twitter Post. 05/15/2022, 1:41AM. https://twitter.com/DesJarlaisTN04/status/1529246170098327555.
[2]Ibid.
[3]"H.R.7910 - Protecting Our Kids Act 117th Congress (2021-2022)," Congress.gov, accessed June 10, 2022, https://www.congress.gov/bill/117th-congress/house-bill/7910.

identically aligned with those proposed in this thesis. However, in the current polarized political climate in the United States, this route is essentially impossible; proponents of gun control are therefore required to, instead of amending the Second Amendment, interpret it as it stands in the way that saves the most lives. The fight of interpretation is what brings us to this scripture. How can it be done; how can change be made in a way that is fair and constitutional?

To understand how to make change, it is important to first understand the empirical context of the crisis in the United States, and how it is different from other worldly regions. Immediately following this clarification, I will enter the doctrinal and jurisprudential meat of my argument, using both international and domestic influence to justify existing constitutional routes to gun control. I will finally end with a proposal of possible constitutionally sound regulations that can be done without amendment to the Constitution. Ultimately, change is possible, change is necessary, and change is desired by the people. This is how it can be achieved.

Context of the Crisis: Key Statistics from the United States and Europe

Before a doctor may prescribe, they must first understand the problem. The same philosophy applies to understanding the gun violence epidemic in the United States in search of a constitutional cure. The statistics are shocking and provide a gruesome diagnosis of the issue faced. According to the Pew Research Center, In the year 2020 45,222 people died from firearms; and this number only includes instances where the primary cause of death was gunshot wound.[4] An astonishing 43% of these deaths were homicides.[5] Even more astonishing – 79% of homicides in the United States involve a firearm.[6] These numbers are not improving with the additions of armed police in schools or on shop corners; the problem is only becoming more grave. 2020's death count was a 19% increase from 2019, a 25% increase from the 5 years prior to that, and a 43% from the decade before that.[7] The state with the highest rate of gun death in all the United States is Mississippi with 28.6 deaths per 100,000 people, followed by Wyoming with 23.9 deaths per

[4]John Gramlich, "What the Data Says about Gun Deaths in the U.S.," Pew Research Center (Pew Research Center, May 16, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.
[5]Ibid.
[6]Ibid.
[7]Ibid.

100,000 people. Meanwhile, some of the states with the lowest rates of gun death are New York with 5.3 deaths per 100,000, and Massachusetts with 3.7 deaths per 100,000.[8] What is striking about these numbers, besides their size, is that they do not correlate even in the slightest, with population size. Wyoming is the smallest state in population in the country – in 2020, the population was only 581,348 people. New York is the fourth largest state in the country, with a population of over 20.2 million.[9] The top 5 states for rates of gun deaths are relatively small populations and small states – indicating a difference in culture and opinion towards firearms in these areas, as the deaths are not proportional to population sizes.

A subtype of gun violence is mass shootings, an event commonly reported in the United States. Mass shootings are defined differently by different authorities, but commonly are understood to be either, according to the Federal Bureau of Investigation, when one or more person is in a populated space attempting to shoot people. By this definition, there would have been 38 deaths from mass shootings in 2020.[10] However, according to the Gun Violence Archive defines a mass shooting as when 4 or more people are shot. According to this definition, there were 513 deaths from mass shootings in 2020.[11] The United States has the highest private gun ownership in the world with 393 million arms – and Americans are also 25% more likely to die from gun homicide than any other person living in a high-income country.[12] This of course also is disproportionately affecting people of color, women, and religious minorities – exemplified the 2021 Atlanta Spa shooting, where eight women, six of which were Asian, were murdered[13], or the Pittsburgh Synagogue shooting of 2018 where eleven Jewish people were murdered.[14] Women living in the

[8]Ibid.
[9]"U.S. Census Bureau Quickfacts: New York," United States Census Bureau, accessed June 14, 2022, https://www.census.gov/quickfacts/NY.
[10]John Gramlich, "What the Data Says about Gun Deaths in the U.S.," Pew Research Center (Pew Research Center, May 16, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.
[11]Ibid.
[12]"Gun Laws," Giffords, July 12, 2021, https://giffords.org/lawcenter/gun-laws/.
[13]Deepa Shivaram, "A Year Later, Atlanta Remembers the 8 People Killed in Spa Shootings," NPR (NPR, March 13, 2022), https://www.npr.org/2022/03/12/1086306008/atlanta-spa-shootings-anniversary-anti-asian-racism.
[14]Peter Smith and Mark Scolforo, "3 Years after Pittsburgh Synagogue Attack, Trial Still Ahead," WHYY (Associated Press, October 22, 2021), https://whyy.org/articles/3-years-after-pittsburgh-synagogue-attack-trial-still-ahead/.

United States are also 21 times more likely to be killed by a firearm than other women living in high income countries.

Federal regulation on firearms is lacking. There have been attempts to formally standardize at the federal level, such as the Gun Control Act of 1968 which regulated international purchases and shipments of firearms as well as established a minimum age of purchase.[15] Nonetheless, with time much of this legislation has deteriorated and left the power of regulation up to the states resulting in great variation in gun control laws around the country. For example, in 1994 Congress passed the Federal Assault Weapon Ban, which prohibited the 'manufacture, transfer and possession of semi-automatic assault weapons; and 2) the transfer and possession of large capacity ammunition feeding devices (i.e., devices capable of holding more than 10 rounds of ammunition)'.[16] Congress permitted this legislation to lapse in 2004, and there is no longer a ban on any of these types of weapons and equipment – and the difficulty of accessing these firearms after the lapse is very different from state to state. Further, the Brady Act was implemented to prevent crimes of passion by instituting a waiting period between selection and receiving a firearm to check the background of the buyer. However, with the newer implementation of 'shall issue' and 'concealed carry' laws, buyers have found a loophole to avoid these essential background checks. In many states it is very easy to purchase and carry publicly and unconcealed, or even concealed, nearly any kind of firearm. This also showcases the diversity in regulation across the states due to the evading of federal regulations.

The culture of guns in the United States is extremely unique and certainly is part of the issue with firearm violence. A key example is the comparison of the use and respect of guns between the United States and Europe. Europe's firearms directive, Directive 91/477/EEC, is designed to balance the internal market and security goals as they pertain to civil firearms.[17] It was revised in 2017 with substantial improvements, including making it much more difficult to legally acquire

[15]"Key Federal Regulation Acts," Giffords, December 1, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/.
[16]Ibid.
[17]"Firearms Directive," Internal Market, Industry, Entrepreneurship and SMEs, accessed June 10, 2022, https://ec.europa.eu/growth/sectors/firearms-directive_en.

many high-capacity weapons such as automatic firearms and semi-automatic firearms.[18] The directive also helps with tracking firearms across borders within the European Union, which significantly decreases the chances of infiltration of the arms into illegal markets.[19] The European gun control system is evidently strong and well considered, though many argue that the rate of violence is the same as in the United States. However, this claim can be refuted with a glace at the statistics. In the United States, there were 25 mass shootings between the years 2009-2015 – in the same time period, Europe (not only the European Union) had 24 incidents. But what is vital to understand is the rate of violence by population size. The United States had a rate of .078 shootings per million individuals, while Europe had a rate of .032.[20] The United States had nearly double the number of shootings despite being half of Europe's population size. This inconsistency is staggering. So, how can it be fixed?

The evidence displays clearly that there is a more pressing, and isolated issue with gun violence in the United States compared to other wealthy countries. The following sections aim to divulge and expound constitutional routes to gun control mimicking not only the European Court of Human Rights' interpretation of Europe's 'constitution' (the European Convention on Human Rights); but also looks within to assess how the United States can use its own jurisprudential history to implement long lasting, life-saving alterations.

