

LIFE, LIBERTY AND THE PURSUIT OF GUN CONTROL: A COMPARATIVE ANALYSIS OF GUN CONTROL IN AMERICA AND AUSTRALIA

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ABSTRACT

America's approach to gun control has long puzzled Australians. After the swift implementation of gun control laws following the Port Arthur massacre, Australia's strict gun control regime has been a point of national pride. Contrastingly, America's hesitance—or perhaps inability—to act on this issue, even after some of the deadliest and most horrific shootings, has been a blemish on the nation's reputation. This article outlines the different gun control regimes in America and Australia and argues that the differences run far deeper than the mere words of the law. This article argues that the deeply entrenched, nation-shaping ideologies rooted in the notion of 'the American Dream' are to blame for the lack of any significant gun control in America, while Australia's strict gun control regime has thrived.

I INTRODUCTION

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Deeply entrenched political, social, and legal ideologies stemming from the *United States Constitution* ('the US Constitution') have prevented the country's effective implementation of gun control. In contrast, Australia has implemented legislative gun control quickly and effectively in the absence of such constitutional and ideological roadblocks. This article will discuss how Australia has implemented strict and effective gun control laws, while a gun crisis in America has flourished.

Americans and global spectators hoped that the Sandy Hook Elementary School shooting ('Sandy Hook') in 2012 would be America's 'Port Arthur moment'.¹ However, this dream was short-lived.² Vox, a media outlet, stated that '[a]fter Sandy Hook, [America] said never again. And then we let 2 498 mass shootings happen'.³ It is telling that the author was required to update the statistics referred to in this article frequently during the preparation of the article. Tim Fischer, the deputy Prime Minister when the Port Arthur massacre occurred, commented that 'Port Arthur was [Australia's] Sandy Hook ... Port Arthur we acted on. America is not prepared to act on their tragedies'.⁴ The question, then, is *why*? Through addressing the legal, structural, and ideological issues that have moulded gun laws in Australia and America, this article will illuminate historical roadblocks to tighter gun control in America.

¹ See, eg, Stephanie March, 'Sandy Hook Anniversary: Families of Those Killed in Mass Shootings Call for More Gun Control', *ABC News* (Online, 15 December 2015) <<https://www.abc.net.au/news/2015-12-15/sandy-hook-anniversary-sparks-calls-for-more-gun-control/7028178>>; Will Oremus, 'In 1996, Australia Enacted Strict Gun Laws. It Hasn't Had a Mass Shooting Since', *Slate* (online, 2 October 2017) <<https://slate.com/news-and-politics/2017/10/australia-enacted-strict-gun-control-laws-after-a-horrific-mass-shooting-in-1996-it-worked.html>>.

² Ibid.

³ German Lopez and Kavya Sukumar, 'After Sandy Hook, We Said Never Again', *Vox* (Online, 3 June 2020) <<https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence>>; Gun Violence Archive, *Gun Violence Archive 2020: Evidence Based Research: Since 2013* (Web Page, 28 May 2020) <<https://www.gunviolencearchive.org/>>.

⁴ Calla Wahlquist, 'It Took One Massacre: How Australia Embraced Gun Control After Port Arthur', *The Guardian* (Online, 15 March 2016) <<https://www.theguardian.com/world/2016/mar/15/it-took-one-massacre-how-australia-made-gun-control-happen-after-port-arthur>>.

The ideological entrenchment of ‘the American Dream’ into America’s constitutional, political and legal framework has prevented, and will continue to prevent, the implementation of effective gun control legislation in America. Unless America acknowledges and works to overcome these ingrained philosophies, the state of gun control in America is unlikely to improve. Part II of this article will identify and delineate the concept of ‘the American Dream’. Part III will explore the contextual background in regard to gun culture and control, and Part IV will discuss the legal status and issues of guns in both nations. Part V will examine the ideological issues behind the gun debate, including those stemming from Australia and America’s constitutions, the rights systems in both countries, neoliberalism and self-defence, and the intersections of gender and race with self-defence.

II THE AMERICAN DREAM

The ‘American Dream’ has come to personify America’s national identity, and in doing so has become intertwined with gun culture. Marco Rubio, United States Senator for Florida, stated that ‘the American Dream is a term that is often used but also often misunderstood. It isn’t really about becoming rich or famous. It is about things much simpler and more fundamental than that’.⁵ For the purposes of this article, I have adopted Cal Jillson’s interpretation of the concept of the American Dream, where the core values have been identified as liberty, equality, democracy, the rule of law under a constitution and *laissez-faire*.⁶ The rule of law under a constitution ‘draws attention to [America’s] base commitments to democracy, limited government, and free markets’,⁷ while *laissez-faire* refers to

⁵ Marco Rubio, ‘Making Community Colleges Work’ (Keynote Speech, 10 February 2014) 1.

⁶ Cal Jillson, *The American Dream: In History, Politics, and Fiction* (University Press of Kansas, 2016) 3.

⁷ *Ibid.*

‘a dedication to capitalism, markets, and competition’.⁸ While this definition is adequate for the purposes of this article, historically, the term has been difficult to define. The term is used so often that it has become a noun, yet its meaning is elusive. It reflects the contention that America is more than just a place—it is an idea. Ted Yoho, former United States Representative, said:

The American Dream comes from opportunity. The opportunity comes from our founding principles, our core values, that are held together and protected by the Constitution. Those ideas are neither Republican, Democrat, conservative, liberal, white, or black. Those are American ideologies.⁹

The term’s meaning has been shaped by centuries of law, literature, politics, and media. Political and legal instruments such as the United States Declaration of Independence, which provides that ‘all men are created equal’ and have the right to ‘life, liberty and the pursuit of happiness’,¹⁰ have become entrenched into what Rubio refers to as ‘American ideologies’.¹¹ The ubiquitous term and ideologies it encompasses are central to American national identity and have, in turn, permeated America’s political and legal systems by becoming the basis upon which the ‘*US Constitution*’, in particular, the Bill of Rights, was drafted.

The crux of this article is to illustrate how America’s unwavering commitment to its pursuit of the American Dream has created a culture which allows gun idealism to thrive and prevented the implementation of any meaningful gun control legislation. By providing a comparative analysis of America’s gun control framework and culture to Australia’s gun control framework and culture, this article will demonstrate the detriment of these pervasive ideas to a continuing gun crisis in America. Without addressing its

⁸ Ibid.

⁹ Peter D Looney, *Lost Cedar Rapids* (The History Press, 2020) 99.

¹⁰ Declaration of Independence (US 1776) 1.

¹¹ Rubio (n 5).

unwavering devotion to the American Dream that have shaped America's political, legal and social frameworks, America will be unable to address its ongoing and devastating gun crisis.

