

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

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I. INTRODUCTION

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

Part II of this Article begins with a highly-condensed description of the enactment of a constitution in Ireland. Ireland's governmental and constitutional structure is then explored, focusing on the judiciary. An examination of the rise and continuation of gun controls in Ireland follows, which involves a discussion of the constitutional issues most likely to arise in the context of gun control. Particular emphasis is placed on case law dealing with the Firearms Act of 1925 and 1964—the primary vehicles for gun control in Ireland.

A brief overview of the adoption of a constitution in Australia begins Part III. An introduction to the Australian governmental and court structure follows. Next comes an account of the enactment of stringent gun controls in the mid-1990s, followed by an examination of the constitutional concerns with regard to gun control. The different tests the Australian High Court uses to address those concerns concludes Part III.

¹ 128 S. Ct. 2783 (2008).

² *Id.* at 2786-7

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

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

II. IRELAND

A. *The Irish Constitution's Adoption*

Like the United States, Ireland's first constitution was enacted amidst a whirlwind of violence and political upheaval. Ireland's struggle for independence from Great Britain did culminate in the enactment of a constitution, but also in a division of its territory. By the early twentieth century, a majority of the Irish, through their representatives in the British Parliament, successfully voted for home rule in Ireland.³ But the Protestants in the north revolted, fearful of becoming a religious minority on a predominantly Catholic island.⁴ This revolt brought an Irish counter-reaction which led to a revolution for independence.⁵ Eventually, the British and the Irish signed the Anglo-Irish Treaty in 1921. The treaty recognized the sovereignty of the twenty-six southern counties in Ireland, but with one major catch—the six northern counties were to remain under British rule.⁶ This division was called the "Partition." Ireland's founding document, the

³ John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L.J. 967, 968 (1994). Hume describes this as "autonomy" but not "independence." *Id.*

⁴ *Id.* at 968. Some Protestants in Northern Ireland still have this fear. See Ian Paisley, *Political Viewpoint: Peace Agreement—or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J., 1273, 1284 (1999) ("We are being asked to commit an act of collective communal suicide by voting ourselves out of the Union.").

⁵ Hume, *supra* note 3, at 968.

⁶ James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 322 (1992).

Constitution of the Irish Free State,⁷ incorporated provisions of the Anglo-Irish Treaty, which was replaced in 1937 by the Constitution of Ireland.⁸

The Constitution of 1937 claims sovereignty over the whole of Ireland, despite a 1925 boundary agreement between the Irish Free State, Northern Ireland, and Britain, confirming the partition of Northern Ireland.⁹ The Irish Constitution also states that every person born in Ireland, north or south, is an Irish citizen.¹⁰ Furthermore, despite the island's contentious religious history, the preamble to the Irish Constitution does not shy away from its religious commitments: "We, the people of *Éire* . . . acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . Do hereby adopt, enact, and give to ourselves this Constitution."¹¹

In 1949, the Irish Free State declared itself the Republic of Ireland, a state independent in all respects from the British Commonwealth.¹² But, the north remained a part of the British Commonwealth.¹³ The tensions also remained. According to a former member of the Northern Ireland Parliament speaking in 1994, "the last twenty-five years have in many ways been the worst twenty-five years of violence in our history."¹⁴

On Good Friday, April 10, 1998, under the patient negotiation techniques of George Mitchell, the political parties in Ireland signed a peace agreement.¹⁵ Sinn Fein reiterated its former

⁷ CONSTITUTION OF THE IRISH FREE STATE (1922).

⁸ BUNREACTH NAH ÉIREANN [Constitution].

⁹ Kelly, *supra* note 6 at 322. The Irish Constitution's claim of sovereignty over Northern Ireland is seen as spurious by some, *See* Paisley, *supra* note 4, at 1288 (arguing that Article 2 and 3 of the Irish Constitution "form the basis of Dublin's illegal claim").

¹⁰ BUNREACTH NAH ÉIREANN, *See* ROBERT KEE, IRELAND, A HISTORY 217 (Weidenfeld & Nicolson 1981).

¹¹ BUNREACTH NAH ÉIREANN, Preamble.

¹² *See* Kelly, *supra* note 6, at 322–23.

¹³ *See id.* at 323.

¹⁴ Hume, *supra* note 3, at 968. John Hume, co-founder and leader of Northern Ireland's Social Democratic Labor Party served on the Northern Ireland Parliament from 1979–2001. He states that about one out of every 500 people in Northern Ireland has been killed in the conflict and half of those killed have been civilians. *Id.*

¹⁵ Zachary E. McCabe, *Northern Ireland: The Paramilitaries, Terrorism, and September 11th*, 30 DENV. J. INT'L L. & POL'Y 547, 551 (2002).

pledge of a “complete cessation of military activities.”¹⁶ The Ulster Defense Association (UDA), the largest paramilitary group holding unionist prerogatives, also agreed to the cease-fire.¹⁷ The “Good Friday Agreement” stipulated in its most relevant part that: (1) Northern Ireland’s constitutional status was dependent on the consent of a majority of Northern Ireland’s citizens (as opposed to all Irish citizens); (2) the Irish Constitution’s claim to Northern Ireland would be amended to reflect the need for consent; and (3) the parties “reaffirm[ed] the commitment to the total disarmament of all paramilitary organizations.”¹⁸ Time proved, however, that disarming Ireland’s many paramilitary groups was a daunting task.¹⁹

In 2006, the Irish and British governments developed and began to implement the St. Andrews Agreement, using the Good Friday Agreement as a launching point.²⁰ Under the Agreement, all major parties in Ireland consented to support the police and uphold the rule of law.²¹ The Agreement also provided for devolution of power away from England toward Belfast.²² At its core, the St. Andrews Agreement was a power-sharing agreement.²³ Thus far, the Agreement has not been shaken by continuing sporadic acts of terrorism in Northern Ireland.²⁴

¹⁶ *Id.* (quoting Irish Republican Army Cease-fire Statement, Aug. 31, 1994, *available at* <http://cain.ulst.ac.uk/events/peace/docs/ira31894.htm>).

¹⁷ *Id.*

¹⁸ Roger Mac Ginty, The Irish Peace Process - Background Briefing by Roger Mac Ginty, *available at* <http://cain.ulst.ac.uk/events/peace/bac.htm>.

¹⁹ See McCabe, *supra* note 14, at 553–57; Ray Moseley, *IRA Keeping Arms, BBC Says*, CHI. TRIB., Dec. 12, 1998, § 1, at 4; *N. Irish Group to Wage Violent Attacks*, XINHUA NEWS AGENCY (Beijing), Dec. 18, 1998.

²⁰ Agreement at St. Andrews, U.K.-Ir., Oct. 13, 2006, *available at* http://www.nio.gov.uk/st_andrews_agreement-2.pdf.

²¹ *Id.* § 5–7.

²² *Id.* § 13.

²³ *Id.* § 13 (“[A]ll the parties wish to see devolution restored. It is also clear to us that all parties wish to support policing and the rule of law. We hope they will seize this opportunity for bringing the political process in Northern Ireland to completion and establishing power-sharing government for the benefit of the whole community.”).