Originalism v. Living-Tree Doctrine

Originalism is a well-known theory of constitutional interpretation, used and supported often when analyzing the United States Constitution. This theory asserts that when interpreting constitutional amendments, the interpretation should align with what the intention and or understanding of the amendment was at the time of its writing and implementation. Proponents of the theory of originalism often proclaim this is the most objective and widely supported theory of interpretation, used by all rational judges, lawyers, and politicians[21] - despite significant evidence disproving this claim. It is to be understood that the Constitution is the supreme law of the land, and has been for

[18]Ibid.
[19]Ibid.
[20]Caitlin Clarkson Pereira, "Myth: Europe and US Have Similar Rates of Public Mass Shootings," GVPedia, March 1, 2021, https://www.gvpedia.org/gun-myths/europe-and-us/.
[21]Kaufman, Whitley. "The Truth about Originalism." *The Pluralist* 9, no. 1 (2014): 39–54. https://doi.org/10.5406/pluralist.9.1.0039.

centuries – therefore as mere interpreters, it is imperative to honor the antiquated opinions of the founding fathers. While the role of Justices in the Supreme Court of the United States (hereafter; SCOTUS) is to remain impartial and avoid having political persuasions color their reading of amendments, it cannot be denied the ways in which originalist interpretations lend themselves to conservative values. This can be evidenced in the holdings of Supreme Court justices regarding *Roe v. Wade*, when in early May of 2022 a drafted majority opinion by Justice Samuel Alito supported by a five Justice majority aimed to overturn the longstanding right to abortion established in 1973.[22] The SCOTUS originalists have also long held conservative inclinations regarding homosexual marriage, and upon its legalization in the United States in 2015, was harshly criticized by, again, Justice Samuel Alito and another right-leaning (yet officially 'impartial') justice, claiming the decision violated the religious liberty of the American people.[23]

However, despite the extensive literature discussing the politicization of the SCOTUS Justice nomination and confirmation processes, originalists still promulgate that their interpretation is true to the document and displays not their personal opinions, but sheds light on the true and unequivocally conservative nature of the document itself.[24] This conservative inclination of the Constitution therefore also endorses the conservative analysis of the Second Amendment, which written verbatim states: *A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.*[25] This right to bear arms has undoubtedly become a major cultural facet of life in the United States; it is a frequently discussed and is a highly respected value in modern American society. Originalism is in strong opposition of restrictive measures against the ownership and use of firearms. It openly and confidently defends the right of each law-abiding, American citizen to keep and bear their own arms; to them, the Second Amendment conclusively and without doubt permits the individual to own arms

[22]"Supreme Court Marshal Digs in on Roe Opinion Leak," POLITICO, accessed May 24, 2022, https://www.politico.com/news/2022/05/24/scotus-marshal-roe-opinion-00034670.
[23]Nina Totenberg, "Justices Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights," NPR (NPR, October 5, 2020), https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights?t=1653487016421.
[24]Kaufman, Whitley. "The Truth about Originalism." *The Pluralist* 9, no. 1 (2014): 39–54. https://doi.org/10.5406/pluralist.9.1.0039.
[25]"U.S. Constitution - Second Amendment - Library of Congress," CONSTITUTION ANNOTATED, accessed May 26, 2022, https://constitution.congress.gov/constitution/amendment-2/.

without hindrance. They also, in modern times, disagree with many of the proposed implementations of gun control or protective measures that do not remove all arms from the citizen, but institute safeguards making ownership and purchase a more tedious and carefully executed process. Both originalists and the theory of originalism itself rely deeply on the historical connotations that come jointly with the interpretation of the Constitution to bring legitimacy to the argument.

Upon the separation of the American colonists from the English Commonwealth, there was insufficient funding and manpower to establish a standing army in peacetime, let alone a standing army in times of crisis, or any kind of police force or law enforcement body.[26] The early Americans were also living in fear of invasion by multiple forces, including but not limited to the Native American tribes who inhabited the territory along the eastern seaboard, as well as the French, Spanish, and Dutch colonies belonging to the British.[27] Seeing as a formally instituted and well-organized method of protection was inaccessible in the early history of the United States, many of the people were drawn to the idea of forming a militia of the citizenry. The creation of this militia not only allowed but *required* all citizens to own firearms for the reasons of state defense, law enforcement, protection against invasion, uprising, and tyranny from the government. This lack of means and men to establish a protective powerhouse began to sculpt what have become some of the greatest sources of pride in the American 'way', and deeply influence the role firearms play in United States culture. These impoverished, malnourished, and exhausted colonists were now the utmost and only protectors of their new nation – one for which they had fought so tirelessly. The militia comprised of the citizens meant that it was their responsibility to continue no longer for their fight of independence, but for the protection, glory, and continuation of their home. The success of this new republic was dependent on the efforts placed forth by these people, and their warrior-like spirit.[28] Their undying passion for life, liberty, and the pursuit of happiness were to be evidenced in their willingness to serve. Further, the draw to the militia comprised of colonists

[26]Kates, Don B. "Handgun Prohibition and the Original Meaning of the Second Amendment." *Michigan Law Review* 82, no. 2 (1983): 204–73. https://doi.org/10.2307/1288537.
[27]Ibid.
[28]Shalhope, Robert E. "The Ideological Origins of the Second Amendment." *The Journal of American History* 69, no. 3 (1982): 599–614. https://doi.org/10.2307/1903139.

allowed them to feel protected by their joint spirit and goal and seemed to fend off - or at least fade - the fears of British invasion that were ever-present. The creation of the militia fostered this attitude that these new Americans had pulled themselves up from their lowest points, when their trousers hung low around their hungry bodies and their sore muscles rested but for only a few hours before work called to them again to construct what would become a major actor on the world stage. Firearms in the home symbolized this entire struggle; the idea that the people were required to own a gun to protect them and theirs was the paramount badge of honor and determination. Their constant preparation for attack, or for the protection of the well-being of their novel society, for many was what allowed the people to prosper into what is now modern American civilization. To the originalist, guns are intrinsically tied to this archival success, disregarding the influence of time or the constitutional legitimacy of modern firearms. This cultural icon of the common man's firearm is what has catapulted this constitutional skirmish that is the battle of pro-gun versus pro-gun control.

Originalism is a legitimate theory of constitutional interpretation, though it is neither the only nor the most feasible method for this particular query. Commonly used in the discernment of the Second Amendment is the living tree doctrine. The living tree doctrine is a theory that proclaims the Constitution of the United States is dynamic and can be interpreted broadly as well as in accordance with norms and the passage of time. It evolves, adapts and does not require amending in order to be interpreted as such. This theory garners more support from lawyers and legal scholars and has been evaluated by many to be the most reasonable and effective way to interpret the Constitution.

The evidence of functionality, and reason, of the living tree doctrine abounds. It cannot be denied that the processes of government are not static, and as time and people and culture and norms all do, government morphs in pursuance of serving the varying needs of its constituents.[29] Even the most confident of the believers in the Constitution assumed that the document would survive and last meaningfully for 75 years maximum.[30] This clearly indicates that even the geniuses which

[29]Reed, Stanley. "THE CONSTITUTION OF THE UNITED STATES." *American Bar Association Journal* 22, no. 9 (1936): 601–8. http://www.jstor.org/stable/25712194.
[30]Kerwin, Jerome G. "THE LIVING CONSTITUTION." *Il Politico* 23, no. 4 (1958): 598–611. http://www.jstor.org/stable/43204774.

originalist interpreters declare deserve to be honored and kept alive through their exact, verbatim scripture and intentions (which are in any case nearly impossible to prove) even they themselves - at very best - estimated the document to only be relevant for less than a century. It was always intended that the federal government should have the capacity to handle new situations or problems as they arise, and it is clear in the Constitution that power of change is in the hands of the central government, not a court or state governments.[31] However, despite this prescription, it is understandable where some of the fear of permitting federal government to have control comes from. At the conception of the United States as its own independent nation, the people had to grow accustomed to the massive distance, changes in geography from icy northeast to the heat and mountainous regions that comprise the locale. This diversity in life experiences, with little capacity for quick and adequate communication between the people in each space, lead to anxiety and hesitancy to permit a federal government to have ultimate control over all regions. The fear of having needs and experiences be misunderstood, restrained, or forgotten felt like a threat to each new American's way of life.[32] Of course, this fear cannot fairly be translated into a present-time fear of the federal government; it is much too easy to communicate with federal representatives, and with one another, and travel to witness and comprehend the life experiences in all the furthest corners of the country. Americans, regardless of location, are mutually understood and no longer is this an excuse for placing so much power into state governments in such a well-connected country – it only further supporting the need to interpret the constitution with flexibility and modern eyes.