III BACKGROUND

A *America and the Sandy Hook Massacre*

Sandy Hook occurred in 2012, and resulted in the death of 20 children between the ages of six and seven, six adults, and the gunman.¹² In 2013, Shultz et al described Sandy Hook as a 'tipping point' of the gun crisis in America,¹³ exemplifying the belief that Sandy Hook would 'ultimately lead toward constructive solutions to diminish high rates of firearms deaths and injuries in the United States'.¹⁴ However, these 'constructive solutions' did not occur. Instead, four years later, Sandy Hook was identified as the point where the 'gun debate stalemated'.¹⁵ Sandy Hook has since been recognised as a symbol of America's failure to enact gun control—the phrase “since Sandy Hook” has become shorthand for an apparently broken system that allows unfettered gun violence'.¹⁶

The absence of impact that Sandy Hook had on gun violence is illustrated by America's death by firearms statistics, which have increasingly worsened in the years since Sandy Hook. In 2012, there were 33,563 deaths by firearm, at an age-adjusted rate of 10.5 per 100,000 people.¹⁷ In 2019, there were 39,707

¹² Justin Eckstein and Sarah T Partlow Lefevre, 'Since Sandy Hook: Strategic Maneuvering in the Gun Control Debate' 81(2) *Western Journal of Communication* (2012) 225, 225.

¹³ James Shultz et al, 'The Sandy Hook Elementary School Shooting as Tipping Point' (2013) 1(2) *Disaster Health* 65, 65.

¹⁴ Ibid.

¹⁵ Eckstein and Lefevre (n 12) 225.

¹⁶ Ibid.

¹⁷ Centers for Disease Control and Prevention, National Center for Health Statistics, 'Firearm deaths by intent, 1999–2019', *Underlying Cause of Death, 1999–2019 Results* (Web Page, 2020) <<https://wonder.cdc.gov/controller/saved/D76/D48F344>>.

deaths, at a rate of 11.9 per 100,000 people.¹⁸ In fact, despite the beliefs that Sandy Hook could be an opportunity to improve the gun crisis, often shootings in America result in gun sales increasing as was evidenced by the 2012 Aurora movie theatre shooting ('Aurora').¹⁹

Mere months before Sandy Hook, a shooting inside a movie theatre in Aurora, Colorado, resulted in 12 deaths and 58 injuries.²⁰ The gunman used a shotgun and an AR-15 semi-automatic rifle and had 6,000 rounds of ammunition in his home, all of which were legally obtained.²¹ Despite the tragedy of Aurora, which was enabled by gun ownership and use, in the weekend after the shooting, the State of Colorado approved 25 per cent more background checks for gun purchases than the weekend average from 2012.²² If Sandy Hook, a shooting of 20 young children while at school, was unable to turn the tides of the gun crisis in America, what will it take to effect change? Why have guns become so ingrained in American society that even the most brutal and tragic incidents have been unable to sway anti-gun control proponents? This article will illustrate how fundamental belief systems about the American Dream have prevented even the worst tragedies from breaking through the American psyche and instigating change.

B *Australia and the Port Arthur Massacre*

The issue of gun control came to the forefront of the Australian political conversation most significantly in 1996. The Port Arthur massacre occurred on

¹⁸ Ibid.

¹⁹ William Briggs, *How America Got Its Guns: A History of the Gun Violence Crisis* (University of New Mexico Press, 2017) 1.

²⁰ Ibid.

²¹ Ibid.

²² Associated Press, 'Gun Sale Background Checks Spike After Aurora', *CBS News* (Online, 19 September 2012) <<https://www.cbsnews.com/news/gun-sale-background-checks-spike-after-aurora/>>.

28 April 1996. Martin Bryant murdered 12 people in just 15 seconds, using military-style semi-automatic rifles.²³ A total of 35 people were killed, and 23 were injured.²⁴ Following the massacre, the National Firearms Agreement ('NFA') was negotiated and drafted. The Federal Cabinet endorsed the NFA on 6 May 1996.²⁵ On 10 May 1996, a mere 12 days after the massacre, a special meeting of the Australasian Police Ministers' Council ('APMC') was called, and approved the NFA.²⁶ While gun regulations are a state power,²⁷ then Prime Minister John Howard insisted all eight states and territories enact the NFA into legislation.²⁸ Polling illustrated up to 90 per cent support for reform.²⁹ Howard used this wide public support to pressure the NFA's national entrenchment.³⁰ Howard said: '[w]e do not want the American disease imported into Australia. Guns have become a blight on American society'.³¹ The federal government gave the states and territories a deadline of 21 July 1996 to bring the NFA into law, which they all met.³² The unprecedented uniformity of all of the states and territories and the Commonwealth government and the speed with which the NFA was drafted, negotiated, approved and enacted into local legislation illustrates just how impactful the Port Arthur massacre was on Australia.

²³ Philip Alpers and Zareh Ghazarian, 'The "Perfect Storm" of Gun Control: From Policy Inertia to World Leader' in Joannah Luetjens, Michael Mintrom and Paul Hart (ed), *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University, 2019) 207, 207.

²⁴ Wahlquist (n 4); Tom Frame, *Gun Control: What Australia Got Right (and Wrong)* (NewSouth Publishing, 1st ed, 2019).

²⁵ Frame (n 24) 18.

²⁶ Ibid 16.

²⁷ Ibid 14.

²⁸ Ibid.

²⁹ Ibid 13.

³⁰ Ibid.

³¹ Toni O'Loughlin, 'Plan to Fight American Gun Disease', *Sydney Morning Herald* (Online, 19 April 2002) <<https://www.smh.com.au/national/plan-to-fight-american-gun-disease-20020419-gdf7k7.html>>.

³² Frame (n 24) 34; The NFA, and its updated 2017 version, the *National Firearms Agreement 2017* (Cth) ('*National Firearms Agreement*') is now in effect in law in *Firearms Act 1996* (NSW) and *Weapons Prohibition Act 1998* (NSW); *Firearms Act 1996* (Vic) and *Control of Weapons Act 1990* (Vic); *Weapons Act 1990* (Qld); *Firearms Act 1973* (WA); *Firearms Act 1977* (SA); *Firearms Act 1996* (Tas); *Firearms Act 1997* (NT); and *Firearms Act 1996* (ACT) and *Prohibited Weapons Act 1996* (ACT).

The NFA and related legislation were comprehensive. The NFA included provisions banning certain weapons, including semi-automatic rifles (except in exceptional circumstances),³³ and required a person to have a ‘genuine reason’ for having a firearm.³⁴ Significantly, ‘personal protection’ was not a genuine reason.³⁵ Following the NFA’s implementation, the Commonwealth implemented the ‘Gun Buy-Back Scheme’,³⁶ which began in October 1996.³⁷ The scheme led to the surrender of 640,000 firearms across Australia.³⁸ Since then, state and territory legislation has been compliant with the NFA,³⁹ partly due to the heavy-handed coercion of the federal government, which led to enactment of the NFA legislation in the first place,⁴⁰ but also due to how deeply Australia felt the impact of Port Arthur.