²⁴ See *N. Ireland Leaders Promise to Keep Peace*, CHICAGO SUN-TIMES, Mar. 8, 2009, *available at* <http://www.suntimes.com/news/world/1466566,w-northern-ireland-real-ira-attack030809.article>.

B. Irish Government Structure and the Supreme Court

The Irish Constitution of 1937 created a three-branch government comprised of an executive, a bi-cameral legislature, and an independent judicial branch. As such, the Irish Constitution created a hybrid system of government, combining elements of the United States' presidential system with the United Kingdom's parliamentary system of governance.²⁵ But in terms of its protection of individual rights, the Irish Constitution is much closer to the United States' Constitution than that of the United Kingdom, where the will of the Parliament dominates.²⁶ Article 34 grants the Supreme Court and the High Court the power of judicial review, a role that contributes significantly to the protection of individual rights and serves as a check on the power of the Irish Parliament.²⁷

The Supreme Court also has the power of abstract review. The Supreme Court can review bills and determine whether they are "repugnant" to the Constitution before the Irish President signs them into law.²⁸ However, under abstract review procedure, when the President refers a bill for review to the Supreme Court and the Court upholds its constitutionality, no court can ever review its constitutional status again.²⁹

The Irish President appoints all judges in Ireland, including those on the Supreme Court.³⁰ Judges appointed to the Supreme Court may be removed by the legislature for misbehavior or incapacity.³¹ The legislature has the power to determine the jurisdiction of Supreme Court, the age

²⁵ Bruce Carolan, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: The Search for Coherence in the use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 TULSA J. COMP. & INT'L L. 123, 126 (2004).

²⁶ *Id.*

²⁷ BUNREACTH NAH ÉIREANN, art. 34.3.2. The constitution grants the Irish Supreme Court the final say on all matters decided by the High Court. *Id.* art. 34.4.3.

²⁸ *Id.* art. 26.1.1.

²⁹ *Id.* art. 34.3.3.

³⁰ *Id.* art. 35.1.

³¹ *Id.* art. 35.4.1.

of retirement for judges, and the number of judges on the Supreme Court.³² The legislature established a nine-member Supreme Court, comprised of a Chief Justice, the president of the High Court, and seven ordinary judges.³³ Judges sitting on the Supreme Court must retire at age seventy.³⁴ Judges or the Advocate-General from the Courts of First Instance and the Court of Justice (the lowest Irish courts) are qualified for appointment to the Supreme Court, provided they have been a practicing barrister for at least twelve years.³⁵ Judges from the Circuit Court (an intermediate court) are qualified after sitting on the Circuit Court for four years and are not required to be licensed barristers for a minimum period of time before appointment.³⁶

In 1994, in *Heaney v. Ireland* the Supreme Court began using a proportionality test to balance legislation against individual rights.³⁷ Like other countries employing the proportionality test, the Ireland Supreme Court proportionality test proceeds on “the notion that the means chosen to pursue a legitimate legislative objective must “impair the right as little as possible.”³⁸ As a common law country, the Irish Supreme Court, and the lower Irish courts adhere to the doctrine of stare decisis.³⁹ Finally, the Irish Supreme Court has on numerous occasions willingly cited to the United States Supreme Court and other foreign courts such as the European Court of Justice.⁴⁰

³² *Id.* art. 36.

³³ Courts and Court Officers Act, 1995, No. 31/1995, § 6 (Ir.) *available at* http://www.bailii.org/ic/legis/num_act/1995/0031.html.

³⁴ *Id.* § 47.

³⁵ *Id.* § 28(d).

³⁶ *Id.* § 28(e).

³⁷ *Heaney v. Ireland* [1994] 3 I.R. 593 (H. Ct.).

³⁸ Brian Foley, *The Proportionality Test: Present Problems*, 2008 JUD. STUD. INST. J. 67, 69 (2008).

³⁹ *See Carolan, supra* note 24, at 135 (discussing the precedential value of Irish Supreme Court cases).

⁴⁰ *Id.* at 133.

C. *Gun Control Legislation in Ireland*

1. *Controls under English Rule*

The English Declaration of Rights of 1689, responding to abuses by the English monarch, expressed a right to bear arms. However, the right was not absolute. Firearms were not available to everyone and were certainly not available without precondition. First, a person only had a right to bear firearms when it was “suitable to their Condition.”⁴¹ Second, the right was subject to regulation by Parliament or “as allowed by law.”⁴² Third, the right was explicitly limited to Protestants.⁴³

Britain had a licensing system in place in Ireland under its colonial laws.⁴⁴ Thus, in 1920, the stage was set for the British Parliament to enact gun control laws severely limiting the right to bear arms in Ireland as well as England. Parliament passed “a comprehensive arms control measure that effectively repealed the right to be armed by requiring a firearm certificate for anyone wishing to ‘purchase, possess, use or carry any description of firearm or ammunition for the weapon.’”⁴⁵ Britain has readopted the Firearms Act, and it remain in force.⁴⁶ Since the devolution of power away from Westminster toward Belfast, Northern Ireland’s primary statute governing the licensing of firearms has been the Firearms Order 1981, promulgated by the Northern Ireland legislature.⁴⁷

⁴¹ English Bill of Rights of 1689, art. 7.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 18 (Routledge & Kegan Paul Ltd. 1972).

⁴⁵ JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 170 (Harvard University Press 1994) (citing Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.)).

⁴⁶ See Firearms Act, 1968, c. 27 (Eng.).

⁴⁷ Firearms Order 1981, 1992 No. 3267(N. Ir.). The Northern Ireland licensing system reads much like the Republic of Ireland’s system. For a case dealing with the particulars of the Northern Ireland Firearms Order, see *In re An Application by Chalmers Brown for Judicial Review*, [2003] NICA 7 (Civ) (N. Ir.) available at <http://www.bailii.org/nie/cases/NICA/2003/7.html>.

2. *Controls in the New Irish Republic*

Shortly after gaining autonomy in 1922, the Irish Free State enacted its own firearm licensing statutes contained in the Firearms Act of 1925.⁴⁸ The Act makes it unlawful to possess an uncertified firearm.⁴⁹ Firearm certificates can only be issued by the superintendent of the Garda Siochana.⁵⁰ Certificates are granted by the superintendent only after he is satisfied that an applicant: (1) has good reason for requiring the firearm, (2) can possess such firearm without danger to the public safety or peace, and (3) is not disqualified to hold a firearm certificate.⁵¹

D. *Irish Gun Control Jurisprudence*

There is no mention of an individual right to possess firearms in the Irish Constitution.⁵² In fact, the only mention of firearms in the Irish Constitution appears to disfavor their possession.⁵³ That there is no constitutional protection for an individual right to bear arms is a fact well-noted by the Irish courts.⁵⁴ Nor does it appear that a significant portion of the public believes there is a right to bear arms.⁵⁵ Although some individuals in Ireland strongly believe there is such a right,⁵⁶ in general, the Irish seem to have negative feelings toward firearms, and appear to view the United

⁴⁸ See Firearms Act of 1925, No. 22/07/1925 (Ir.). The long title of the Act is as follows: “An Act to place restrictions on the possession of firearms and other weapons and ammunition, and for that and other purposes, to amend the law relating to firearms and other weapons and ammunition.”