This theory of constitutional interpretation is further supported by many reputable sources in American history, which increases the legitimacy of the method. Chief Justice Morrison Remick Waite stated, speaking on behalf of the SCOTUS in regard to the 1877 Pensacola Telegraph Case, 'Powers thus granted are not confined to the instruments of commerce, or the postal system known as in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances'.[33] This clear indication of the fluidity and flexibility of the constitutional amendments, even within the first century after

[31]Reed, Stanley. "THE CONSTITUTION OF THE UNITED STATES." *American Bar Association Journal* 22, no. 9 (1936): 601–8. http://www.jstor.org/stable/25712194.
[32]Ibid.
[33]Ibid.

the Constitution's ratification only reinforces the argument given by living-tree scholars, lawyers, and justices. Additionally, Justice George Sutherland spoke in the year 1926 for the case *Euclid v. Ambler Co (1926)* - regarding zoning ordinances and the right to equal protection clause of the Fourteenth Amendment – stating:

> *Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, even half a century ago probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.*[34]

Again, the reader is assured that the guarantees as read in the Constitution are meant to evolve, change, and adapt with time. Even more so than this, Justice Sutherland establishes that assertions crafted in the document can even become unreasonable and no longer relevant with time and the development of technology. It is undeniable the clarity and common sense this quote provides. It becomes obvious once again the early protectors of the United States Constitution believed with confidence that certainty and uniformity are not for law; but what is for law is the consistent evaluation with the passage of years to protect the changing social and economic ideals American society values.

Outside the Supreme Court there has time after time been support for the fluid interpretation of the Constitution as well. President Woodrow Wilson, the 28th President of the United States famously declared: 'The Constitution of the United States is not a mere lawyers document, it is a vehicle of life, and its spirit is always the spirit of the age'.[35] These quotations all indicate a shared idea on the way the Constitution deserves to be interpreted to best serve the people whom it protects. However, as was mentioned in the analysis of the theory of Originalism, there has been bitter battle between the two interpretations. This clash between original intent and modern flexibility has not

[34]"Village of Euclid, Ohio, Et Al. v. Ambler Realty Co..," Legal Information Institute (Legal Information Institute), accessed May 30, 2022, https://www.law.cornell.edu/supremecourt/text/272/365.
[35]Janine Turner and Cathy Gillespie, "The President of the United States by Woodrow Wilson – Reprinted from The U.S. Constitution, A Reader, Published by Hillsdale College," Constituting America (Janine Turner and Cathy Gillespie http://constitutingamerica.org/wp-content/uploads/2021/10/logo_web_white_280x62.png, December 6, 2013), https://constitutingamerica.org/the-president-of-the-united-states-by-woodrow-wilson-reprinted-from-the-u-s-constitution-a-reader-published-by-hillsdale-college/.

left many amendments from unscathed by the shrapnel, including the Second Amendment. Many argue the way to end gun violence's reign of terror that plagues the United States is to interpret the Second Amendment organically.

In the founding era, a citizen militiaman when threatened would reach for his gun, determined to protect dutifully his country. However, it is important to understand the damage firearms during this time period were capable of. Firearms commonly used included muskets and flintlock pistols which could each only hold a single round at a time.[36] In addition, if being wielded by a skilled shooter, these weapons could fire around three to four shots a minute – with limited accuracy. The muzzle velocity of both models was around one thousand feet per second, with a fifty-meter range accuracy. For those unacquainted with the intricacies of weaponry, these firearms are relatively basic and primitive; especially in comparison to what is currently available to many with modern technology. In comparison, a regularly owned weapon in the U.S. today is the ArmaLite Rifle 15 (hereafter AR-15); a semi-automatic assault rifle. These firearms can hold thirty rounds compared to the single round of the musket or flintlock pistol. Switching the empty magazine with a new, refilled one is also very simple and can be done in seconds. The AR-15 also can fire around 45 shots a minute by a decent shooter. The gun is stable, and accurate up to 550 meters – which is 10x further than the firearms of choice during the founding era.[37] It is lightweight, easy to hold, the ammunition travels three times the speed of sound[38] and is designed to blow a human body to smithereens. This is a weapon of war; it is capable of more carnage than any founding father ever could have imagined. This is not a weapon the average citizen is constitutionally granted access to. This is not a weapon the average citizen requires in their home.

These are the weapons used by the military – another purpose the American citizenry no longer must serve. The AR-15 is also, uncoincidentally, the weapon of choice in some of the United States' most tragic mass shootings. Of these are included Robb Elementary in Uvalde, Texas (May

[36]Christopher Ingraham, "Analysis | What 'Arms' Looked like When the 2nd Amendment Was Written," The Washington Post (WP Company, November 24, 2021), https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/.
[37]Ibid.
[38]Scott Pelley, "What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters?," CBS News (CBS Interactive, May 29, 2022), https://www.cbsnews.com/news/ar-15-mass-shootings-60-minutes-2022-05-29/.

2022); a Buffalo, New York supermarket (May, 2022); a Texas Walmart (2019); A church in Texas and a concert in Las Vegas, Nevada (2017); and Sandy Hook Elementary in Newtown, Connecticut (2012).[39] It cannot be denied that these weapons are a threat and are consistently being used not for self-defense, not for the protection of state and country, but for mass murder. The Constitution, according to history, would not condone this gross abuse of modern technology. While at one time a simple and now-antiquated firearm may have been imperative, even Alexander Hamilton himself asserted that 'instruments of reform in one age, may be sources of political evil in another'.[40]

Originalists also cling tightly to the need to allow the individual to own a firearm in the home because historically, as aforementioned, the early American citizens were not only permitted but *required* to have a firearm. This was, again, for the purpose of protection, as well as the lack of financial capability or manpower to establish a strong army. However, to say that this is no longer the situation of the Armed Forces in the United States is a comically underwhelming expression of reality. In 2021 there were over 2 million people serving in the United States Military across all branches, between active duty and reserves.[41] Military spending from the United States hit 801 billion in 2021, making it the highest military budget worldwide.[42] The economic support given to the U.S. military, as well as the sheer amount of people serving blow those of most countries all over the globe out of the water. Considering the roots from which those starving, deeply impoverished, citizen militiamen came from, the United States has exploded into what is considered the strongest military superpower in the world. However, using the claims the originalists themselves make, their point appears moot. In having a very strong and prepared army, supported worldwide by the nations we used to fear - such as the United Kingdom and their colonies, who all are allies of the United States in the North Atlantic Treaty Organization (NATO) – there is hardly any need for the average citizen to be armed for impending attack. The United States are not at risk from their former enemies, nor do they feel threatened by states remained unallied. Their power is too great. Along this note, there is no longer a need for the citizen to be

[39]Ibid.
[40]Alexander Hamilton, "The Federalist Papers : No. 83," The Avalon Project : Federalist no 83, accessed June 1, 2022, https://avalon.law.yale.edu/18th_century/fed83.asp.
[41]"US Military & Defense Statistics: 2022 State of the Union," USAFacts (State of the Union, February 28, 2022), https://usafacts.org/state-of-the-union/defense/.
[42]"World Military Expenditure Passes $2 Trillion for First Time," SIPRI, April 25, 2022, https://www.sipri.org/media/press-release/2022/world-military-expenditure-passes-2-trillion-first-time.

armed and act as police or law enforcement. The United States has widely varying police budgets across all states, but nonetheless all states are well equipped with adequate state level law enforcement, as well as the Federal Bureau of Investigation at the federal level. The legislation governing the United States must keep pace with the realities in which it is faced[43]; and the reality is, and is unlikely to change in the near future, that the United States Army is at little risk for domination and does not need the support of the constituent body.

The originalist method of constitutional interpretation is a valid way to look at the history of the Constitution of the United States. It may be true that the Constitution and the founding fathers did indeed wish for the individual to be armed and for this right to be uninfringed upon. However, while valid this story may be this is no longer the contextual reality of the country, and the interpretation of the amendment requires analysis through a modern lens. There is much support for the use of the living tree doctrine of constitutional interpretation from justices, scholars, lawyers, and political servants alike. There is no reason to continue the bloodbath that is caused directly by the use of firearms, when there is abundant evidence that originalism is not only disfunctional, but actively harmful to the people of the United States. To solidify this point, it is key to delve into the use, and success, of the living tree doctrine in the European Court of Human Rights when interpreting the European Convention of Human Rights.