The effectiveness of the NFA has been illustrated by the rate of gun deaths falling after its implementation. In 1996, the rate of gun deaths per 100,000 people was 2.84, in 2006 it was 1.20, and by 2016 it had fallen to 0.95.⁴¹ Firearm suicide rates dropped from an annual average 2.6 per 100,000 people across the seven years prior to the NFA, to an annual average of 1.1 in the seven years after its implementation.⁴² Most significantly, the lack of incidence of ‘mass shootings’ (defined as shootings where five or more people were killed) decreased.⁴³ In the 13 years prior to 1996, there were 13 mass fatal shootings,

³³ National Firearms Agreement (n 32) s 1(a).

³⁴ Ibid s 3(b).

³⁵ Ibid s 3(a).

³⁶ Australian National Audit Office, *The Gun Buy-Back Scheme* (Report, December 1997) 5 <https://www.anao.gov.au/sites/default/files/anao_report_1997-98_25.pdf?acsf_files_redirect>.

³⁷ Frame (n 24) 34.

³⁸ *The Gun Buy-Back Scheme* (n 36) 5.

³⁹ Samantha Bricknell, *Firearm Trafficking and Serious and Organised Crime Gangs* (Research and Public Policy Series No 166, Australian Institute of Criminology, 29 June 2012) <<https://www.aic.gov.au/publications/rpp/rpp116>>.

⁴⁰ Frame (n 24) xi.

⁴¹ Philip Alpers and Michael Picard, ‘Gun Facts, Figures and the Law’, *Sydney School of Public Health, The University of Sydney* (Web Page, 9 June 2020) <<https://www.gunpolicy.org/firearms/region/united-states>>.

⁴² Harvard Injury Control Research Center, ‘The Australian Gun Buyback’ [2011] (Spring) *Bulletins* 1, 1.

⁴³ Simon Chapman, Philip Alpers and Michael Jones, ‘Association Between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979–2013’ (2016) 316(3) *The Journal of the American Medical Association* 291,

however in the following 20 years there were zero.⁴⁴ This is significant because mass shootings have been enabled and assisted by semi-automatic weapons, which allow shooters to engage in rapid fire. The banning of such weapons was a key element of the NFA and has been crucial to its success.⁴⁵ The lack of mass shootings and reduction in firearm fatality rates in Australia demonstrates the efficacy of restrictions and regulations on firearms. Despite evidence from the Australian experience, America has still been unable to implement reform.

IV LEGAL ISSUES

A *The Legal and Constitutional Status of Guns in America*

Firearms, and their use, have shaped American history and, consequently, America's political and legal structure. The central role guns played in American society was solidified at the drafting of the Second Amendment to the Bill of Rights in the *US Constitution*. This constitutional entrenchment ensured guns would play a pivotal role in American society for centuries to come. The Second Amendment is one fundamental source of attitudes towards guns in America. It provides that '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'.⁴⁶ It is necessary to consider the context in which the *US Constitution* was drafted and what implored the drafters to include the Second Amendment.

America ratified the *US Constitution* in 1787.⁴⁷ This is significant for two reasons. First, the gun technology available today is vastly different to that which

293.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ United States Constitution amend II.

⁴⁷ Letter of Transmittal, *United States Constitution*.

the drafters of the *US Constitution* would have considered. For example, all descendants of the original eighteenth-century musket have been deemed to legally constitute ‘arms’,⁴⁸ including semi-automatic rifles, despite these rifles exceeding the traditional musket’s rate of fire twenty-fold.⁴⁹ Second, the historical context was particularly influential on the contents of the *US Constitution* and the Bill of Rights. Prior to 1787, American distrust of government was brewing. Whilst America was still under English rule, the English Parliament passed the *Stamp Act of 1765*,⁵⁰ which imposed taxes on Americans by a ‘distant government in which they were not represented’.⁵¹ To enable the *Constitution* to be implemented and federalisation to occur, anti-federalists who were cautious of entrenching too much power in a federalist government had to be appeased.⁵² The movement was deeply suspicious of any central ruler reverting the country to a pre-independence style of ruling.⁵³ Fears of ‘big government’ and ‘hostile’ Aboriginal peoples fuelled this movement.⁵⁴ The introduction of the first 10 Amendments, known as the Bill of Rights, won over the anti-federalists. America ratified the Bill of Rights into the *US Constitution* in 1791, offering strict protection of individual and personal rights.⁵⁵

Since the ratification of the Bill of Rights, the United States Congress has implemented legislation regulating gun use, albeit generally with minimal impact on both the prevalence of gun violence and the continuation and development of anti-gun violence laws. For example, despite being a positive step towards

⁴⁸ *United States v Miller*, 59 SCt 816 (1939).

⁴⁹ John McNamara, ‘The Fight to Bear Arms: Challenging the Second Amendment and the U.S. Constitution as a Sacred Text’ (2017) 12(2) *European Journal of American Studies* 1, 2.

⁵⁰ *Duties in American Colonies Act 1765*, 5 Geo III, c 12.

⁵¹ ‘The Bill of Rights: A Brief History’, *American Civil Liberties Union* (Web Page) <<https://www.aclu.org/other/bill-rights-brief-history>> (‘The Bill of Rights: A Brief History’).

⁵² *Ibid.*

⁵³ Caroline Light, ‘From a Duty to Retreat to Stand Your Ground: The Race and Gender Politics of Do-It-Yourself-Defense’ (2015) 15(4) *Cultural Studies and Critical Methodologies* 292, 293.