⁴⁹ *Id.* § 2(1).

⁵⁰ *Id.* § 3(1). “Garda Siochana” is the Irish name for the police force of the Republic of Ireland.

⁵¹ *Id.* §4. Disqualified persons include: (1) any person under 16 years old, (2) any person of “intemperate habits,” (3) any person of unsound mind, (4) any person sentenced for an offense in which a firearm or firearm imitation was used to intimidate or threaten another person within the past five years, (5) any person sentenced to at least three months of imprisonment for an assault within the past five years, (6) any person subject to police supervision, and (7) any person bound by a court order of good behavior. Firearms Act of 1925 § 17(b).

⁵² See BUNREACTH NAH ÉIREANN, art. --. Moreover, there is no provision providing for a right of self-defense that might arguably justify the possession of firearms.

⁵³ See BUNREACTH NAH ÉIREANN, art. 40.6.2 (providing for “[t]he right of the citizens to assemble peaceably and without arms”).

⁵⁴ See, e.g., *McCarron v. Kearney*, [2008] I.E.H.C. 195 (H. Ct.) available at

<http://www.bailii.org/ie/cases/IEHC/2008/H195.html> (“There is no constitutional provision providing for any right to keep lethal firearms such as that in the Second Amendment to the United States . . .”).

⁵⁵ See, e.g., John Burke, *Garda Inspectorate Head Backs Ban on Handgun Ownership*, SUNDAY BUSINESS POST (Dublin), Dec. 28, 2008.

⁵⁶ See Stephen Breen, *Sick Praise for Recent Slayings*, SUNDAY LIFE (Belfast), Mar. 15, 2009 (reporting that an IRA prisoner stated: “The right to bear arms in the pursuit of a united Ireland cannot be taken away by anyone and it’s about time the people realised this.”).

States' stance on firearms as somewhat foolhardy.⁵⁷ A surprising sight to an American visitor in Ireland might be the fact that the vast majority of their uniformed Garda do not carry firearms.⁵⁸

Despite the fact that there is no express right to bear firearms within the Irish Constitution, several parties have successfully challenged a select few firearms regulations and certification decisions in the court system. One avenue has been to challenge directives passed by superiors of the superintendants as unjustifiably “fettering the discretion”⁵⁹ of superintendants in violation of the Irish Constitution’s strong commitment to the Irish Legislature’s exclusive power to make law.⁶⁰ This is the result of the Irish Supreme Court’s steadfast commitment to separation of powers notions.⁶¹ Another route has been to challenge a given Garda superintendant’s decision as “so illogical and unreasonable” and so “fundamentally at variance with reason and common sense,” that the decision is untenable.⁶² Each avenue is discussed in turn below.

1. “Fettering the Discretion” of Superintendants

In *Dunne v. Donohoe*, the Irish Supreme Court heard a challenge to a directive set forth by an Assistant Commissioner of the Garda Siochana.⁶³ The directive required district officers to ensure an applicant had a secure firearms cabinet and satisfactory level of security before granting or renewing firearms certificates.⁶⁴ Martin Dunne had sought renewal of his firearms certificate, but

⁵⁷ See, e.g., John Burke, *Garda Inspectorate Head Backs Ban on Handgun Ownership*, SUNDAY BUSINESS POST (Dublin), Dec. 28, 2008 (noting that the head of the Garda Siochana Inspectorate, a former police commissioner in Boston, “would ‘absolutely’ support a total ban on handguns, based on her experience of murders in the US”); Denis Staunton, *Plague of Gun Crime will not be Helped by Supreme Court Ruling*, The Irish Times, Jun. 28, 2008 (stating that in “cities like Washington and Chicago, which [are] plagued by gun crime, local politicians fear a wave of lawsuits by gun rights advocates to remove restrictions, a danger Justice Stephen Breyer highlighted in his dissenting opinion [in *Heller*]”).

⁵⁸ This is pursuant to an Association of Garda Sergeants and Inspectors (AGSI) policy that uniformed Garda are not to carry firearms. See generally Valerie Robinson, *Arming Gardai ‘Not an Answer to Gun Crime’*, IRISH NEWS, Mar. 19, 2008 (noting the AGSI’s commitment to continuing this policy).

⁵⁹ *Dunne v. Donohoe*, [2002] 2 I.R. 533, available at <http://www.bailii.org/ie/cases/IESC/2002/35.html>.

⁶⁰ BUNREACTH NAH ÉIREANN, art 15. See Carolan, *supra* note 25, at 127 (noting that the Irish Supreme Court is willing to strike down rather than enjoin government acts that violate the legislature’s exclusive law-making power).

⁶¹ See Carolan, *supra* note 25, at 127.

⁶² O’Leary v. Maher, [2008] I.E.H.C. 113 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H113.html>.

⁶³ *Dunne*, [2002] 2 I.R. 533.

⁶⁴ *Id.*

was ordered to install a new firearms cabinet, pursuant to a new directive the Garda superintendent was enforcing.⁶⁵ The directive, entitled “Security Arrangements for Licensed Firearms,” did not permit wooden firearms cabinets and required separate storage for the keys to firearms cabinets.⁶⁶ Even more stringent requirements applied to rifles with a higher caliber than .22.⁶⁷ The High Court granted relief to Dunne on two grounds: (1) the directive fettered the superintendent’s discretion in the exercise of the relevant functions of the Firearms Act of 1925, and (2) the superintendent was not empowered to impose a fixed precondition requiring every applicant for a firearm certificate to keep the firearms in a locked firearms cabinet constructed in accordance with the requirements of the directive.⁶⁸

Affirming the High Court, the Supreme Court emphasized the fact that the Oireachtas could have granted Garda commissioners the power to enact such directives, but it chose instead to give that power only to local Garda superintendents.⁶⁹ The legislature had conferred the power upon the superintendent in *Dunne* as a “persona designata.” According to the persona designata doctrine, when an individual is granted power, he or she must exercise that power independently from, and unconstrained by, any outside authority which seeks to exercise power in concert with the individual who has been granted actual authority.⁷⁰ Therefore, the assistant commissioner of the Garda who set forth the directive engaged in unlawful interference under the persona designata doctrine when he unilaterally added requirements to the firearms licensing scheme.⁷¹ The Supreme Court upheld the High Court’s decision to strike down the directive and quash the superintendent’s decision to deny the applicant’s application for a firearms certificate.⁷²

⁶⁵ *Dunne* [2001] I.E.H.C. 126 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2001/126.html>.

⁶⁶ *Dunne v. Donohoe*, [2002] 2 I.R. 533.

