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Mass Shootings, Legislative Responses, and Public Policy: An Endless Cycle of Inaction

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MASS SHOOTINGS, LEGISLATIVE RESPONSES, AND PUBLIC POLICY: AN ENDLESS CYCLE OF INACTION

Jaclyn Schildkraut*
Collin M. Carr**

ABSTRACT

Although mass shootings give rise to particularly visceral reactions and demands for action within the public sector, the corresponding response from legislators has failed to produce any meaningful change. With much of the discourse in the aftermath of these events centering on the polarized gun control-gun rights debate, two proposed solutions—assault weapons bans and universal background checks—often are at the forefront. Although varying by group and often higher immediately following a shooting, public support for these two proposals has yet to translate into legislative action. In this Article, we explore previous attempts by the federal government to regulate assault weapons and implement background checks for all firearm purchases, particularly in response to high-profile (and highly lethal) mass shootings. We situate these efforts in the context of corresponding public support as well as examples of how such regulations may have been effective at creating impediments for the perpetrators. We also explore state legislative efforts, which have been far more successful in enacting legislation related to assault weapons and background checks. Finally, we consider the role of lobbying and interest groups in overshadowing bipartisan support for these proposals, as well as what may be needed to break the perpetual stalemate in Congress and end the cycle of legislative inaction stemming from mass shootings.

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INTRODUCTION

Though within the context of the national crime picture, mass shootings are statistically rare events, their frequency of occurrence has been found to be on the rise in recent years.¹ The disproportional amount of attention they receive, particularly from the media, however, makes it appear as though mass shootings are reaching an epidemic-like proportion² with many accepting these events as a fixed part of American culture.³ Consequently, mass shootings have become, and continue to be, a cause for concern for politicians, pundits, and the public alike.⁴ Some events are viewed as reflecting broader problems within society.⁵ Conversely, others have been perceived as isolated incidents.⁶ Still, all events elicit some type of collective response that something needs to be done.

Despite such perceptions, however, the response to mass shootings has become almost scripted and therefore predictable. When word of a shooting breaks, politicians and the public alike immediately rush to offer their “thoughts and prayers” to those who have been impacted.⁷ Debates ensue across both the

¹ See, e.g., Jaclyn Schildkraut, Margaret K. Formica & Jim Malatras, *Can Mass Shootings Be Stopped? To Address the Problem, We Must Better Understand the Phenomenon* (2018); Bruce Drake, *Mass Shootings Rivet National Attention, but Are a Small Share of Gun Violence*, PEW RES. CTR. (Sept. 17, 2013), <https://www.pewresearch.org/fact-tank/2013/09/17/mass-shootings-rivet-national-attention-but-are-a-small-share-of-gun-violence/>.

² Jaclyn Schildkraut, *Mass Murder and the Mass Media: Understanding the Construction of the Social Problem of Mass Shootings in the US*, 4 J. QUALITATIVE CRIM. JUST. & CRIMINALITY 1, 1 (2016). See generally JACLYN SCHILDKRAUT & H. JAYMI ELSASS, *MASS SHOOTINGS: MEDIA, MYTHS, AND REALITIES* (2016); Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME L. & SOC. CHANGE 147 (1999).

³ See Peter Moore, *Over a Third of Americans Think Mass Shootings Are Just ‘a Fact of Life’*, YOU GOV (Oct. 7, 2015, 12:32 PM), <https://today.yougov.com/topics/politics/articles-reports/2015/10/07/third-americans-mass-shootings-fact-life/>; see also Maria Caspani, *Most Americans Expect Next Mass Shooting to Happen in Next Three Months: Reuters/Ipsos Poll*, REUTERS (Aug. 9, 2019, 10:46 AM), <https://www.reuters.com/article/us-usa-shooting-poll-most-americans-expect-next-mass-shooting-to-happen-in-next-three-months-reuters-ipsos-poll-idUSKCN1UZ1OZ>.

⁴ See, e.g., Sophie Bethune & Elizabeth Lewan, *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, AM. PSYCHOL. ASS’N (Aug. 15, 2019), <https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting>; Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, PEW RES. CTR. (Apr. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/>.

⁵ Bruce Drake, *Public Divided over the Root Causes of Mass Shootings*, PEW RES. CTR. (Apr. 11, 2013), <https://www.pewresearch.org/fact-tank/2013/04/11/public-divided-over-the-root-causes-of-mass-shootings/>; *Washington Post-ABC News Poll*, WASH. POST (Dec. 2012), http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_20121216.html.

⁶ Drake, *supra* note 5.

⁷ AJ Willingham, *How ‘Thoughts and Prayers’ Went from Common Condolence to Cynical Meme*, CNN (Feb. 21, 2018), <https://www.cnn.com/ampstories/us/how-thoughts-and-prayers-went-from-common-condolence-to-cynical-meme>.

public (often via social media) and political arenas about the root causes of mass shootings,⁸ a conversation that routinely falls to the “usual suspects” of guns, mental health, and violent media.⁹ Yet despite such outrage, the conversation often is short-lived,¹⁰ and Congress fails to take any meaningful steps to address the issues surrounding these events—in some cases even noting that the immediate aftermath, when support for change often is at its highest, is not the time to politicize the tragedy.¹¹ That time, however, seems to never come, and the conversation fades as quickly as it began, only to be reignited with the next mass shooting, causing the cycle of inaction to restart.