The ECHR: Living Instrument Doctrine of Constitutional Interpretation & European Consensus

The European Convention of Human Rights (hereafter; ECHR) is a binding human rights document that is directly applicable to all 47 of its member states. It grants absolute rights that are both untouchable and unreachable by the domestic governments of those states[44] and has primacy over domestic law. The interpreting body for the ECHR is the European Court of Human Rights (hereafter; ECtHR), otherwise known as the Strasbourg Court. The member states are also bound by the judgements of the ECtHR. In this way, the ECHR and ECtHR are comparable to the United

[43]Reed, Stanley. "THE CONSTITUTION OF THE UNITED STATES." *American Bar Association Journal* 22, no. 9 (1936): 601–8. http://www.jstor.org/stable/25712194.
[44]Letsas, George, "The ECHR as a Living Instrument: Its Meaning and its Legitimacy" (March 14, 2012). Available at SSRN: https://ssrn.com/abstract=2021836 or http://dx.doi.org/10.2139/ssrn.2021836

States Constitution and the SCOTUS; the rights afforded in the Constitution cannot be infringed upon, and U.S. citizens rely on the SCOTUS Justices to interpret whether or not a violation has occurred. Despite this kindred similarity, there is one vital difference: the ECtHR always interprets the ECHR using the living instrument doctrine. The ECHR is incredible and extremely modern because of 'the way the Court interprets it: dynamically, and in the light of present-day conditions'.[45] The ECtHR openly supports and asserts that the ECHR should be analysed with a lens of life as it is today, because the provisions that are granted in the document were crafted when the situations faced today were entirely unforeseeable.[46] It is therefore vital to account for this and understand reasonably how to allow the ECHR to keep up with and justly govern modern society.

This method of interpretation has allowed for the extension of many rights set out in the ECHR, as well as applied to areas of life that were completely non-existent at the time of adoption – such as technology, bioethics, or environmental concerns. Since much remains in common between international human rights treaties and constitutional bills of rights, it is fair to assume that SCOTUS could certainly emulate the ECtHR when evaluating the fundamental rights granted in the Constitution. In both situations, the documents contain rock-solid rights that individuals have against their government[47] - however only in the ECtHR are those rights read in bearing with the passage of time. This also means that it is considered not only if a right has been violated, but also how far the *meaning* of legal rights given to the people evolve over time.[48] This is where using the ECtHR's living instrument doctrine of constitutional interpretation may allow for the implementation of constitutionally sound gun control in the United States.

The ECtHR asserts that it is key that the current standards they consider must be 'common' or 'shared' amongst contracting states.[49] Despite this assertion, 'the Court has never defined what it means for a standard to be common or shared… the Court does not make it a condition that all

[45]Ibid.
[46]Ibid.
[47]Ibid.
[48]Ibid.
[49]Ibid.

contracting states have expressly accepted the standard by way of legislative enactment'.[50] This means that while there should be what is called European Consensus, meaning a majority of signatory states show presence or absence of a common ground[51] on a certain subject. However, a majority is not all; and there are several instances in which the respondent state that has gone against the grain of the consensus has yet still been found in violation of an ECHR right. This has therefore required the respondent state to adjust to the binding decision. These historical cases are key for possibly implementing a similar interpretation strategy in the United States; but it is important to first understand why the cases are of such value in the first place.

The first case which is incredibly valuable in terms of possibly applying the living instrument doctrine to the United States Constitution as well as permitting a majority to function as consensus, not an entirety, is *Dudgeon v. United Kingdom (1981).* In this case, Mr. Dudgeon (the applicant) declared that laws in Northern Ireland criminalizing certain acts of homosexuality between two consenting, male adults violated his Article 8 right to respect for private life of the Convention.[52] It was argued by the Northern Ireland government that in Northern Ireland, the society was very religious and decriminalizing such acts would be harmful to everyone in the area as well as diminish the morals of Northern Irish existence. However, the Court stated:

> *As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.*[53]

Even though this situation was, in fact, morally sensitive in Northern Ireland, as well as many other member states to the Council of Europe (Hungary, Turkey, Austria, Poland, etc.), the Court still ruled that with the living instrument doctrine it is important to look around at what others are doing and what others wish for, even if it does not supply the Court with a unanimous consensus. Times had changed, and hence so had opinion, even if it had not changed in the respondent state.

[50]Ibid.
[51]"Interpretive Measures of ECHR case-law: the concept of European consensus," HELP, accessed June 8, 2022, https://www.coe.int/en/web/help-country/article-echr-case-law.
[52]"Dudgeon v. UK," Minority Rights Group, October 24, 2016, https://minorityrights.org/law-and-legal-cases/dudgeon-v-uk-2/.
[53]Dudgeon v. United Kingdom (Appl No. 7525/76) Judgement of February 1983, at para. 60.

Therefore, a breach was found and those acts of homosexual activity between consenting, male participants was no longer to be criminalized. Another case evaluated with similar criteria is the case of *Norris v. Ireland (1988)* – which is nearly exactly the same to *Dudgeon v. United Kingdom*, so similar that *Dudgeon* is cited as reasoning for the final judgement.[54] Mr. Norris also alleged that Ireland's prohibition of male homosexual activity was a violation of his Article 8 right to private life in the Convention. The ECtHR ruled there was, in fact, a violation of Mr. Norris' article 8 right, and this finding led to the decriminalization of homosexuality in 1993.

Another applicable case for comparison is that of *Schalk and Kopf v. Austria (2010).* In this case, the applicants approached the competent parties to allow for their same sex marriage. At the time marriage could only be granted between two parties of opposite sex, and so their request was denied. It was ultimately determined by the ECtHR that the state of Austria had a wide margin of appreciation and therefore was best suited to determine whether homosexual marriage was a reasonable legal implementation at that time.[55] However, the Court did also acknowledge that two same-sex people living together in a stable, cohabitating, de facto partnership do indeed have a right to family life under Article 8 of the ECHR. This decision used the magnifying glass of 'the evolution of society and the growing number of countries which had already granted rights to homosexual couples'.[56] Further, the court noted:

> *Here is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.*[57]

Though the judgement did not grant the right to same-sex marriage in Austria, it did bend a small amount to assert that changes are coming. Nonetheless, in the current climate, small changes are possible and more significant alterations are to be awaited.

[54]Morgane Kleine, Victoire de Maillard, and Ariane Piat, "PDF" (Bordeaux, France, n.d.).
[55]Echr, "European Court of Human Rights," HUDOC, accessed June 10, 2022, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-912%22]}.
[56]Morgane Kleine, Victoire de Maillard, and Ariane Piat, "PDF" (Bordeaux, France, n.d.).
[57]ECtHR, Schalk and Kopf v. Austria, No 30141/04, 24 June 2010.

It is easy to see why these cases may be significant in Europe, but what do they have to do with the United States Constitution and gun control? In each of these cases, the situation is interpreted with a modern eye. Each state claimed that the opinion of that area (Northern Ireland, Ireland, and Austria) all did not condone homosexual fornication or matrimonial unity. However, the Court was clear in saying that things are changing in the world, and people are becoming less traditional and far more accepting of untraditional partnerships. Therefore, there is at least some right to some kind of relation (sexual or civil) between people of the same sex – whether it be what they exactly asked for, or only one step up from what was legally permitted before bringing a case to the ECtHR. Of course, this use of the living tree interpretation would be just as effective for gun control. As aforestated, if the SCOTUS were to use this method, it would be clear that the founding fathers (regardless of their desire to have the individual be armed or not) would not see a need for automatic weapons or for the average citizen to be armed in the home when the country boasts the world's strongest military – so on and so forth. These cases are excellent evidence as to the living instrument doctrine functioning effectively to protect the rights of their citizens.

However, the more interesting evidence is that regarding consensus in the European states that are bound by the ECHR. In each case, there was not complete, unanimous European Consensus concerning the issue at hand. However, the upward trend in support for the decriminalization of homosexuality and permission of same-sex marriage all encouraged the Court to at least be more flexible in their decision making – in *Dudgeon* and *Norris*, this meant the decriminalization in Ireland while in *Schalk and Kopf* this meant giving right to family life to stable, cohabitating, de facto same-sex couples. The ECtHR's use of emerging consensus and common standards can be applied in the United States regarding some (but not all) measures of gun control. Pew Research Center executed a research study in 2021 regarding American public opinion on gun control. According to this study (consisting of over 5,000 randomly selected participants with a range in political affiliation, age, geographical location, education level, gender and more), 87% of people favor preventing people with mental illnesses from purchasing guns, 81% of people favor making private gun sales at gun shows subject to background checks, 66% of people favor creating a federal government database to track all gun sales, 64% of people favor banning high capacity ammunition magazines that hold more than 10 rounds, and 63% of people favor banning assault-

style weapons.[58] While none of these numbers reach 100% support, it cannot be denied that there is at least solid support for each of these implementations. If the U.S. government were to mirror the reasoning of common standard and emerging consensus on the judgments of the ECtHR in the cases referenced prior, it would be possible to put some of these propositions into law and start seeing some change in the amounts of mass shootings and homicides using firearms. It is true that it is not possible at this time to implement all the controls that proponents of gun control desire based on the data of majority public opinion. Nonetheless, it is without a doubt plausible and legally legitimate to both interpret the constitution using the living tree doctrine as well as accept the emerging public opinion/consensus adopted by the ECtHR regarding gun control legislation.