⁶⁷ *Id.*

⁶⁸ *Dunne v. Donohoe* [2001] I.E.H.C. 126 (H. Ct.).

⁶⁹ *Dunne v. Donohoe*, [2002] 2 I.R. 533. “Oireachtas” is the term for the Irish Legislative Assembly.

⁷⁰ See *Dunne v. Donohoe* [2001] I.E.H.C. 126 (H. Ct.) (describing the doctrine’s applicability in Ireland).

⁷¹ *Dunne v. Donohoe*, [2002] 2 I.R. 533.

⁷² *Id.*

2. Separation of Powers Violations

The Irish Supreme Court also accepted the High Court's second basis for granting relief to Dunne: the separation of powers doctrine. The court stated that by adding requirements to the certification process, the superintendent was acting ultra vires of the provisions of the Firearms Acts of 1925 and 1964.⁷³ Neither the commissioners nor the superintendants had been empowered by the legislature to impose additional prerequisites for firearm certifications.⁷⁴ Therefore, by imposing additional prerequisites, the superintendent, in essence, assumed the legislature's power in violation of the Constitution's explicit provision that only the Oireachtas can enact law.⁷⁵

The Irish legislature knows how to adapt to the Irish Supreme Court's rulings. Four years after *Dunne*, legislators enacted the 2006 Criminal Justice Act.⁷⁶ The Act codified the requirement that a certificate holder have a secure place of storage for the firearm and ammunition, subject to inspection by a member of the Garda.⁷⁷ The Act also vested more power in the Garda hierarchy: "The Minister, in consultation with the Commissioner, may by regulations provide for minimum standards to be complied with by holders of firearm certificates in relation to the provision of secure accommodation for their firearms."⁷⁸

Not surprisingly, in the wake of the 2006 Criminal Justice Act, courts examining certification decisions will often defer to superintendants' determinations. For example, following the Act, the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Dunne v. Donohoe*, [2002] 2 I.R. 533. See BUNREACT NAH ÉIREANN, art. 15 ("The sole and exclusive power of making laws for the State is hereby vested in the *Oireachtas*").

⁷⁶ Criminal Justice Act of 2006, No. 26/2006 (Ir.) available at <http://www.oireachtas.ie/documents/bills28/acts/2006/A2606.pdf>.

⁷⁷ *Id.* § 32.4(2)(d). The Act also introduced mandatory minimum sentences between five and ten years for certain firearms offenses. *Id.* § 61.

⁷⁸ *Id.* § 32.4(5). Given Ireland's strong adherence to the separation of powers doctrine, one might be curious as to whether such a delegation of legislative power to executive officers is constitutional. The Irish Constitution does provide, however, that "[p]rovision may be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures." BUNREACT NAH ÉIREANN, art. 15. Compare with *Bowsher v. Synar*, 748 U.S. 714 (1986) (striking down the Graham–Rudman–Hollings Act because the legislature retained too much control over a Comptroller General whom it granted the authority to make budget cut recommendations to the President, who was then required to follow the recommendations).

High Court showed extreme deference to a Garda superintendent's decision in *McCarron v. Kearney*. In *McCarron*, the High Court rejected a challenge to a superintendent's denial of a firearm certificate application on the basis that he was not satisfied that the applicant had a good reason for requiring the particular firearm he desired.⁷⁹ The applicant had attempted to certify a .40 caliber "glock" pistol, which he stated he required for target practice.⁸⁰ The superintendent informed the applicant that he considered the glock a combat weapon, and while it might be capable of use for shooting targets, it was not suitable for such a use when weighed against the inherent dangers of the weapon.⁸¹ The court first discussed the effect of the 2006 Criminal Justice Act on the licensing system:

The purpose of licensing is to have control over firearms. It would not be right for this Court to construe the Act in such a way that the controls put in place by the legislature are abdicated in favour of a test of choice as if a firearm is not a lethal weapon and is something other than a most dangerous article. That is what the legislation is there to control. It is not within the legislative scheme to issue a firearm certificate to any individual simply having a genuine desire to hold a particular weapon for sport, no matter what its calibre, the velocity of its projectile or its especial killing potential.⁸²

The court next indicated that the Act made clear that public safety considerations, good order of the community, and general proliferation of firearms could enter into a superintendent's individualized certification decision.⁸³ Furthermore, the court stated its version of the burden on firearms applications: "the more dangerous the weapon, the greater the burden born by a person applying for a firearm certificate to show that he or she has good reason for seeking to possess and use that particular weapon."⁸⁴

Interestingly, rather than distinguishing its decision from *Dunne*—as it likely could have done by pointing out that, in this particular case, the superintendent did not act pursuant to a superior's

⁷⁹ See *McCarron v. Kearney*, [2008] I.E.H.C. 195 (H. Ct.).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

directive as in *Dunne*—the *McCarron* court set forth its own interpretation of *Dunne*. First, the court stated that interpreting *Dunne* as a determination that Garda superintendants could not enact their own licensing requirements was “an unfortunate misunderstanding.”⁸⁵ Next, the court stated that under a determination of the “public good,” a superintendent could create and adhere to policy it considered to advance the “public safety or peace” requirement of the 1925 Act.⁸⁶ The court seemed to imply that if *Dunne* stood for anything, it was that a superintendent had *more* discretion, not less, to set forth whatever licensing policy he or she desired.⁸⁷

The *McCarron* court’s holding is questionable. While *Dunne* made it clear that a Garda superintendent retains control over his own discretion, *Dunne* also specified that superintendants are not vested with the authority to insert their own requirements into the certification calculus.⁸⁸ To the extent that *Dunne* protected a superintendent’s discretion, it did so from outside influence—the court was clear that a superintendent was still not free to promulgate non-statutory certification requirements.⁸⁹ Additionally, it is unclear in *McCarron* just how the superintendent’s denial of a “glock” license can be characterized as a decision appropriately made under the “public” prong of the Firearms Act of 1925. In *Dunne*, the superintendent’s enforcement of the storage unit requirement could just as easily have been defended on the ground that it was for the “public good,” but the Court found the superintendent’s actions to be an improper discretionary determination anyway.⁹⁰

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Dunne v. Donohoe*, [2002] 2 I.R. 533.

⁸⁹ *Id.*

⁹⁰ *Id.*

Contrary to language in *McCarron* indicating otherwise, the Criminal Justice Act of 2006 did not give Garda ministers and superintendants free reign to set licensing policies.⁹¹ Under the Act, such policy-making power was confined to dealing with the “secure accommodation” of firearms.⁹²

As discussed below, other judges on the High Court have more carefully abided by the Irish Supreme Court’s decision in *Dunne*, carefully scrutinizing the decisions of Garda superintendants and simultaneously balancing the Criminal Justice Act’s changes to gun licensing. But rather than distinguish those cases, the judge in *McCarron* merely stated, “In so far as my decision in this regard differs . . . I find myself unable to follow those decisions.”⁹³

3. “Illogical and Unreasonable” Licensing Decisions

A party may challenge a Garda superintendant’s decision as “fundamentally at variance with reason and common sense,”⁹⁴ which is essentially the Irish test for minimum rationality, akin to the rational basis test in the United States. The High Court’s decision in *Goodison v. Shehan* illustrates the principles of this line of judicial review.⁹⁵ *Goodison*, like *McCarron*, dealt with an applicant’s challenge to a superintendant’s refusal to issue a certificate on the basis that it presented a danger to the safety of the public.⁹⁶ But in *Goodison*, the applicant had already been granted licenses for two double-barreled shotguns and a rifle.⁹⁷ Under these circumstances, the court stated:

There is nothing in [the Firearm Act’s provisions] which entitles the respondent to consider the applicant’s suitability in relation to a particular weapon where certificates are held in respect of others. Either the applicant is a person who can

⁹¹ See Criminal Justice Act of 2006, No. 26/2006, §32.4(5) (Ir.).