This is not to say, however, that no legislative efforts have been offered in responses to mass shootings.¹² Numerous proposals have been put to the floors of both the Senate and House of Representatives, though the majority never make it past introduction.¹³ At the same time, laws that already exist on the books that could potentially play a role in helping to prevent mass shootings (or at least make it more difficult for them to occur) are not utilized to their fullest capacities. The occurrence of such attacks also may highlight gaping loopholes in the existing legislation that need addressing to help prevent future attacks.

In short, the federal government has failed to respond adequately to mass shootings in a meaningful way. In this Article, we explore several of the key debates that arise after mass shootings—namely, whether assault weapons should be banned and if universal background check policies should be implemented. Specifically, we examine the key arguments from both supporters and those who are against such policies and related congressional action (or lack thereof) from each side. We also consider how such policies correlate with mass shootings and what impact, if any, the implementation of such legislation could have on the occurrence of these events. Finally, we explore what action has been

⁸ JACLYN SCHILDKRAUT, MASS SHOOTINGS IN AMERICA: UNDERSTANDING THE DEBATES, CAUSES, AND RESPONSES, at xxvii (2018); Richard K. Yu, *The Debate on School Shootings in the United States*, MEDIUM (Mar. 6, 2018), <https://medium.com/age-of-awareness/the-debate-on-school-shootings-in-the-united-states-1ca8254535>.

⁹ Jaclyn Schildkraut & Glenn W. Muschert, *Violent Media, Guns, and Mental Illness: The Three Ring Circus of Causal Factors for School Massacres, as Related in Media Discourse*, FAST CAPITALISM, 2013, at 159, 159.

¹⁰ Laura Ratliff, *With Every Mass Shooting, the US Makes the Same Fundamental & Routine Mistake*, BUSTLE (Oct. 2, 2017), <https://www.bustle.com/p/with-every-mass-shooting-the-us-makes-the-same-fundamental-routine-mistake-2756740>.

¹¹ *The Grim Political Routine of Responding to a Mass Shooting*, PBS NEWSHOUR (Oct. 2, 2017, 7:17 PM), <https://www.pbs.org/newshour/show/grim-political-routine-responding-mass-shooting>.

¹² See generally Jaclyn Schildkraut & Tiffany Cox Hernandez, *Laws that Bit the Bullet: A Review of Legislative Responses to School Shootings*, 39 AM. J. CRIM. JUST. 358 (2014).

¹³ *Id.*

taken at the state level and whether addressing mass shootings at the federal level can be achieved or if the partisan divide will continue to perpetuate this endless cycle of inaction.

I. ASSAULT WEAPONS

A common response in the aftermath of mass shootings is to call for the banning of assault-style weapons, such as AR-15s, AK-47s, and similar firearms. This call to action stems from the perception that these types of guns are the weapon of choice among mass shooters, despite the fact that handguns are three times more likely to be used by such perpetrators.¹⁴ Proponents of banning assault-style firearms also routinely claim that the usage of these by mass shooters has been significantly increasing.¹⁵ In reality, however, despite a small uptick in the proportion of events where these weapons were present, their use in mass shooting events has remained largely stable over the past three decades.¹⁶

Part of the reason that these claims have gained traction is that such weapons have been used in high-profile shootings including (but not limited to) an Aurora, CO movie theater (2012); Sandy Hook Elementary School in Newtown, CT (2012); a municipal government office in San Bernardino, CA (2015); a nightclub in Orlando, FL (2016);¹⁷ a concert in Las Vegas, NV (2017); a church in Sutherland Springs, TX (2017); and Marjory Stoneman Douglas High School in Parkland, FL (2018).¹⁸ These shootings also are among the more lethal events

¹⁴ Schildkraut, Formica & Malatras, *supra* note 1; *see also* JACLYN SCHILDKRAUT, ASSAULT WEAPONS, MASS SHOOTERS, AND OPTIONS FOR LAWMAKERS 4 (2019).

¹⁵ *See, e.g., Assault Weapons and High-Capacity Magazines*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Mar. 22, 2019), <https://everytownresearch.org/assault-weapons-high-capacity-magazines/>.

¹⁶ SCHILDKRAUT, *supra* note 14, at 5.

¹⁷ Gregor Aisch et al., *What Happened Inside the Orlando Nightclub*, N.Y. TIMES (June 12, 2016) <https://www.nytimes.com/interactive/2016/06/12/us/what-happened-at-the-orlando-nightclub-shooting.html>.