5. Conservative Living Tree vs. Liberal Living Tree

While the living tree doctrine is often associated with liberal and progressive ideologies, when discussing gun control in the United States it often can be swayed to the right. These two branches exist on opposite ends of the spectrum of political persuasion and have very different outcomes of interpretation of the Second Amendment. The first, as previously explained (supported by the ECtHR and Living Tree scholars in the United States), is the way of thought understanding that the founding fathers could never have foreseen what would become of this right, the violence and slaughter it would ensue – therefore, we should interpret the amendment with fluidity and take into mind making alterations. Circumstances in the modern world, such as the United States being a superpower on the world stage and the lethal technological advancements of firearms. On the other end of the spectrum is the conservative living tree interpretation. Supporters state that while it may be true that the founding fathers did not anticipate the speed at which firearms and the American status would accelerate, this is the situation that has become, the hand that has been dealt. The three most common conservative living tree arguments are that guns do not kill people; people kill people with guns as the agent, everyone now has guns thanks to the Second Amendment and guns are necessary in order to protect oneself, and that automobiles also are responsible for an enormous number of fatalities in the country, but not for a moment is the prohibition of their use considered.

[58]Kim Parker et al., "America's Complex Relationship with Guns," Pew Research Center's Social & Demographic Trends Project (Pew Research Center, February 5, 2022), https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/.

While at face value some of these arguments may appear reasonable and almost fair, the evidence to support them is neither strong nor compelling. The evidence that is available indicates that these claims are invalid, and the interpretation method of choice should henceforth remain that of the liberal living tree doctrine.

It is as close to impossible as something can be to enter a discussion about gun control without hearing the phrase 'Guns don't kill people; people kill people'. This phrase, even backed by the National Rifle Association (hereafter; NRA) is meant to assert that guns aren't the reason people die, but it is the intention of the killer that truly is the cause of death – essentially, if death is the goal of the assailant, it will happen regardless of weapon choice. Therefore, what would the reason be to prohibit [certain] firearms if they aren't the reason people die? However, studies show that this information is not correct, and the reasoning is not sound. It has been found that the determination to kill is the same amongst all violent assaults, regardless of weapon – especially between knife and gun attacks.[59] However, attacks (even with same measurable intent) result in fatality far more often if the attack is carried out with a firearm.[60] An analysis executed by Franklin Zimring, a professor of law at the University of Chicago, analyzed the outcome of violent attacks with regard to the caliber of firearm being used. He found that the circumstances between fatal and nonfatal gun attacks were relatively similar (intent, location, etc) – but discovered that there was a sharp increase in fatality rate corresponding positively to the increase in caliber of firearm used in the attack.[61] This of course demonstrates that the lethality of the weapon changes with caliber, which therefore means so does the likelihood of fatality regardless of the equality of assailants' intentions. The relationship between caliber and fatality has been coined as 'instrumentality' by Zimring.[62] To further prove the presence of instrumentality in gun related deaths, the University of Pennsylvania, using data from the Boston Police Department, performed a research study in which they used details of fatal and nonfatal shootings between the years 2010-2014 (221 homicides, 300 non-fatal shootings). The goal of the research was to determine whether or not a

[59]Anthony A. Braga and Philip J. Cook, "Guns Do Kill People," The Regulatory Review (Published by Penn Program of Regulation, November 5, 2018), https://www.theregreview.org/2018/11/05/braga-cook-guns-do-kill-people/.
[60]Ibid
[61]Ibid.
[62]Ibid.

new project would mirror the findings of Zimring with more detailed information, technology and techniques. The team concluded that:

> *[T]he likelihood of death was more than doubled for criminal assaults involving medium-caliber guns and nearly five times greater for criminal assaults involving large-caliber guns. Based on these estimates, we ran a simulation that found that if the medium and large caliber guns had been replaced with small caliber guns in these criminal assaults, and all else had remained the same, it would have reduced gun homicides by nearly 40 percent. This percentage reduction in fatalities provides a measure of the overall effect of instrumentality associated with caliber for our sample.*[63]

This evidence proves as fact, not opinion, that death is linked intrinsically to power and lethality. The more powerful the gun, the higher likelihood of death. The numerical and empirical evidence of this correlation sheds light on the fact that intention does not matter; if you place a gun in the hand of someone who intends to kill, the victim is more likely to die than if you had given that person a knife, or even a lower caliber firearm. It is impossible to argue with this information that guns don't kill people, people kill people. Guns may surely be the agent, but without them, there would be substantially less fatalities.

The second most common argument amongst proponents of the conservative living tree doctrine is that there is an issue with gun violence, however the only way to protect oneself from a firearm attack is with a firearm itself. There is no good evidence that using firearms in self-defence truly reduces likelihood of injury. There is evidence that it deters property damage, however no more efficiently than using a baseball bat, a knife, or another weapon that is less lethal.[64] Using these weapons only shows to make crimes more violent and deadly than is necessary. Having a gun is no guarantee of safety. The most compelling evidence of this is the lack of protection having armed officers in school buildings has given in school shooting situations. In Uvalde, Texas on May 25th, 2022, gunman Salvador Ramos entered the Robb Elementary School building and killed 19 students and two teachers, as well as injured dozens more. Ramos was in fact approached by the campus policeman, and yet Ramos was still able to not only make it into the school, but murder at

[63]Braga AA, Cook PJ. "The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults". *JAMA Netw Open.* 2018;1(3):e180833. doi:10.1001/jamanetworkopen.2018.0833

[64]Melinda Wenner Moyer, "Will a Gun Keep Your Family Safe? Here's What the Evidence Says," The Trace, May 25, 2022, https://www.thetrace.org/2020/04/gun-safety-research-coronavirus-gun-sales/.

least 21 people.[65] In Santa Fe, Texas, there was another shooting in a high school. Two police officers at the school cordoned off the shooter, and was shot – however, 10 people were killed and 13 wounded.[66] These are just a couple of examples of instances when fully armed police officers were unable to stop the deaths of at least 10 students, despite being armed themselves. A study conducted by the University at Albany and RAND Corporation showed that these school policemen, also called school resource officers, can be helpful in deterring some kinds of school violence; but there is no evidence saying they prevent school shootings or other gun violence incidents.[67] Another study done by the JAMA Network found 'no association between having an armed officer and deterrence of violence in these cases. An armed officer on the scene was the number one factor associated with increased casualties after the perpetrators' use of assault rifles or submachine guns'.[68] The JAMA Network also asserts that many shooters are also suicidal and their goal at the end of the attack is to be shot and killed – meaning school police may serve more as an incentive rather than a deterrent.[69] All of this information goes to show that having a firearm does not in reality mean one is well protected against armed intruders – students and people everywhere are dying all over the United States with armed police officers in schools and armed security in shopping centers. It is also key to mention many believe that having a gun would protect them against a violent crime from an assailant. However, the reality is that people are more frightened of the thought of a violent crime occurring and are hence more likely to think it is going to happen, even though the empirical evidence does not prove this point. Pew Research Lab compared the numbers of violent crime to property crime, and concluded that in 2019 there were 2,109.9 property crimes per 100,000 people in the United States, compared to 379.4 violent crimes per 100,000 people.[70] The threat of violent crime is not prevalent enough to justify having a

[65]Madison Czopek et al., "Armed Campus Police Do Not Prevent School Shootings, Research Shows," Poynter, May 31, 2022, https://www.poynter.org/fact-checking/2022/do-armed-school-police-officers-prevent-shootings/.
[66]Ibid.
[67]Sorensen, Lucy C., Montserrat Avila Acosta, John Engberg, and Shawn D. Bushway. (2021). The Thin Blue Line in Schools: New Evidence on School-Based Policing Across the U.S.. (EdWorkingPaper: 21-476). Retrieved from Annenberg Institute at Brown University: https://doi.org/10.26300/heqx-rc6
[68]Jillian Peterson, James Densley, and Gina Erickson, "Presence of Armed School Officials and Fatal and Nonfatal Gunshot Injuries During Mass School Shootings, United States, 1980-2019," Jama Network, accessed June 10, 2022, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776515.
[69]Ibid.
[70]John Gramlich, "What the Data Says (and Doesn't Say) about Crime in the United States," Pew Research Center (Pew Research Center, November 23, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/.

firearm; especially since when they do happen, as in school shootings, firearms do not make a significant difference in the loss of life.