⁹² *Id.*

⁹³ See *McCarron v. Kearney*, [2008] I.E.H.C. 195 (H. Ct.).

⁹⁴ *O’Leary v. Mahar*, [2008] I.E.H.C. 113 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H113.html> (citing *The State v. Stardust Victims; Compensation Tribunal* [1986] I.R. 642. (Ir.)).

⁹⁵ See *Goodison v. Sheahan*, [2008] I.E.H.C. 127 (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2008/H127.html>.

⁹⁶ *Goodison*, I.E.H.C. 127.

⁹⁷ *Id.*

posses, use or carry a firearm or he is not. In this case he must be seen as a person who can.⁹⁸

In other words, the superintendant illogically found that the applicant was incapable of holding a glock without endangering the public, because the applicant had already been found qualified to hold other firearms that were just as deadly.⁹⁹

Under similar circumstances, in *O'Leary v. Mahar*, the High Court struck down a Garda superintendent's decision to refuse an application for certification of a .308 caliber hunting rifle because he considered it a "military caliber weapon."¹⁰⁰ The first problem was that the applicant already owned a certified .243 rifle.¹⁰¹ Furthermore, the superintendant informed him that although he could not certify his .308 rifle, he would be entitled to certify a 30-06, which, as it turned out, is a more powerful firearm.¹⁰² The court analyzed the situation stating, "it is difficult to see how one rifle is deemed too dangerous to the public . . . to be licensed while the other which is favoured by the [superintendant] delivers its rounds at 100 feet per second faster."¹⁰³ The court then held that "this case is one of those relatively rare cases of judicial review where . . . the decision sought to be impugned is so illogical and so unreasonable as to . . . [be] fundamentally at variance with reason and common sense."¹⁰⁴

III. AUSTRALIA

A. *The Australian Constitution's Adoption*

Overall, Australia's move toward independence was a slow and nonviolent process, as distinguished from its American and Irish counterparts. Australia has long been very loyal to Britain. However, despite this loyalty, the Australian colonies began to discuss joining together into

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *O'Leary v. Maher*, [2008] I.E.H.C. 113 (H. Ct.).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

a federation in the late nineteenth century. Although smaller colonies feared a lack of power in a new federation, all six states would finally agree to join the federation by enacting a constitution in 1901.¹⁰⁵ Still, Australia remained tied to the British government. It was not until 1942 that Australia would take its next step toward independence. In 1942, Australia adopted the Statute of Westminster, which had been enacted by the English Parliament in 1931.¹⁰⁶ The Statute set out as law the constitutional independence of Australia, Canada, New Zealand, and other British colonies.¹⁰⁷ The Statute also granted equal sovereign status to Australia, Canada and New Zealand.¹⁰⁸ Finally, in 1980, Australia cut all significant ties to Britain by enacting the Australia Act, though the Queen of England remains the Australian Head of State.¹⁰⁹ The Act also ended all constitutional provisions providing for appeal from Australian courts to English courts, and ended the inclusion of Acts of the British Parliament into Australian law.¹¹⁰

B. *Australian Government Structure and the High Court*

Australia's governmental structure has aptly been described as a "Washminster" system, blending parliamentary and presidential aspects into its constitution.¹¹¹ Similar to the United States' federalist system, the Australian government is divided vertically between a federal government and the state government.¹¹² The constitution divides the federal government's power horizontally into an executive, legislative, and judicial branch.¹¹³

¹⁰⁵ *See id.* at 79–94.

¹⁰⁶ Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4 (Eng.) *available at* <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1081723>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Australian Act, 1986, c. 2 (U.K.) *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/aa1986114/.

¹¹⁰ *Id.*

¹¹¹ Elaine Thompson, A Washminster Republic, *in* WE, THE PEOPLE 91–113 (George Winterton ed., 1994). Australia is quite similar to Ireland in the manner its combines presidential and parliamentary elements. *See supra* Part II.B.

¹¹² *See generally* AUSTL. CONST. §§ 106–109.

¹¹³ *Id.*

Section 71 of the Australian Constitution vests ultimate judicial authority in a High Court.¹¹⁴ The High Court has the power to review the constitutionality of laws.¹¹⁵ It does not, however, have the power of abstract judicial review like the Irish Supreme Court. The High Court has a significant level of appellate jurisdiction.¹¹⁶ It can hear appeals from the federal courts, and even from the highest state courts, on purely state issues.¹¹⁷ The High Court's jurisdiction over state courts is an intriguing fact given Australia's commitment to federalism.

Technically the Governor-General, the Queen's representative in the Parliament and ceremonial executive, appoints the High Court Justices.¹¹⁸ In practice, however, the Prime Minister, on advice from the Attorney General and Cabinet, appoints Justices.¹¹⁹ The constitution requires a minimum of only three Justices to sit on the High Court,¹²⁰ but the Parliament has provided for a Chief Justice and six other Justices.¹²¹ The constitution requires no formal legal qualifications for Justices, but that he or she already be a judge or have at least five years of experience as a barrister or solicitor.¹²² The constitution requires that High Court Justices retire at age seventy.¹²³

The High Court strictly adheres to a textualist approach when it interprets constitutional powers issues.¹²⁴ Conversely, when analyzing rights issues, the Australian High Court has "rejected any semblance of textualism," finding rights rooted in the background and purposes of the

¹¹⁴ *Id.* § 71, 73.

¹¹⁵ *Id.* § 76.

¹¹⁶ *Id.* § 73(ii); James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627, 667-668 (1997).

¹¹⁷ *Id.* § 73(ii); Thomson, *supra* note 130, at 667-668.

¹¹⁸ AUSTL. CONST. § 72(i).

¹¹⁹ See JACKSON & TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 499 (Foundation Press 2nd ed. 2006) (1999).

¹²⁰ AUSTL. CONST. § 71.

¹²¹ High Court of Australia Act 1979 § 5.

¹²² *Id.* § 7(a)-(b).

¹²³ AUSTL. CONST. § 72.