⁵⁴ *Ibid.*

⁵⁵ ‘The Bill of Rights: A Brief History’ (n 50).

stricter gun control in America, the Federal Assault Weapons Ban ('FAWB') enacted in the *Violent Crime Control and Law Enforcement Act of 1994*⁵⁶ was negotiated down significantly in order to obtain bi-partisan support, and its impact was far less meaningful than it could have been. The FAWB provision contained a 'sunset clause', which meant that the legislation expired in 2004 after being in force for 10 years.⁵⁷ The legislation contained a number of other exclusions from its restrictions on ownership and the use of assault weapons, including a 'grandfather clause', which meant that weapons that were possessed lawfully prior to the enactment of the FAWB were allowed to continue to be possessed and transferred.⁵⁸ This stands in stark contrast to Australia's NFA which implemented a gun buyback scheme and incentivised the return of newly banned weapons while criminalising the holding of them entirely (regardless of the date of purchase).⁵⁹ Given these caveats, it is hardly surprising that America continues to have the highest rate of gun ownership internationally and high rates of deaths and injuries by firearms.⁶⁰

The interpretation of gun laws in the courts has also failed to contribute to meaningful gun control. American courts have been inclined to interpret the Second Amendment as a plenary right—a right that is absolute and unrestricted—by avoiding narrowing its scope and application. This occurred in the landmark case of *District of Columbia et al v Heller* ('Heller')⁶¹ where proponents of gun control argued that the specification of 'militia' in the Second Amendment excludes the private ownership and use of firearms.⁶² However, the

⁵⁶ *Federal Assault Weapons Ban*, 42 USC ch 136; Meghan Keneally, 'Understanding the 1994 Assault Weapons Ban and Why It Ended', *ABC News* (Online, 13 September 2019) <<https://abcnews.go.com/US/understanding-1994-assault-weapons-ban-ended/story?id=65546858>>.

⁵⁷ *Violent Crime Control and Law Enforcement Act of 1994*, 18 USC §110105 (1994).

⁵⁸ *Ibid* §§ 922(v)(2); (w)(2) (1994).

⁵⁹ National Firearms Agreement (n 32) 1(a).

⁶⁰ See above Part III(a).

⁶¹ *District of Columbia v Heller*, 554 US 1, 1 (USC, 2008) ('Heller').

⁶² *Ibid*.

Court held that ‘the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defence within the home’.⁶³ This finding reflects the tendency of American courts to interpret the Second Amendment as broadly as possible. This constitutional backdrop has been used to quash even the mildest attempts to restrict gun ownership and use in America.

B *The Legal and Constitutional Status of Guns in Australia*

Australia has been championed as a leader in the way of gun control laws internationally, with the NFA being referred to as the ‘gold standard’.⁶⁴ The NFA is one of the strictest gun control regimes in the world and was passed with relative ease in comparison to America’s ongoing uphill battle against increasing gun control.⁶⁵ This has been largely enabled by Australia’s constitutional framework and its underlying principles that differ greatly to the *US Constitution* and its guiding principles. Australia’s ‘Washminster’ system is a merging of the American and English political and legal systems.⁶⁶ From America, Australia took principles of federalisation—including a written constitution—and from the United Kingdom (‘UK’), Australia took the general principles and concepts underlying its drafting, such as representative and responsible government.⁶⁷ A key difference between the English and American systems is that the *US Constitution* ‘created’ a model, while the UK’s model and its unwritten constitution merely ‘described’ centuries of tradition.⁶⁸ The Australian system is

⁶³ Ibid.

⁶⁴ Frame (n 24) viii.

⁶⁵ See above Part III(b).

⁶⁶ Elaine Thompson, ‘The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation’ (2001) 24(3) *University of New South Wales Law Journal* 657, 657.

⁶⁷ Helen Irving, ‘A Nation Built on Words: The Constitution and National Identity in America and Australia’ (2007) 33(2) *Journal of Australasian Studies* 211, 211.

⁶⁸ Ibid.

a ‘curious blend of both practices and words’.⁶⁹ Australia has no Bill of Rights, and this was a conscious choice made by the framers of the *Australian Constitution*, as ‘the prevailing view was that Australia did not need a Bill of Rights because basic freedoms were adequately protected by the common law and by the good sense of elected representatives, as constrained by the doctrine of responsible government’.⁷⁰

Evidently, while America believes in individuals protecting their own rights and liberties and having the means to ensure this protection, Australia instead relies on the already entrenched political and legal systems that were described by the *Australian Constitution* (rather than created by it) to uphold citizen’s rights. This illustrates the vital role the Bill of Rights has played in establishing American identity and the American Dream, whereas Australia has no similar loyalty to the *Australian Constitution*. Australia has a lesser focus on specific individual rights, as they are not explicitly written and delineated, but rather a broader focus on social justice and equality that does not home in on any one particular notion. This has established a more flexible, albeit often inadequate, system of rights protection.⁷¹ While America relies on a strict interpretation of the word of law to give citizens their rights, Australia relies far more on the principles and traditions *described* by the *Australian Constitution*—such as representative government—to ensure the nation’s safety and security.⁷² In this way, the specific words of the *US Constitution*, rather than the principles they enunciate, are fundamental to America’s national identity—in fact, the *US*

⁶⁹ Ibid 213.

⁷⁰ George Williams, Consultant Law & Bills Digest Group, ‘The Federal Parliament and the Protection of Human Rights’ (Research Paper 20, 11 May 1999) <[⁷¹ Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* \(Cambridge University Press, 2009\) 23.](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20#:~:text=The%20prevailing%20view%20was%20that,the%20doctrine%20of%20responsible%20government.>.</p></div><div data-bbox=)

⁷² Irving (n 66) 211.

Constitution forms the basis of American national identity⁷³—while Australia has ‘no concept of constitutional identity’.⁷⁴ The historical and ideological context behind the *Australian Constitution* explains why it does not contain a Bill of Rights or any mention of firearms, and why the *Australian Constitution* did not act as a barrier to effecting gun control in Australia as it has in America.

V IDEOLOGICAL ISSUES

While the constitutional entrenchment of the right to bear arms is significant, it is not determinative of the current state of America’s gun control. As was argued above, legislative regulation of firearms can lead to a reduction in firearm-related death and injury. Why, then, has America refrained from enacting a suite of such legislation? Why does America continue to have the highest rate of private gun ownership of 178 countries?⁷⁵ Comparatively, Australia sits at a rate of 13.7 per 100 people and is ranked at 42 of 178 countries.⁷⁶ Ideologies and values borne from the American Dream have contributed greatly to America’s resistance to gun control. These ideological factors must be examined to ascertain whether they explain why America has not enacted effective gun control.

There are a myriad of ideological issues underlying the lack of gun control in America. The fundamental question driving the ideological differences is: ‘does the government’s ultimate responsibility to keep people safe from harm give it limitless authority to regulate the lives of citizens and the power to ensure their compliance?’⁷⁷ The analysis of America and Australia’s differing answers to this question can be traced back to the principles upon which each country’s

⁷³ Ibid 217.

⁷⁴ Ibid 222.

⁷⁵ According to a 2020 University of Sydney study, which found that the rate of private gun ownership in America is 120.50 per 100 people: Alpers and Picard (n 40).

⁷⁶ Ibid.