The last of the most common rebuttals against gun control by conservative living tree supporters is that automobile accidents kill more people each year than guns, but the government would never even consider prohibiting them. This is an unfair comparison. As time has passed, more and more safety measures have been created to make driving a safer experience. For many years, cars did not have seatbelts, let alone backup cameras, airbags, or blind-spot sensors for merging on the highway. These measures were made to protect passengers and to lower the number of accidents on the road. On the contrary, as proven in the example of the evolution from historical muskets to assault rifles, guns only evolve to become more efficient at their job: killing people. The goal of the firearm is to end the life of the target, and with increased numbers of rounds, magazines, and speed of fire, firearms continue to actively be made less safe. Automobile accidents are usually part of operator error – which is still not legally permissible. Driving is certainly a risk that all people take because without cars and the ability to travel long distances in a short period of time, society would collapse. Automobiles bring us food, water, goods, and allow for efficient transportation.[71] People select to endanger themselves when driving because it is necessary for existence; however, this does not come without limits. Endangering oneself is a permissible example of negligence, but endangerment no longer is acceptable when we are endangering others around us for no valid reason. Therefore, there are speed limits – driving is dangerous, and it is necessary for this danger to be used because it is a key service in society, but people have a moral duty to not endanger others around us without reason.[72] It is illegal to use a mobile phone device while driving, drive under the influence of drugs or alcohol, drive in an excessively reckless manner, etc.[73]; there are punishments for this behavior due to the way it, without justification, is a significantly greater threat to other drivers.

[71]Josh Max, "Comparing Gun Carnage with Auto Deaths Is a Flawed Argument," Forbes (Forbes Magazine, July 19, 2021), https://www.forbes.com/sites/joshmax/2017/10/10/comparing-gun-carnage-with-auto-deaths-is-a-flawed-argument/.
[72]Howard, JW; (2021) Coronavirus Misinformation, Social Media and Freedom of Speech. In: Niker, F and Bhattacharya, A, (eds.) Political Philosophy in a Pandemic: Routes to a More Just Future. Bloomsbury: London, UK.
[73]Ibid.

There are abundant regulations ensuring that people do not make the roads even more treacherous than they already are. This is also the opposite case for firearms. Operator error does not cause gunfire; someone removing their gun from its location of storage, aiming at the target, placing their finger on the trigger, and pulling is what causes gunfire. Using and operating a gun precisely as it is intended to be used is what makes a gun dangerous, meanwhile using and operating a car exactly as it is intended to be used is what makes a car safe. Many forms of gunfire are claimed to be self-defense, and the shot party dies, however it is often unnecessary to use a firearm on an attacker, and the higher the caliber the more likelihood of death. It begs the question – what positive do firearms carry that make these infinite and increasing threats worth it? The risk the people take when driving is connected to a very real and clear positive: continuing life as we know it, having food to eat and clothes to wear, being able to drive to work when there may not be a job available in certain areas, et cetera. What are the benefits of arms if it is not to defend against intruders, or to defend against school shooters or other mass shooting events? The evidence is damning for pro-firearm constituents. The most popular claims from the Conservative Living Tree theorists have here been refuted, therefore adequately proving that the best way to interpret the constitution is neither Originalism nor the Conservative Living Tree doctrine from the United States, but to mirror the Liberal Living Tree Doctrine used in Europe.

Limitations on the First Amendment

Beyond the borrowing of international legal standards from the ECHR and ECtHR, there is evidence in the United States Constitution itself that modifying a 'unilateral' positive right granted in the Constitution is not only possible, but necessary, for the well-being of society. This evidence is found in another amendment also considered a vital cornerstone of American culture and life – the First Amendment. The first amendment reads verbatim: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*.[74] The First Amendment is comparable to the second amendment in that the freedom of speech is to remain unabridged (untouched, unaltered, un-

[74]"U.S. Constitution - First Amendment - Library of Congress," Constitution Annotated, accessed June 10, 2022, https://constitution.congress.gov/constitution/amendment-1/.

curtailed) by the government – while in the Second Amendment, the right of the individual to bear arms, is not to be 'infringed' upon. The wording of both these amendments indicates the same fundamental concept. The people of the United States have a positive right to free speech and to bear arms, but also a negative right to not have the government usurp this privilege. Therefore, these amendments have a pristine background for comparison. While the similarity in formation and wording of these amendments is abundant, what is more important is that there are certain regulations on the use of free speech that have been deemed constitutional despite the universal right to free speech. In theory, due to the legal reasoning of several constitutional regulations on free speech, it would also be possible to create some sort of reasonable, constitutional restriction on the right to bear arms. For the sake of this evaluation, not all the regulations on free speech will be included, only those most relevant. The key regulations are those applied to true threats and obscenity.

True threats as they are related to the First Amendment are 'statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'[75] The most valuable case determining what qualifies as a true threat came from *Watts v. United States (1969).* The case facts consisted of Watts, while attending an anti-war demonstration, declared 'They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers'.[76] Ultimately, the SCOTUS held that Watts had not actually threatened anyone but was rather expressing himself in crude political speech. From this decision emerged what are now known as the Watts Factors – a series of questions that help determine whether speech has crossed into the realm of true threat.

These factors are arguably just as applicable to the use of firearms as they are to true threats. The first question in the Watts Factors is *whether the statement was made in a political context*. While

[75]Blocher, Joseph, and Bardia Vaseghi. "True Threats, Self-Defense, and the Second Amendment." *The Journal of Law, Medicine & Ethics* 48, no. 4_suppl (December 2020): 112–18. https://doi.org/10.1177/1073110520979409.
[76]David L. Hudson, "Watts v. United States," Watts v. United States, accessed June 10, 2022, https://www.mtsu.edu/first-amendment/article/707/watts-v-united-states.

it may be possible that at a specific rally or political demonstration regarding the right to bear arms a person might bring their gun in order to display their allegiance to the cause, the most common reason gun owners have guns in the United States own guns is for protection and self-defense.[77] Self-defense is not political; it is carnal, it is instinctual, and it is a natural right every human has. However, if a majority of people in the United States claim their gun is for reasons of protection, it is impossible to simultaneously proclaim that having it on their person is a political exercise of their Second Amendment right. Further, a firearm is objectively more dangerous and more lethal than simple words, even threatening ones – no matter how true the threat may be. This indicates that the use of firearms does not meet the standards of the first question. The second question of the Watts Factors is *whether the statement was expressly conditional* – meaning it is hinged on an action that may or may not occur in the future. While it is impossible to deny that there are many moments of self-defense that of course are conditional – for example stating 'if you break into my house and hurt me, my family, I will shoot you' – there are also many incidents that do not indicate any type of provocation, which therefore means there was no 'warning' that was conditional. A very pressing issue the United States has is the problem of mass shootings in public spaces. In a study conducted by the Secret Service in 2019, there were 34 mass shooting attacks in public spaces between January and July, and all the shooters had one issue or another that should have blockaded them from having a gun – underage, mental health institutionalization history, convicted felon, illegally carrying with no permit, etc.[78] These instances of shootings of multiple people in public spaces by random, unprovoked individuals indicate that the action of gunfire was not conditional on the behavior of shoppers or patrons; the aim of the shooter was to shoot regardless of anyone's actions. Therefore, it is feasible to say the threat of a firearm is unconditional, making the use of firearms pass the second question of the Watts Factors. The third and final question in the Watts Factors is regarding *the reactions of the listeners.* It is fair to assume with the constant inundation of information about gun-induced death in schools, superstores, subways, malls, and more, being in a public space and seeing a gun, regardless of the reason or qualifications/permits the person has to be wielding it may obtain. Sentiments around gun violence in public spaces has been analyzed, and according to 'A 2019 Harris Poll', it was 'found that 79% of Americans endorse

[77]Kim Parker et al., "America's Complex Relationship with Guns," Pew Research Center's Social & Demographic Trends Project (Pew Research Center, February 5, 2022), https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/.
[78]Diana Drysdale et al., "PDF" (Washington, DC, USA, August 2020).

stress as a result of the possibility of a mass shooting, with about a third reporting that they "cannot go anywhere without worrying about being a victim"'.[79] This indicates that fear is permeating the people, enough to even discourage them to enter possible zones of attack. Their disenchantment with entering public spaces also only emphasizes the fear they would feel should they see a real firearm in these spaces. This evidence of the sentiment firearms cause within the American people solidifies that the reactions of the listeners/witnesses of the Watts Factors on true threats to be reactions of fear and terror. The Watts Factors, based on the answers indicating the display of firearms is a true threat, can be adequately and constitutionally applied to the Second Amendment, much like it is to the First Amendment.