¹²⁴ Mayer & Schweber, *Does Australia Have a Constitution? – Part II The Rights Constitution*, 25 UCLA PAC. BASIN L.J. 265, 271-72 (2008).

constitution.¹²⁵ Beginning the 1990s, the High Court began analyzing rights issues using the doctrine of proportionality.¹²⁶

C. *Gun Control in Australia*

Prior to 1996, gun control was mainly effectuated at the state level by each state, without regard to the laws of other states.¹²⁷ For example, New South Wales enacted the first gun-registration system in 1802.¹²⁸ In the 1920s and 1930s, each Australian state jurisdiction enacted its own form of firearm registration.¹²⁹ But each state enacted different registration laws, leading to conflicts over which state law, if any, could take preeminence over others.¹³⁰

On April 28, 1996, a 28-year-old Australian went on a killing spree in Tasmania, killing 35 and wounding 21 others in the Port Arthur Massacre, which brought national attention to the different gun laws enacted by the states.¹³¹ Following the tragedy, then-Prime Minister John Howard urged the states to form a coalition and adopt an agreement on firearms.¹³² Turning to the states for help was necessary because Howard's federal government could not constitutionally enact such legislation.¹³³

¹²⁵ *Id.* at 272.

¹²⁶ See Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 39 (2005).

¹²⁷ DAVID KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* 195 (Prometheus Books, 1992).

¹²⁸ See e.g., Malcolm Brown, *A Nation Won by Guns*, Sydney Morning Herald, Feb. 27, 1988, 68.

¹²⁹ See Firearms Act 1921 (Victoria); Gun License Act 1920 (New South Wales); Firearms Licence Act 1927 (Queensland); Pistol Licence Act 1929 (South Australia); Firearms Act 1931 (Western Australia); Firearms Act 1932 (Tasmania); Firearms Registration Ordinance 1932 (Northern Territory). See also KOPEL, *supra* note 116, at 195 (citing RICHARD HARDING, *FIREARMS AND VIOLENCE IN AUSTRALIAN LIFE: AN EXAMINATION OF GUN OWNERSHIP AND USE IN AUSTRALIA* 167 n.2 (University of Western Australia Press, 1981)).

¹³⁰ See KOPEL, *supra* note 129, at 195.

¹³¹ See *Port Arthur Tragedy Remembered*, THE SYDNEY MORNING HERALD, Apr. 28, 2008 available at <http://www.smh.com.au/news/national/australias-worst-mass-murder-remembered/2006/04/28/1145861514613.html>.

¹³² See *Tasmania's Tragedy: Our Lax Gun Laws*, The Australian, Apr. 30, 1996.

¹³³ This is due to the Australian Constitution Commerce Clause, discussed *infra*, Part III(D)(1).

On May 10, 1996, the Australasian Police Ministers' Council adopted numerous resolutions with the goal of more effective firearms control.¹³⁴ The regulations were designed to ensure uniform control of the circulation of firearms.¹³⁵ Its principle provisions included: (1) a ban on automatic firearms, most semi-automatic firearms, and handguns, (2) the exclusion of the need for self-protection as a legitimate reason for owning a firearm, (3) a classification scheme based on firearm type and need for the firearm,¹³⁶ (4) mandatory safety training, (5) a 28-day waiting period before obtaining a firearm,¹³⁷ (6) standards for the storage of firearms and (7) the recording of all sales by firearms dealers.¹³⁸ The state governments also provided for a “buyback program” in which the government would purchase newly-banned firearms from owners.¹³⁹ From 1996 to 1997, the Australian state governments collected 643,726 prohibited firearms.¹⁴⁰ The cost was approximately \$A320 million, or about \$U.S. 230 million.¹⁴¹

D. *Australia Gun Control Jurisprudence & Constitutional Issues*

Australia, like Ireland, has no express provision in its constitution guaranteeing a right to bear arms. In fact, the Australian Constitution contains no bill of rights whatsoever.¹⁴² Of course it must be remembered that it is possible to have constitutional rights in the absence of written text

¹³⁴ See Chief Executive Officer of Customs v. Granite Arms Party, 221 A.L.R. 137 (2005) *available at* <http://www.austlii.edu.au/au/cases/cth/HCA/2005/51.html> (discussing the enactment of the Agreement).

¹³⁵ *Id.*

¹³⁶ For example, under the classification system, most handguns are placed in Category H, a completely restricted category. Semiautomatic rifles with a magazine capacity of less than 10 rounds are in Category C, which prohibits ownership except for occupational purposes, i.e. security employees and rural farmers who need to protect livestock from predators.

¹³⁷ Note that this is in direct distinction to one of *Heller's* key rationales: the need for self-defense. See District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008) (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

¹³⁸ Australian Police Ministers Council, Special Firearms Meeting, Resolution, *available at* <http://www.austlii.edu.au/au/other/apmc/>.

¹³⁹ See Router & Mouzos, *Australia: A Massive Buyback of Low-Risk Guns*, in LUDWIG & COOK, EVALUATING GUN POLICY 121–53 (Brookings Institution Press, 2003).

¹⁴⁰ *Id.* at 130.

¹⁴¹ *Id.* Exchange Rate as of September 25, 1997. *Id.* at n.33.

¹⁴² For some of the arguments about the possible implementation of a bill or rights to the Australian Constitution, see Mayer & Schweber, *supra* note 124; see also Stone, *supra* note 126.

explicitly providing those rights—constitutionalism is possible even without a constitution. Because of the absence of a textual right to bear arms in Australia’s constitution, the country’s gun advocates often argue that their right to bear arms comes from the 1689 English Bill of Rights’ right to bear arms provision.¹⁴³ Although rejected by the High Court, this is not a completely untenable position.¹⁴⁴ After all, the High Court has recognized a right similar to habeas corpus,¹⁴⁵ a freedom of expression,¹⁴⁶ and a right to vote,¹⁴⁷ despite the absence of express text providing those rights.¹⁴⁸ Even so, Australia is properly regarded as having relatively weak individual rights due to the lack of a textual foundation.¹⁴⁹ Not surprisingly, constitutional issues with regard to gun control in Australia have a distinctive flavor of federalism and constitutional powers rather than individual rights issues.

1. *Federal Gun Controls*

The Australian federal government’s role in gun control is limited primarily to customs controls.¹⁵⁰ In 1991, the federal government was able to use its customs power to ban importation of many semi-automatic weapons.¹⁵¹ The limitations on the federal government in all other areas of gun control are the result of the fact that the Australian Constitution contains a Commerce Clause which confines the national parliament to acting in interstate commerce.¹⁵² Although its level of

¹⁴³ See KOPEL, *supra* note 129, at 209. The High Court has never accepted the argument that the Magna Carta and Declaration of Rights of 1689 are a source of rights in Australia. Mayer & Schweber, *supra* note 124, at 298.

¹⁴⁴ Mayer & Schweber, *supra* note 124, at 298.

¹⁴⁵ *Chu Kheng Lim v. Minister for Immigration*, (1992) 176 C.L.R. 1.

¹⁴⁶ *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, 559–62.

¹⁴⁷ *Roach v. Electoral Commissioner* (2007) H.C.A. 43, 26.