⁷⁷ Frame (n 24) I.

constitution has been built. The overarching principle of each constitution is usefully summarised by Justice Nettle in *McCloy v NSW* (*‘McCloy’*),⁷⁸ where his Honour stated:

Unlike the “great underlying principle” of the Australian Constitution— “that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power”—United States constitutional law puts emphasis on individual rights.⁷⁹

This focus on individual rights is why the *US Constitution* contains a Bill of Rights, which guarantees individual rights to American citizens. Due to this focus on guaranteeing individual rights, attempts to restrict the Second Amendment in America have become perceived as ‘a challenge to cherished individual freedom itself’.⁸⁰ Additionally, the right to bear arms has often been considered one of the most (if not the most) important of these rights—as Hubert Humphrey, Democratic Vice-President between 1965–1969, stated, ‘[c]ertainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms’.⁸¹ In contrast, the *Australian Constitution* contains very basic ‘implied’ rights, such as the implied freedom of political communication, which has been extrapolated from the right to vote.⁸² The ideological perspectives guiding law and society in America, including the focus on individual rights and liberties, neoliberalism, civilian self-defence, and patriarchal and racial structures, fostered the drafting of the Second Amendment and its ongoing glorification and approval. This entrenched ‘gun freedom’ in America’s national identity—a notion absent in Australia—has created a culture where guns and gun violence is ubiquitous.

⁷⁸ (2015) 257 CLR 178 (*‘McCloy’*).

⁷⁹ *Ibid* [219].

⁸⁰ *McNamara* (n 49) 1.

⁸¹ *Briggs* (n 19) 1.

⁸² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*‘Lange’*); Australian Constitution ss 7, 24.

C Commercialised Politics and the Freedom of Speech

Gun lobbies, in particular, the National Rifle Association ('NRA'), have significant power in America. This has been enabled by America's constitutionally protected freedom of speech, whereas gun lobbies in Australia have a far lesser ability to impact political outcomes due to the limited application of Australia's implied freedom of political communication. The NRA plays a significant role in American politics through electoral campaigning.⁸³

President Bill Clinton, in his 1995 State of the Union Address, stated that many Democratic incumbents were defeated in the election due to the lobbying efforts of the NRA.⁸⁴ A study that looked at the surprisingly Republican-leaning election results of 1994 confirmed Clinton's statement. The study found that NRA endorsement gave incumbent electoral candidates a 1.7 point increase, and challenging electoral candidates a 1.8 point increase.⁸⁵ Although at the time of the Port Arthur massacre 'the gun lobby was the ruling lobby in Australia',⁸⁶ the Howard government was able to push through radical legislative reform in a matter of days. In stark contrast, American congress and other lobbyists have repeatedly challenged the NRA and lost. Some studies have shown up to 91 per cent of Americans support increased gun control,⁸⁷ however legislation has not reflected this, which illustrates how the NRA's political power is so considerable that it outweighs the power of the people. American Democratic Party

⁸³ Joshua Newman and Brian Head, 'The National Context of Wicked Problems: Comparing Policies on Gun Violence in the US, Canada, and Australia' (2017) 19(1) *Journal of Comparative Policy Analysis: Research and Practice* 40, 45; Christopher Kenny, Michael McBurnett and David Bordua, 'The Impact of Political Interests in the 1994 and 1996 Congressional Elections: The Role of the National Rifle Association' (2004) 34(2) *British Journal of Political Science* 331.

⁸⁴ Kenny, McBurnett and Bordua (n 83) 331.

⁸⁵ Ibid 339.

⁸⁶ Wahlquist (n 4).

⁸⁷ Tom Smith, 'Public Opinion About Gun Policies' (2002) 12(2) *The Future of Children* 154; M Bennett, 'Misfire: How the Debate over Gun Rights Ignores Reality' (2008) 1(2) *Albany Government Law Review* 482, 488; Gallup poll cited in Phil Hasselback, *The Intractable Issue of Gun Control in America* (2020) [94].

Representative Feighan stated: ‘at least two dozen House members had privately spoken of their support for the [Brady] bill but had refused to vote for it, not because they feared losing their seats, but because of “the aggravation” that accompanied opposing the NRA’.⁸⁸ The NRA releases ‘legislative scorecards’ on how well members of congress comply with NRA policy to influence voters and political candidates alike.⁸⁹ In 2019, the NRA directly contributed USD349,844 to congressional candidates—98.95 per cent of whom were Republicans⁹⁰—while USD3,220,000 was spent on political lobbying.⁹¹ This spending is constitutionally protected by the First Amendment, which states: ‘congress shall make no law ... prohibiting the free exercise thereof; or abridging the freedom of speech’.⁹² This freedom of speech has been a key enabler of the NRA’s power over American politics, as political donations are legally a form of political communication or speech.⁹³

In contrast, in Australia, there is no ‘freedom of speech’, but an implied freedom of political communication (‘IFPC’).⁹⁴ The IFPC acts as a legislative limitation in Australia, rather than an absolute freedom.⁹⁵ A significant element of the IFPC is that political communication must not only be ‘compatible with the system of representative government, but [must] preserve and enhance it’.⁹⁶ *McCloy* is instrumental, as the Court considered the IFPC and contrasted it to America’s freedom of speech. *McCloy* concerned the issue of whether caps on

⁸⁸ The Brady Bill is the informal name for the *Brady Handgun Violence Prevention Act* Pub L No 103-159, 107 Stat 1536 (1993); Gregg Lee Carter, *Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law* (ABC-CLIO, 2nd ed, 2012) 108.

⁸⁹ Lois Beckett, “‘FX’: NRA’s New Letter Grade for Politicians it Opposes in “Gunshine state””, *The Guardian*, (Online, 11 October 2018) <<https://www.theguardian.com/us-news/2018/oct/10/nra-new-rating-florida-candidates-gun-control>>.

⁹⁰ Open Secrets: Center for Responsive Politics, ‘National Rifle Association’, *Influence & Lobbying* (Web Page, 21 May 2020) <<https://www.opensecrets.org/orgs/recipients?id=d000000082>>.

⁹¹ *Ibid.*

⁹² United States Constitution amend I.

⁹³ *Citizens United v Federal Election Commission* 558 US 1, 1 (2010) (‘*Citizens United*’).

⁹⁴ *Lange* (n 82); Australian Constitution ss 7, 24.

⁹⁵ *McCloy* (n 78) [2].

⁹⁶ *Ibid* [47].

political donations by property developers was a justifiable burden on the IFPC. The High Court of Australia held that the caps were constitutional as they supported representative government by ensuring certain groups with significantly disproportionate access to funds were not able to control the arena of political communication through donations.⁹⁷ In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*,⁹⁸ Lord Bingham stated:

[Representative democracy] is achieved where, in public discussion, differing views are expressed, contradicted, answered, and debated ... it is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than auction.⁹⁹

This limit on political donations was law in America for a time,¹⁰⁰ but its authority was subsequently found inconsistent with the First Amendment.¹⁰¹ In *Citizens United v Federal Election Commission* ('*Citizens United*'), Citizens United, a not-for-profit organisation, released a documentary that was critical of Hillary Clinton prior to the 2008 Democratic primary elections.¹⁰² Such a campaign violated the *Bipartisan Campaign Reform Act of 2002*, which prohibited corporations from expending funds opposing or support a political candidate.¹⁰³ Citizens United applied for a declaration that the Act contravened the First Amendment. The Court upheld the notion that the 'First Amendment has its fullest and most urgent application to speech uttered during a campaign

⁹⁷ Ibid [49], [50], [53].