The government has displayed that they can regulate free speech, especially when the statement is of 'such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order of morality'.[80] What also outweighs the benefit of speech is not only truly threatening someone, but also the fear that is instilled in those because they do not know whether a threat/dangerous conflict is arising. In the case *Virginia v. Black (2003)*, two situations of cross-burning (one at a rally for the white supremacist group, the Ku Klux Klan, and the other in front of an African American individual's home) went to trial under the notion that the action had been a true threat towards African American people. The leader then stated that solely burning a cross was not sufficient to be a true threat. The SCOTUS concluded that the state of Virginia could indeed constitutionally ban cross-burning, because it did represent a true threat.[81] It was further declared that a person does not even have to intend to or plan to execute the threat in which they are imposing for it to constitute as a true threat.[82] This idea has been established on order to protect people from the exhausting and mentally scarring emotion of

[79]American Psychological Association (2019). One-third of US adults say fear of mass shootings prevents them from going to certain places or events. Press release, 15 August 2019. https://www.apa.org/news/press/releases/2019/08/ fear-mass-shooting. Accessed 19 Nov 2019

[80] See, e.g., *Gould v. Morgan*, 907 F.3d 659, 663 (1st Cir. 2018). 20. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[81]Robert A. Kahn, "Virginia v. Black," Virginia v. Black, accessed June 10, 2022, https://www.mtsu.edu/first-amendment/article/271/virginia-v-black.

[82]Blocher, Joseph, and Bardia Vaseghi. "True Threats, Self-Defense, and the Second Amendment." *The Journal of Law, Medicine & Ethics* 48, no. 4_suppl (December 2020): 112–18. https://doi.org/10.1177/1073110520979409.

fear of violence. There is an unnecessary level of disruption that being scared and terrified engenders. The emotion of fear is extremely damaging; petrifying people so intensely that threat is nigh is sufficient for it to be unprotected by the First Amendment. Now of course, the Second Amendment does not claim to protect gun owners that are toting their firearms about with menace or to purposefully torment the population - which is valid. But guns are not only menacing when they are toted about without caution. Mentioned in the previous paragraph is the study regarding fear of being in public spaces due to the possibility one may be shot. However, is it possible to imagine the fear a person might feel not just entering a public space, but seeing an armed individual in this public space? Surely this would only amplify their terror. Further, the threshold for true threat should be lowered when the person is wielding a weapon capable of fast, painful, efficient death.

Outside of case law definitions of how threats look and what true threats are, there is additional empirical evidence that people with firearms are a greater threat than they claim to be. In a self-reported study executed regarding defensive gun use, there were 2.2-2.5 million reported defensive gun uses per year, where 200,000 of them indicate they hit their target, resulting in injury or death.[83] However, there are only around 100,000 people hospitalized annually with gunshot wounds. This evidence indicates a massive inconsistency in the amount of people who report they fire a gun and the amount of people who are injured by firearm, illustrating that firearm owners tend to be 'trigger happy' - meaning they are highly inclined to pull the trigger[84] and shoot when threat is not necessarily true enough for them to do so. This is possibly to assert dominance or scare off a possible threat they sense. The evidence displays that gun owners tend to overreact to perceived threats. This means they could react based on race, gender, time of day, neighborhood, and many more variables without fully assessing whether or not they are in actually danger. It begs the question: is this not true threat? That merely holding a firearm in the palm of a gunman makes them more likely to decide to shoot, regardless of the amount of danger they are truly in? There is endless evidence not only supporting that the government can constitutionally limit the Second Amendment, just as they have limited the First Amendment, but also that there is significant

[83] David Hemenway, Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates, 87 J. Crim. L. & Criminology 1430 (1996-1997)
[84]Ibid.

enough threat from merely seeing or holding a firearm that either injury, death, or traumatizing fear will ensue. Firearms, without doubt, do constitute a true threat using the framework of the regulations of the First Amendment – and therefore require limitations on their use.

Obscenity is another additional manifestation of 'speech' that is not protected by the First Amendment and is regulated by law. To identify what speech or material is obscene, there is a classification system resulting from the SCOTUS case *Miller v. California (1973).* In this case, the SCOTUS upheld the prosecution of a Californian publisher for his distribution of obscene and graphic material.[85] The Miller Standards were created after this case to establish objective criteria to decide if speech had wandered into obscenity. However, what is more relevant than the determination of obscenity is rather the classification system that has resulted from these standards – the high-value (highly protected), low-value (intermediately protected), no-value (not protected) classifications. Both obscene materials and firearms can be possessed, commoditized, and sold, and the utility of them comes mostly from their possession. The possession of most pornography is also constitutional, much like firearms.[86] There is a perfectly aligned blank canvas on which to compare regulatory standards.

Speech is valued according to the way in which it furthers the goal of the First Amendment, which is to protect the free trade and marketplace of ideas[87], criticizing their government/political speech. As decided in the landmark case *District of Columbia v. Heller (2008)*, guns are vital to the self-defense of a person, therefore their protection level should be determined based on the degree in which they further that cause.[88] This technique, when used with the right criteria, is a very suitable way to assess fairly what a reasonable weapon is for the purpose of self-defense. Some suggested firearm criteria are the effectiveness at close range, compactness, the ease with which it can be wielded quickly and under pressure, and risk for collateral damage based on the capacity of the

[85]David L. Hudson Jr., "Miller v. California," Miller v. California, accessed June 10, 2022, https://www.mtsu.edu/first-amendment/article/401/miller-v-california#:~:text=In%20Miller%20v.%20California%2C%20413,the%20line%20into%20unprotected%20obscenity.
[86]Joseph E Sitzmann, "University of Chicago Law Review," University of Chicago Law Review, accessed June 10, 2022, https://lawreview.uchicago.edu/publication/high-value-low-value-and-no-value-guns-applying-free-speech-law-second-amendment.
[87]Ibid.
[88]Ibid.

weapon.[89] Of course, it is easy to argue that even a firearm that does not place highly with these criteria (such as an automatic rifle) still does work for self-defense; however ultimately what is most important should be the capabilities and intended purpose of the firearm, not the intent of the person[90]; the intent of the person can be executed without tearing the human body to shreds.

High value firearms, like high value speech, would be the guns that require the most constitutional protection and most effectively further the lawful cause of self-defense that the Second Amendment is mean to safeguard. These guns are small, very effective at close range, very easy to whip out of a nightstand or gun safe, and with a shot fired in self-defense there is little risk for collateral damage; someone breaking into a home or threatening harm to an individual can be shot once and then be inhibited/incapacitated. Examples of high-value firearms would be handguns and shotguns. They are easy to use and can hold only several rounds rather than the hundreds some other types of firearms carry. Low-value firearms, like low-value speech, would be firearms that receive intermediate protection and require more assessment to determine if they are constitutionally protected. Shotguns and handguns are relatively 'safe' by these standards, and the most suited for self-defense; however, after these models, there comes automatic assault weapons and automatic weapons, which belong in the no-value firearm category. These guns would hit none of the factors that indicate a firearm suited for self-defense. The weapons are very large, and while exact at large distances (sniper arms), they are unwieldy and hard to use at close range. Further, they likely cannot be placed in the home in a convenient place for when a surprise attack has sprung, and the risk of collateral damage is massive. Semi-automatic weapons release bullets with each pull of the trigger, but immediately and automatically reload – allowing for another shot to be made as soon as the last trigger pull is done. Automatic weapons, with just one pull of the trigger, fire bullets automatically until the shooter ceases the fire manually. Both these weapons encourage the easy destruction and death of the target – they are simple to use and before the shooter is aware, dozens of bullets can be rattled off. These are not weapons of self-defense, but weapons of war, like grenades, tanks, bombs, etc. They are designed to kill, and to kill many. They are unreasonable weapons for domestic purposes, and therefore should garner no constitutional protection, much like no-value obscene speech.

[89]Ibid.
[90]Ibid.

The ways that regulation has been applied to the First Amendment, specifically with true threats and obscenity, allow for objective and unbiased analysis of whether an occurrence requires constitutional protection. These methods have functioned well for decades since some of their decisions, and still prove to maintain the integrity of the American citizen's right to free speech and freedom of expression. Their constitutional functioning regarding the First Amendment makes a case for their functioning with the Second Amendment as well. There is substantial constitutional reasoning why the applications of regulations on the Second Amendment right to bear arms would be effective as it has been proven effective in another area. There is no adequate reasoning why one uninfringeable right deserves boundaries, and another does not – especially when bullets are far more lethal than words.