¹⁴⁸ See Mayer & Schweber, *supra* note 124, at 298 (discussing these cases as ones in which the High Court found “substantive rights,” even in the absence of explicit constitutional text). In *Lange* however, the High Court indicated that constitutional analysis must have at least some textual foundation. See Stone, *supra* note 115, at 35. Thus in *Lange*, the High Court found the freedom of expression was based on the constitutional guarantee of representative government, and in *Roach*, it found that the right to vote is founded on the constitution’s statement that the legislature must be “directly chosen by the people.” Mayer & Schweber, *supra* note 113, at 301–02.

¹⁴⁹ Stone, *supra* note 126, at 39–46.

¹⁵⁰ See KOPEL, *supra* note 129, at 196. The federal government is also free to enact legislation in Canberra, which, as the capital of Australia, is a federal jurisdiction. *Id.*

¹⁵¹ CONSTITUTION OF AUSTRALIA § 86.

¹⁵² The Australian Constitution provides: “The Parliament shall . . . have power to make laws . . . with respect to: (i) Trade and commerce with other countries, and among the States . . .” AUSTL. CONST. § 51(i).

adherence has ebbed and flowed,¹⁵³ the Australian High Court has a history of judicial commitment to federalism and state sovereignty.¹⁵⁴ For example, early in the twentieth century, the Australian High Court stated that the parliament could only act in areas which have a “direct, substantial and proximate” effect on commerce.¹⁵⁵ This was revised in *Airlines of NSW Pty Ltd v. NSW (No.2)*,¹⁵⁶ where the High Court adopted a direct–indirect effect test—a much narrower test than the United States Supreme Court’s “significant effect” test.¹⁵⁷ In fact, a few members of the High Court specifically rejected the United States Supreme Court’s substantial effect test.¹⁵⁸ Under the Australian High Court’s direct–indirect test, the national legislature’s target must “directly and causally” affect interstate commerce.¹⁵⁹

Two cases decided by the Australian High Court dealing with the regulation of air travel demonstrate the direct–indirect test. In the first case, legislation regulating air travel from one state to another state (i.e. interstate) was found properly enacted under the Commerce Clause.¹⁶⁰ In the second case, legislation permitting the federal government to transport passengers by air within a state (i.e. intrastate) was found to be beyond the scope of the Commerce Clause, despite the fact that such legislation might be conducive “to the efficiency, competitiveness and profitability of . . . interstate activity[.]”¹⁶¹

The narrow test adopted by the Australian High Court means that the Australian Parliament has long faced significant barriers to enacting nationwide legislation, barriers felt by the United States Congress only when *United States v. Lopez* struck down legislators’ attempt to regulate firearms

¹⁵³ Mayer & Schweber, *supra* note 124, at 302–13.

¹⁵⁴ See generally Jeremy Philips, *United States v. Lopez: Constitutional Interpretation in the United States and Australia*, 18 U. N. S. W. L. J. 532, 532–54 (1995).

¹⁵⁵ *Federated Amalgamated Gov’t Ry. and Tramway Serv. Ass’n v. NSW Ry. Traffic Emps. Ass’n* (1906) 4 C.L.R. 488.

¹⁵⁶ *Airlines of NSW Pty. Ltd. v. NSW (No. 2)* (1965) 113 C.L.R. 54.

¹⁵⁷ See generally, Philips, *supra* note 143, at 532–54.

¹⁵⁸ *Id.* (citing *Airlines of NSW Pty. Ltd. (No. 2)*, 113 C.L.R., at 113–15, 127, 149–50).

¹⁵⁹ *Airlines of NSW Pty Ltd (No. 2)*, 113 C.L.R. 54.

¹⁶⁰ *Id.*

¹⁶¹ *Attorney-Gen. (WA) v. Australian Nat’l Airlines Comm’n* (1976) 138 C.L.R. 492.

near schools.¹⁶² Thus, it is widely recognized that any attempts by the Australian Parliament to enact national gun control laws would be found unconstitutional.¹⁶³

2. *State Gun Controls*

In contrast to the Commerce Clause is the issue of individual state measures that touch or “burden” interstate commerce. In the United States the Dormant Commerce Clause, inferred from the Commerce Clause, strikes down state laws which overly burden interstate commerce, thereby guarding Congress’ exclusive power to regulate interstate commerce.¹⁶⁴ The Australian Constitution, unlike the United States Constitution, explicitly provides that “customs, trade, commerce and intercourse among the States . . . shall be absolutely free.”¹⁶⁵ This has had a similar effect as the United States’ Dormant Commerce Clause and has prevented each individual state from enforcing their own gun registration laws in other states.¹⁶⁶

Historically, the Australian High Court was very protective of the “complete freedom of trade.”¹⁶⁷ For example, in *Chapman v. Suttie*, Victoria attempted to prosecute a Victorian firearms dealer who sold guns via mail to buyers in another state who were not registered under the Victoria licensing scheme.¹⁶⁸ The High Court held that Victoria could not force buyers outside its borders to obtain Victoria gun licenses.¹⁶⁹ The court quashed the convictions of the firearms dealer and stated that imposing an obligation on gun dealers to require a purchaser to produce a Victorian firearm

¹⁶² 514 U.S. 549 (1995). See generally Philips, *supra* note 143, at 532–54.

¹⁶³ See generally, Sandra Egger and Rebecca Peters, *Firearms Law Reform: The Limitations of the National Approach*, available at <http://www.aic.gov.au/publications/proceedings/17/egger-peters.pdf> (“The Federal Government does not have the constitutional power to enact laws regulating possession, other than in the narrow federal and territorial jurisdiction and thus a cooperative state/federal arrangement is the only possible option.”).

¹⁶⁴ See *Pike v. Burch Church, Inc.*, 397 U.S. 137 (1970).

¹⁶⁵ CONSTITUTION OF AUSTRALIA § 92.

¹⁶⁶ See KOPEL, *supra* note 129, at 198.

¹⁶⁷ *Chapman v. Suttie*, 110 C.L.R. 321 (1963), 165 C.L.R. 321.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

certificate “strikes directly and immediately at the very heart of the trade and must be taken to constitute an infringement of s. 92.”¹⁷⁰

Because the current High Court has changed its approach to reviewing § 92 violations, it is uncertain whether the holding from *Chapman v. Suttie* would be upheld today. In *Cole v. Whitfield*, the High Court held that the wording “absolutely free” in § 92 guaranteeing freedom of trade was not an absolute freedom from all restrictions on trade.¹⁷¹ The High Court then set forth its test for determining whether § 92 had been violated. First, a law or measure is only invalid if it imposes “discriminatory burdens of a protectionist kind.”¹⁷² Second, a law or measure can be “saved” if it does not have a protectionist purpose and any burden on trade is limited and the approach is tailored to the purpose it serves.¹⁷³

IV. ANALYSIS OF CONSTITUTIONAL ISSUES

A. *United States*

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

Although its full impact is yet to be determined, and the critics are already abundant,¹⁷⁴ *Heller*'s right to bear arms, which has recently been incorporated to the states,¹⁷⁵ will be instrumental in

¹⁷⁰ *Id.* at 339.