⁹⁸ [2008] 1 AC 1312.

⁹⁹ Ibid [28] cited in *McCloy* (n 78) [39].

¹⁰⁰ *Austin v Michigan Chamber of Commerce*, 494 US 652, [660] (1990).

¹⁰¹ *Citizens United* (n 93) 1.

¹⁰² Ibid.

¹⁰³ Ibid 2.

for political office'.¹⁰⁴ As such, the offending sections of the Act were deemed unconstitutional.¹⁰⁵

In America, the only political donation or communication that is restricted is blatant 'quid pro quo' corruption.¹⁰⁶ In *McCutcheon v Federal Election Commission*, the Court differentiated between quid pro corruption and allowable political spending, stating that:

spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties.¹⁰⁷

This lack of limitation on political donations is what has enabled the NRA to maintain a significant stronghold over the Republican party. Legislation imposing restrictions on political donations, such as that considered in *McCloy*, is unconstitutional in America.¹⁰⁸ This type of spending restricted by this American legislation falls under the allowable category of spending large sums of money in connection with elections, regardless of its potentially overbearing influence on the political party or elected official.¹⁰⁹ If the Second Amendment was a great impediment to gun control, the combination of both the First and Second Amendments have effectively blockaded any meaningful firearms regulations or restrictions in America. Conversely, Australia's lack of an explicit right to freedom of speech and total absence of any right to firearms allowed effective and strict gun control to be implemented in a matter of days.

¹⁰⁴ *Monitor Patriot Co v Roy*, 401 US. 265, 272 (1971).

¹⁰⁵ *Citizens United* (n 93) 3.

¹⁰⁶ *McCutcheon v Federal Election Commission*, 188 L Ed 2d 1, [494] (2014) ('McCutcheon').

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

D *Neoliberalism and ‘Do-It-Yourself’ Defence*

Gun ownership and use have become synonymous with the concept of self-defence in America. Deeply entrenched attitudes regarding self-defence, that stem from neoliberalism and anti-federalism, have allowed gun culture to further taint notions of the American Dream. The concept of ‘do-it-yourself’ defence is inherently linked to the American focus on individual rights identified above. While in Australia, citizens are to rely on the overall systems and structures in place to protect rights; in America, the onus of upholding individual rights is put onto the individual. Rather than the government defending rights, American values encourage citizens to ‘do-it-themselves’ and protect their own rights.

America’s approach to ‘do-it-yourself’ self-defence can be traced back to the anti-federalist movement at the drafting of the *US Constitution*, which was wary of giving too much power to a centralised government and wanted to ensure that power remained in citizens’ hands.¹¹⁰ Not only has this strengthened the importance of the ability to defend oneself in America, and thus, meant people feel they need guns to be able to do this, it has also created significant resistance to increasing regulations generally.¹¹¹ Self-defence is one of the key arguments in favour of unregulated and unrestricted gun control. Following the Aurora shooting, which occurred in a ‘gun-free zone’, Erich Pratt from ‘Gun Owners of America’ stated that ‘the victims were disarmed by law or regulation ... They were made mandatory victims by restrictions which never stop the bad guys from getting or using guns’.¹¹² Ironically, Pratt argues that not only were the legislated gun-free zones ineffective to stop the gunman, but they inhibited the victims from protecting themselves. This contention is illustrative of how the belief that

¹¹⁰ Light (n 53) 293.

¹¹¹ Ibid.

¹¹² Briggs (n 19) 1.

citizens need to have the ability to ‘self-defend’ has prevented significant gun control reform, whilst further increasing the prevalence of gun possession in America.

The *US Constitution*, and its Bill of Rights, was influenced by neoliberal ideas espoused by the anti-federalist movement;¹¹³ specifically, ‘the dangers of “big government”’ and ‘the virtues of “rugged individualism” and “self-reliance”’.¹¹⁴ These notions have strong ties to neoliberalism, as was helpfully described in the following quote from Esposito and Finley:

Neoliberalism stresses competitive individualism as a natural outgrowth of human freedom, encourages a religious-like faith in the presumed powers of the free market to promote freedom and an optimal order, and understands the state as a protector of the prevailing market order as opposed to guarantor of social or economic justice. In effect, supporters of neoliberalism envision an ideal universe as one consisting of autonomous, self-contained individuals freely pursuing their self-interests with minimal political interventions.¹¹⁵

This quote explains how notions of individualism and self-reliance work to foster a ‘free market’, as a market is not truly ‘free’ if there is government interference in it. The American Dream places strong emphasis on the value of free markets and tells Americans that anyone can succeed if they try hard enough. In turn, this has created a belief that it is the citizen’s role to defend themselves, rather than the role of the government to interfere and (to an extent) protect citizens. This is how the concept of ‘do-it-yourself-defence’ was borne.

Furthermore, these notions stemmed from the anti-federalist movement that existed at the drafting of the *US Constitution* and have been reiterated by

¹¹³ See above Part III(A).

¹¹⁴ Luigi Esposito and Laura Finley, ‘Beyond Gun Control: Examining Neoliberalism, Pro-Gun Politics and Gun Violence in the United States’ (2014) 7(2) *Theory in Action* 74, 74. See also Light (n 53) 292.

¹¹⁵ Esposito and Finley (n 114) 76.

world events such as the 9/11 terrorist attacks.¹¹⁶ To the American public, 9/11 highlighted both the vulnerability of America's threat from the 'other' (whether that be the terrorist, the undocumented immigrant, the Indigenous person, or the African-American criminal) and the inability of the government to protect its people.¹¹⁷ As such, the 9/11 terrorist attacks gave rise to an acute awareness of the American people that the government was unable to protect its citizens, further solidifying the importance of self-defence in the mind of the average American citizen.

In contrast to Australian attitudes that divert to elected officials to secure the nation's safety, American attitudes regarding self-defence have allowed 'Stand Your Ground' ('SYG') laws—adopted in over half of America's states¹¹⁸—to expand dramatically. It is argued that the dramatic expansion of SYG laws reflects worsening, rather than bettering, attitudes of Americans towards gun use and self-defence. SYG laws are central to the NRA's policy,¹¹⁹ and are the laws that, rather than requiring a person to retreat in the face of danger if possible, allow citizens to 'stand their ground' and defend themselves or their property. The first state to officially enact SYG laws was Florida in 2005.¹²⁰ Florida's SYG law states:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.¹²¹

¹¹⁶ Light (n 53) 12.