Proposal and Practical Roadblocks

So, what can be done? Where does this leave the people of the United States? There is space for constitutional gun control that still allows for protection of the Second Amendment. As determined in *District of Columbia v. Heller (2008),* the primary and most important reason for the Second Amendment is for the individual's right to self-defense. Therefore, I suggest implementation of gun control that reasonably respects this fundamental right. Handguns and shotguns should be permitted to every law-abiding individual age 21 and over that has passed a universal background check as well as a mental health screening. Should the individual have any prior felonies, inclinations towards violent behavior, or a mental illness, a firearm should not be granted as the danger to society outweighs their individual right to a firearm. This mandatory background check and mental illness screening is a part of a cooling off period to prevent crimes of passion where the purchaser may angry or highly emotional about something happening in that moment and wishes without weighing the consequences using violence to handle their feelings. The individual may also be considering attempting suicide before thoroughly considering the decision. Once issued the firearm assuming all prerequisites are met, the firearm is not permitted to leave the property of the purchaser. The owner may use the firearm for the purposes of self-defense in their own home, however bringing the firearm outside their property and into the public spaces poses a greater threat to the general populace than it serves the owner as a means of self-defense. Of

course, this also means no open carrying or concealed carrying in any space outside the property of the firearm owner, or arming schoolteachers in K-12 schools.

Every current gun owner in the United States should also be subject to a background check and mental illness screening if they have not been already. Armed (no pun intended) with the information now available regarding mental instability or prior criminal record and the likelihood of gun violence, the individual's right in the Second Amendment does not outweigh public safety. Should they pass, licensure and firearms remain in their possession. Should they not, licensure and firearms should be removed. All purchases should also be tracked on a federal database to discourage as much as possible infiltration of arms into illegal sales markets.

Semi-automatic weapons and automatic weapons, as well as large magazines will be prohibited. For those already owning these weapons legally in the United States there should be a mandatory gun buy-back program, similar to the one in Australia after the mass shooting in 1996 where 35 were killed and 25 were injured.[91] In this mandatory gun buyback, nearly 650,000 automatic and semi-automatic guns were handed over to police in exchange for a fair, market rate price. Gun violence rates decreased significantly.[92] The police also offered immunity to those who illegally owned guns and handed them over. This is a solid start to decreasing ownership of unnecessarily lethal arms for the reason of self-defense.

While my research has indicated that all these regulations are constitutional and absolutely possible, there are certainly some concerns and practical roadblocks that must be addressed to see the entire picture of ending the epidemic of gun violence. The first of these roadblocks would be the economic implications of removing firearms. There is a substantial and influential gun culture in the United States, making the distribution, vending, and manufacturing of firearms a lucrative business. There is also much job opportunity in the area – around 375,000 jobs have been created since 2008.[93] Those jobs have produced over 21 billion dollars in wages, as well as over 70 billion

[91]Zack Beauchamp, "Australia Confiscated 650,000 Guns. Murders and Suicides Plummeted.," Vox (Vox, August 27, 2015), https://www.vox.com/2015/8/27/9212725/australia-buyback.
[92]Ibid.
[93]"Firearm and Ammunition Industry Economic Impact," NSSF, March 23, 2022, https://www.nssf.org/government-relations/impact/.

in total economic impact.[94] This is including firearms, ammunition, and hunting equipment. The average worker in firearms makes $56,000 annually with benefits, resulting in over 7.8 billion in taxes.[95] Implementing the strict gun controls I have suggested would have great financial impact including loss of jobs, revenue, and tax dollars from the gun industry.

There also, like when all things are controlled, will be an illegal firearm market. This issue already exists in the United States. Loopholes in gun laws allow the accountability of licensed gun dealers and sellers to be weakened. Therefore, there is a pressing issue with illegal trading and transfer of firearms through scofflaw gun dealers, which allows for illegible owners to bypass screening procedures and obtain arms.[96] If there is issue now with this secondary market for firearms, the issue may become only more poignant after the implementation of the proposed regulations – meaning more and more private sales that are untracked and falling into dangerous hands.

The final, and most significant roadblock to serious restrictive changes in the realm of gun control is that of the sheer difficulty in political implementation – specifically due to the filibuster and the National Rifle Association (hereafter; NRA). Despite general consensus on several aspects of gun control laws, political leaders are running into issues when the bills hit the Senate – specifically the filibuster. The goal of the filibuster is to grant equal power to small states, and it allows for that minority of states to have veto power over national policy.[97] These states, unfortunately, tend to be gun-heavy locales: white populations, republican constituents, small states, and rural areas. These areas are given an unfair advantage on the Senate floor due to the requirement of a two-thirds majority, not a simple majority. This will be a major deterrent from making lasting change, though it should not be; the Grand Old Party has only represented the majority of the United States twice since 1980, yes has held control of the senate for 22 of the last 42 years.[98] After the shooting at Sandy Hook Elementary School in Newtown, Connecticut, President Barack Obama and his

[94]Ibid.
[95]Ibid.
[96]Anthony A. Braga et al., "National Library of Medicine," National Library of Medicine, June 6, 2012, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3462834/.
[97]Ronald Brownstein, "The Real Reason America Doesn't Have Gun Control," The Atlantic (Atlantic Media Company, May 25, 2022), https://www.theatlantic.com/politics/archive/2022/05/senate-state-bias-filibuster-blocking-gun-control-legislation/638425/.
[98]Ibid.

administration attempted to pass universal background check legislation on firearms. 54 senators voted in support, representing 194 million people, while the rest of the senate vetoed the bill representing 118 million people. However, due to the filibuster, the bill was not implemented and the 118 million prevailed over the true majority. This, despite occurring in 2012, would have no chance of turning out differently as the filibuster remains strong in all its inequality. Backing the Republican Party in this area, and posing an issue all the same, is the NRA. The NRA is a special interest lobby that encourages the use and shooting of rifles and has grown to be a GOP powerhouse. The NRA has a massive budget allowing them to influence congresspeople regarding firearms and their control[99] (or lack thereof). In 2020 alone the NRA spent a nauseating 250 million, spending 3 million on candidate influence only.[100] The NRA has enormous membership and therefore die-hard support and have garnered so much trust from their supporters that their members will vote on representatives, senators, and presidents depending on their view on the sole issue of firearms. On the NRA website, there is even a grading system (A-F) used to mark congresspeople on their stances regarding gun control.[101] The NRA has become an absolute powerhouse machine for promoting antiquated views of pro-gun citizens and politicians and is one of the biggest threats the people of the United States face in the fight against gun violence.

Conclusions and Thoughts (& Prayers)

Firearms are the problem. All empirical and circumstantial evidence points to the same conclusions - the more firearms available, the more danger, the more violence, the more fatalities the United States will experience. While amending the Second Amendment might not be feasible now, or maybe ever, there are options to prevent the continuation of catastrophic loss. Interpretation is everything, and there are too many historical and modern indicators that prove the Constitution is meant to be interpreted with the lens of today - the lens of now. If the Constitution is interpreted using the liberal living tree doctrine as the ECtHR interprets the ECHR, while bearing in mind the constitutionally sound regulations made on the First Amendment, there is a chance at safety.

[99]"US Gun Control: What Is the NRA and Why Is It so Powerful?," BBC News (BBC, May 27, 2022), https://www.bbc.com/news/world-us-canada-35261394.
[100]Ibid.
[101]Ibid.

However, one cannot hold their breath. Despite having given legitimate legal argument for routes to gun control using Europe as an example, even another amendment from the very same Constitution as an example, it will be a grueling battle to achieve adequate gun control because of the ways the NRA and the bipartisanship of the U.S. Government have turned protecting the lives of citizens into an ideological tug-of-war between the elite, powerful, political entities that are politicians - while the people of the United States pay the price. What I have suggested is without doubt very difficult to transpose into reality. But the voices of the people must be heard, the voices of children with no siblings, parents with no children, little boys and girls who are scared of school and watch their classmates die in front of them as they are supposed to be learning their multiplication tables. The United States government is running out of excuses; there are too many examples of similar countries who have avoided the wreckage firearms achieve, regardless of the hands they are wielded by. The thoughts and prayers of antiquated, tired, and self-absorbed politicians will not stop the travesties from coming. Thoughts and prayers are not enough. Do not only think of Robb Elementary; increase the age of purchase of firearms. Do not only pray for Parkland; prohibit the purchase of semi-automatic and automatic weapons. Do not only start donation pages for the parents of murdered elementary schoolers; implement universal background checks. The evidence is there, the proof is in the pages and in the words of our history; change can be made. It must.

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