¹⁷¹ See *Cole v. Whitfield* (1988) 165 C.L.R. 360.

¹⁷² See Gonzalo Puig, *Abridged Proportionality in Australian Constitutional Review: A Doctrinal Critique of the Cole v. Whitfield Saving Test for Section 92 of the Australian Constitution* (2007), 3 available at <http://www.enelsyn.gr/papers/w15/Paper%20abstract%20by%20Gonzalo%20Villalta%20Puig.pdf>.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., William G. Merkel, *D.C. v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009) (accusing Justice Scalia of “manipulate[ing] outlying evidence to dress up his claim in ill-fitting pseudo academic garb” to reach the decision that the framers intended to protect private gun ownership); Saul Cornell,

preventing states from “experimenting” with methods of crime control that venture into the spheres of home-protection and self-protection, the two best reasons for having a right to bear arms.¹⁷⁶ Unlike the District of Columbia’s outright ban on handguns and stringent trigger-lock requirement, most licensing schemes in the United States will likely remain constitutional. Although *Heller* was novel, it was not actually radical in its result.¹⁷⁷ First, it made it clear that the right to bear arms is not an absolute right; there are several places, such as in “schools and government buildings,” where the government has a stronger interest in prohibiting possession.¹⁷⁸ There are also certain persons, such as insane persons or felons, who may yet be disqualified from bearing arms.¹⁷⁹ Next, it did not hold that every weapon, such as “M-15 rifles and the like,” would be allowed.¹⁸⁰ The right to bear arms extends to only those weapons “in common use at the time.”¹⁸¹

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

Originalism on Trial: The Use and Abuse of History in D.C. v. Heller, 69 OHIO ST. L. J. 625 (2008) (arguing that Justice Scalia’s use of history was arbitrary and results-oriented). Indeed, the criticism of *Heller* has even come from some unlikely sources, including a conservative judge on the Fourth Circuit. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (comparing *Heller* to *Roe v. Wade*, 410 U.S. 113 (1973), and arguing that the decision improperly presses a political agenda in the courts, thereby stunting the political process).

¹⁷⁵ See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

¹⁷⁶ See *D.C. v. Heller*, 128 S. Ct. 2783, 2821–22 (holding that “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” outweighs state interest in preventing handgun violence).

¹⁷⁷ See Allen Rostron, *Protecting Gun Rights and Improving Gun Control after D.C. v. Heller*, 13 LEWIS & CLARK L. REV. 383 (2009) (praising *Heller* for “confirming that reasonable gun regulations will not lead to extreme measures like prohibition of all guns” and surmising that “*Heller* may turn out to be an important victory for both gun control and gun rights.”).

¹⁷⁸ *Heller*, 128 S. Ct. at 2799.

¹⁷⁹ *Id.* at 2816–17.

¹⁸⁰ *Id.* at 2817.

¹⁸¹ *Id.* (citing *U.S. v. Miller*, 301 U.S. 174, 179 (1939)).

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

B. *Ireland*

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

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

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

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

Court has on occasion found that there are certain unenumerated substantive rights held by the Irish people.¹⁸² Furthermore, it seems doubtful that the Irish, successful in their struggle for independence because they were willing to take up arms against their oppressors, would be quick to forget that firearms facilitated their struggle for history. It is also seems doubtful the Irish legislature would ignore classic thinkers like Blackstone, who embraced the individual right to bear arms as inherent in the common law.¹⁸³

On the other hand, it would not be astonishing if Ireland's bloody experience with domestic terrorism eventually drives the country in the opposite direction. The rate of legislation enacted certainly supports the assertion that gun controls are stiffening in Ireland as a result of paramilitary activity.

C. *Australia*

Case law shows that in Australia, the freedom of trade and the Commerce Clause are the primary barriers to gun control. Practically speaking, the freedom of trade does little to help an Australian citizen who just wants to keep a gun at home for self-protection. The freedom of trade most likely benefits firearms dealers. Amongst firearms dealers, the freedom of trade will only be of assistance to those selling guns to residents from other states. Narrowing the window further, the freedom of trade is now subject to proportionality review, which is more likely to uphold state infringement of individual rights. Moreover, shielding firearms dealers from government action is largely ineffective in advancing the personal self-defense rationale that *Heller* found so important in

¹⁸² See *Ryan v. The Attorney General* [1965] I.R. 294 available at <http://www.bailii.org/ie/cases/IESC/1965/> (“To attempt to make a list of all the rights which may properly fall within the category of ‘personal rights’ would be difficult”).

¹⁸³ See William Blackstone, *Commentaries on the Laws of England, Book 1* (Oxford 1765-1769) *136–39. Blackstone classified “having arms for . . . defense” as one of his five “auxiliary” rights. *Id.*

the United States. Australian state legislatures have even determined that self-defense is not a legitimate reason for owning a firearm.¹⁸⁴

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

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

¹⁸⁴ Australian Government Attorney General's Department: Firearms Regulation: Frequently Asked Questions, http://www.ag.gov.au/www/agd/agd.nsf/Page/Firearmsregulation_Frequentlyaskedquestions.

V. CONCLUSION

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

While a total ban on firearms in Ireland is conceivable, actual gun licensing in Ireland is conducted in a manner not unlike many United States licensing schemes left intact even in *Heller*'s wake.¹⁸⁵ In fact, most of Ireland's restrictions on gun ownership are echoed in *Heller*'s express exceptions to the right to bear arms. For example, Ireland's gun restrictions on “persons of unsound mind” or violent felons are among the exceptions to the right to bear arms outlined in *Heller*.

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

Without any doubt, in Ireland the right to bear arms is not recognized as an esteemed individual right in the same sense that it is in the United States. But even in light of *Heller*, the actual gun controls in place in Ireland do not differ significantly from many schemes left intact in the United States. Gun controls in Ireland pale in comparison to those in England. Irish case law shows that although there is no express constitutional right to bear arms in Ireland, gun control is not as free-wheeling as some might contend. Indeed, this Article has established that there are in fact significant constitutional barriers to gun controls in Ireland, although the source of those checks is quite different than the source of barriers to gun control in the United States.

¹⁸⁵ See *Heller*, 128 S. Ct. at 2816–17 (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive areas such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”). The Court also made clear that this was its non-exhaustive list of “lawful regulatory measures.” *Id.* at 2817 n.26.

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

Although there remain a considerable number of firearms in Australia, and while the limitation on the federal government via its federalism system is noteworthy, gun owners are nearly completely exposed to the will of each state government and the local police administrators. The restraints on the state governments through the Australian Constitution’s freedom of trade does little for the private citizen who would simply like to keep a firearm at home for self-protection. Moreover, in direct contrast to the rationale in *Heller*, the right of self-defense is not considered a legitimate reason for owning a firearm, in any Australian jurisdiction. It can only be concluded that the ability of Australians to bear arms is slight vis-à-vis Americans.

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

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

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