¹¹⁷ Ibid 295; Susan Faludi, *The Terror Dream* (Metropolitan Books, 2007) 12.

¹¹⁸ Noel Otu, 'Stand Your Ground Laws in The United States' (2019) 7(1) *Salus Journal* 1, 3.

¹¹⁹ Light (n 53) 292.

¹²⁰ Otu (n 118) 3.

¹²¹ *Crimes*, ch 776, §776.013, XLVI Fla Laws (2020).

Since Florida's SYG law was enacted, another 32 states have enacted such laws.¹²² Prior to the implementation of SYG laws, the English concept of the 'duty to retreat' was the norm in America.¹²³ The history of Americans needing to defend themselves in their fight for independence, in addition to their desire to diverge from English principles, contributed to the departure from the 'duty to retreat'.¹²⁴

The castle doctrine protects an individual's right to protect their 'castle', being their home, and has always been excluded from the duty to retreat, as citizens have the right to protect their property.¹²⁵ This doctrine, however, has slowly been expanded in America, as the concept of 'castle' has extended from the boundaries of private property into the public domain.¹²⁶ In Australia, self-defence laws vary across states but generally sit somewhere between those of America and the UK. While the castle doctrine does exist in Australia,¹²⁷ self-defence must occur in circumstances where the victim has a genuine, reasonable belief that the act of self-defence was necessary to protect themselves (or their property).¹²⁸ Further, 'the existence of an opportunity to retreat from the conflict' is a relevant consideration as to whether the act was lawful.¹²⁹

The most distinctive element of the Australian notion of self-defence is that personal protection is *not* a genuine reason to own a gun. Thus, gun ownership under the guise of self-defence is unlawful.¹³⁰ The converse is true in America,

¹²² Otu (n 118) 3.

¹²³ Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (Yale University Press, 2009) 56.

¹²⁴ Light (n 53) 293.

¹²⁵ Ibid.

¹²⁶ Ibid; Suk (n 123) 55.

¹²⁷ See, eg, *Criminal Law Consolidation Act 1935* (SA) ss 15(1), 15A(1); *Criminal Code Act Compilation Act 1913* (WA) ss 251, 244.

¹²⁸ See, eg, *Criminal Code* (WA) s 248; *Zecevic v Director of Public Prosecutions* (Vic) [1987] HCA 26; *R v Burgess* [2005] NSWCCA 52.

¹²⁹ *R v Randle* (1995) 81 A Crim R 113, 15.

¹³⁰ National Firearms Agreement (n 32) 3(a).

as the rhetoric surrounding self-defence is centred around protecting gun rights. A landmark American case, *Runyan v State*, recognised that ‘the law of self-defence is founded on the law of nature; and is not, nor can be, superseded by any law of society ... the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed’.¹³¹ Similarly, *Miller v State* referred to ‘the divine right of self-defence’.¹³² In both *Runyan v State* and *Miller v State*, the defendant was acquitted for fatally shooting the victim in self-defence, despite having the opportunity to retreat and avoid a fatality. These references to ‘the law of nature’, ‘the American mind’, and ‘divinity’ illustrate how the impediments to gun control go far deeper than constitutional entrenchment.

While amending the *US Constitution* is an extensive process, it is theoretically achievable under Article V, which allows an amendment to be proposed by a two-thirds vote in both the House of Representatives and the Senate. The amendment must then be ratified by the legislatures of 75 per cent of the states.¹³³ The key impediment to gun control is not, however, the difficulties associated with amending the *US Constitution*. The issue is how one would go about altering the ‘American mind’ or natural law. Who can deny *divine rights*? The complexity of these notions explains why it has been so difficult for America to achieve any meaningful gun control. While, theoretically, the Second Amendment can be amended, it is far more difficult to amend centuries-old ideologies. Amending the right to bear arms, or enacting legislation that is seen to be impeding the right to bear arms in any way goes directly against

¹³¹ *Runyan v State*, 57 Ind 80, 84 (1877).

¹³² *Miller v State*, 139 Wis 57, 72 (1909).

¹³³ United States Constitution art V.

the ideals purported by the American Dream, such as restricting government interference, a free market, self-reliance and individualism.

E *Phallic Weapons: Self-Defence and Masculinity*

American gun ideologies are inextricably linked to notions of patriarchy and white supremacy, and are centrally conveyed through acts of, or beliefs about, self-defence. As previously discussed, the intersections of race, gender, and self-defence into beliefs about guns stem from notions of liberal democracy and anti-federalism. As Nettle J noted in *McCloy*, the principles underpinning America and Australia's constitutions are disparate. The American values of individual rights and liberties to 'protect' oneself stand in stark contrast to the Australian focus on the role of the state in fostering this protection.¹³⁴ This section asserts that America's racial and gender stereotypes and hierarchies have created a strong belief that women and children are to be protected by men, often from men of colour, and this protection is to be achieved through gun violence.

Attitudes towards racial and gender stereotypes have shaped American notions of self-defence. In 2015, Gahman conducted a study in rural Kansas on the role of hegemonic masculinity in perpetuating certain ideologies about guns,¹³⁵ and subsequently identified a link between beliefs about guns and beliefs about gender norms. For example, regarding beliefs about gender norms, participants of the study highly valued 'being considered a "good family man"'.¹³⁶ In the participants' views, a 'good family man' is one who protects his family and is 'tough, rational, aggressive, and strong'.¹³⁷ This understanding of

¹³⁴ *McCloy* (n 78); see above Part III(A).

¹³⁵ Levi Gahman, 'Gun Rites: Hegemonic Masculinity and Neoliberal Ideology in Rural Kansas' (2015) 22(9) *Gender, Place & Culture: A Journal of Feminist Geography* 1203.

¹³⁶ *Ibid* 1207.

¹³⁷ *Ibid* 1208.

the ‘good family man’ is rooted in patriarchal gender norms of both the man and the woman’s place in the household. Beliefs about gun use were then interwoven with these ideas, as participants expressed views that a good family man should protect his ‘helpless’ and ‘vulnerable’ wife and children, and a primary way through which this was to be achieved was through gun ownership and use.¹³⁸ A participant in the study encapsulates the relationship between such beliefs and gun use:

[I]f owning a gun helps me protect my wife and kids and provide for the family—then I’m surer than shit going to have one ... you never know when a criminal may be on the loose and all drugged up, or when a pervert may come sneaking around. It’s times like that when a guy has to ‘man up’ and protect what’s his. And if that requires shooting some nutcase then that’s what he’s got to do.¹³⁹

This idea of having to ‘man up’ through owning and potentially using a gun to help protect one’s ‘wife and kids’, illustrates the strong relationship between American notions of masculinity and gun use. This concept of being a ‘good family man’ is a driver of the philosophies reflected in strong self-defence laws. *Erwin v State of Ohio*¹⁴⁰ and *Runyan v State*¹⁴¹ marked the end of the ‘duty to retreat’, codifying the imagery of any form of retreat as ‘masculine cowardice’,¹⁴² while championing violent self-defence as an example of the ‘true man’.¹⁴³ In each case, the perpetrator was a white man.¹⁴⁴ This is significant as it reflects how these laws tend to be utilised by those in society with the most power—

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ 29 Ohio St 186, 199 (1876) (*Erwin*). See also Suk (n 123) 56.

¹⁴¹ 57 Ind 80, 84 (1877).

¹⁴² Light (n 53) 294.

¹⁴³ *Erwin* (n 140) 199 [26], [34]; Suk (n 123) 55.

¹⁴⁴ Light (n 53) 294.

reflecting how they stem from, and reinforce, harmful racial and gender hierarchies.

F *Stand Your Ground: Self-Defence and Race*

The practical effect of SYG laws further illustrates the devastating harm arising from ideals of the American Dream. Although SYG laws contain ‘race-neutral language’,¹⁴⁵ white-on-black homicides are significantly more likely to be deemed lawful homicides than white-on-white homicides in American states with SYG laws in place.¹⁴⁶ SYG laws were twice as likely to result in the acquittal of a defendant accused of killing a black person than a defendant accused of killing a white person.¹⁴⁷ These statistics indicate the capacity for SYG laws to perpetuate white supremacy and racial hierarchies by effectively decriminalising murders perpetrated against people of colour.¹⁴⁸ The necessity and continuing relevance of the Black Lives Matter (‘BLM’) movement illustrates how the racialised nature of gun use in America is still widespread and prolific. One of the most publicised deaths sparking the BLM movement was the shooting of 17-year-old Trayvon Martin in 2012. Trayvon Martin was killed in Florida, seven years after it passed an SYG law, and his murderer was acquitted under the SYG law.¹⁴⁹

This is not to say that Australia is free of these gendered and racial notions. There remain overwhelming issues regarding: Aboriginal deaths in custody,¹⁵⁰

¹⁴⁵ Ibid 292.

¹⁴⁶ Dream Defenders, Community Justice project of Florida for Legal Services and National Association for the Advancement of Colored People, *United States’ Compliance with the International Covenant on Civil and Political Rights: Written Statement on Stand Your Ground Laws* (Report, United Nations Human Rights Committee, October 2013) 162, 163.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 162.

¹⁵⁰ See, eg, Royal Commission into Aboriginal Deaths in Custody (National Report, April 1998) (‘Royal Commission into Aboriginal Deaths’).

racism and xenophobia against immigrants and Indigenous Australians;¹⁵¹ and misogynistic ideals that continue to permeate cultural, legal, and social norms.¹⁵² The key difference, however, is that in Australia, these issues are neither defined nor enabled by guns. For example, the *Royal Commission into Aboriginal Deaths in Custody* concluded that, of the deaths investigated, none were the result of police violence (and, therefore, gun use), but rather, ‘glaring deficiencies in the standard of care’ of the deceased.¹⁵³ By contrast, in America, there were only 27 days in 2019 where a person was not killed as a result of police violence.¹⁵⁴ Of these deaths, people of colour were more likely to be killed and less likely to be armed or threatening someone when killed.¹⁵⁵ This is not to diminish the seriousness or prevalence of these issues in Australia but to recognise the blatant absence of gun-use permeating such issues in Australia—not just physically, but ideologically.

This physical and ideological distinction demonstrates the extreme divergence between gun control in Australia compared to America. Police in both countries carry guns, yet fatal shootings perpetrated by police officers are an endemic issue in America, accounting for 92 per cent of those killed by police,¹⁵⁶ while only 30 per cent of deaths in custody in Australia were by gun.¹⁵⁷ The deep entrenchment of, and loyalty to, gun culture in America explains this. Guns are so heavily ingrained into the American psyche that they have infiltrated every aspect of society—not only in fringe, radical groups, but also in the mainstream.

¹⁵¹ See, eg, Kevin Dunn, Natascha Klocker and Tanya Salabay, ‘Contemporary Racism and Islamophobia in Australia: Racialising Religion’ (2007) 7(4) *Ethnicities* 564.

¹⁵² See, eg, Julia Baird, ‘In Australia, Misogyny Lives on: Commentary’, *New York Times* (New York, 6 July 2013).

¹⁵³ Royal Commission into Aboriginal Deaths (n 50) vol 1.

¹⁵⁴ ‘Police Violence Map’, *Mapping Police Violence* (Web Page) <<https://mappingpoliceviolence.org/>>.

¹⁵⁵ ‘2017 Police Violence Report’, *Mapping Police Violence* (Web Page) <<https://policeviolencereport.org/>>.

¹⁵⁶ Ibid.

¹⁵⁷ Laura Doherty and Samantha Bricknell, ‘Shooting Deaths in Police Custody’ (Statistical Bulletin No 19, Australian Institute of Criminology, 4 February 2020) <<https://aic.gov.au/publications/sb/sb19>>.

Misogyny and racism convey pro-gun ideologies, and these principles have manifested into the daily lives of all Americans.

VI CONCLUSION

The question as to how Australia and America solve (or decline to solve) the socio-legal problem of gun violence comes down to the distinctive ideological differences underlying the constitutions of both countries. The idealisation of the American Dream has allowed certain values—such as hyper-individualism, minimal government intervention, a strong self-defence regime and a focus on individual rights—to become deeply ingrained in America’s national identity. In turn, these values have become inextricably intertwined with an unwavering loyalty to gun freedom. The ideologies commanding the ‘American mind’, as identified in this article, demonstrate that many Americans would not consider gun violence to be a problem but a rightful practice of the individual’s divine right to self-defence and personal liberty. The historical and ideological connotations of guns and individual rights have proven impossible for America to shake, despite growing political unrest. The absence of any constitutionally explicit rights in Australia are a blessing in disguise for the nation’s gun control. While a lack of delineated, express rights elicits its own host of problems, Australia has avoided the trap of a legal stalemate in which the implementation of rigorous gun control appears to be an illusory fantasy. The ideal of the American Dream has, ironically, acted as a significant impediment to America’s progress in the context of gun control. For any meaningful reform to occur, America must first recognise and address the ideological roadblocks that have fostered the harmful and pervasive national culture of gun freedom.