¹⁸ C. J. Chivers et al., *With AR-15s, Mass Shooters Attack with the Rifle Firepower Typically Used by Infantry Troops*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/interactive/2018/02/28/us/ar-15-rifle-mass-shootings.html?auth=login-smartlock>. More recently, variants of the AR-15 were used in attacks at a Pittsburgh, PA synagogue in 2018 (11 killed, 6 injured); a Thousand Oaks, CA bar and grill in 2018 (12 killed, 18 injured); a Walmart in El Paso, TX in 2019 (22 killed, 24 injured); a Dayton, OH bar (9 killed, 27 injured); and in Midland and Odessa, TX in 2019 (7 killed, 22 injured). WHY Y Staff, *11 Killed, 6 Injured in Pittsburgh Synagogue Shooting; FBI Investigating as Hate Crime*, WHY Y (Oct. 27, 2018), <https://whyy.org/articles/multiple-casualties-after-shooting-near-pittsburgh-synagogue/>; Sean Greene et al., *Thousand Oaks Shooting Leaves 12 People Dead and 18 Injured*, L.A. TIMES (Nov. 7, 2018, 11:58 PM), <https://www.latimes.com/local/lanow/la-me-ln-thousand-oaks-20181107-story.html>; Chas Danner, *Everything We Know About the El Paso Walmart Massacre*, N.Y. INTELLIGENCER, <https://nymag.com/intelligencer/2019/08/everything-we-know-about-the-el-paso-walmart-shooting.html> (last updated Aug. 7, 2019); Timothy Williams & Farah Stockman, *Gunman Kills 9 in Dayton Entertainment District*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/>

that have been carried out. Collectively, they account for 202 fatalities and 597 injuries.¹⁹ It bears noting, however, that not all highly lethal mass shootings are carried out using an assault-style rifle. The 2007 shooting at Virginia Tech, which claimed the lives of thirty-two individuals (excluding the gunman) and left seventeen injured, was carried out with two semiautomatic handguns.²⁰ Variations of the handguns used at Virginia Tech also were present in other particularly lethal attacks including a Killeen, TX restaurant in 1991 (twenty-three killed, twenty injured); a Tucson, AZ supermarket in 2011 (six killed, thirteen injured—including Congresswoman Gabrielle Giffords); and a Charleston, SC church in 2015 (nine killed).²¹

Still, the presence of an assault-style rifle has been found to increase the number of casualties—both fatalities and injuries—in a mass shooting event. In one analysis of 340 mass shootings occurring between 1966 and 2016, it was found that in mass shootings carried out using at least one assault-style rifle, an average of 5.2 people were killed and 7.6 others were injured.²² Comparatively, an average of 2.9 fatalities and 3.2 people injured per event was found in cases where no such weapon was present.²³ With these statistics in mind, it is not surprising then that there regularly is a call to ban assault-style rifles following such tragedies.

A. *The Federal Assault Weapons Ban*

On September 13, 1994, the Violent Crime Control and Law Enforcement Act was signed into law by President Bill Clinton.²⁴ Among the provisions included in the Act was the Public Safety and Recreational Firearms Use Protection Act, more commonly known as the Federal Assault Weapons Ban

us/dayton-ohio-shooting.html; Tara Law et al., *7 People Killed, 22 Injured in Odessa Mass Shooting. Here's What We Know So Far*, TIME, <https://time.com/5666249/mass-shooting-midland-odessa-texas-police/> (last updated Sept. 1, 2019, 3:24 PM). It bears noting, however, that in this context, the Las Vegas shooting is an outlier event. While the perpetrators of nearly all (Sandy Hook is the notable exception with four, though only two were used in the shooting) these attacks mentioned used a single weapon, the gunman in Las Vegas had twenty-three separate assault-style rifles that were recovered at the scene, many of which had been fired during the course of the attack. See JOSEPH LOMBARDO, LAS VEGAS METRO. POLICE DEP'T, LVMPD CRIMINAL INVESTIGATIVE REPORT OF THE 1 OCTOBER MASS CASUALTY SHOOTING (2018).

¹⁹ See Aisch, *supra* note 17; Chivers et al., *supra* note 18.

²⁰ VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007, at 1, 71 (2007). The seventeen students noted here were injured by gunfire. *Id.* at 92. An additional six students sustained injuries when trying to escape through the windows at Norris Hall. *Id.*

²¹ SCHILDKRAUT, *supra* note 14, at 7.

²² *Id.* at 6.

²³ *Id.*

²⁴ Schildkraut & Hernandez, *supra* note 12, at 361.

(AWB).²⁵ The legislation prohibited “the manufacture, transfer, or possession of a semiautomatic assault weapon.”²⁶ Specific criteria for what designated a firearm (either a rifle, pistol, or shotgun) as an “assault weapon” was among the language crafted in the AWB. Semiautomatic rifles in particular were categorized as such if they were able to accept detachable magazines and had two or more of the following features: (1) a folding or telescopic stock; (2) a pistol grip that protrudes conspicuously beneath the action of the weapon; (3) a bayonet mount; (4) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; or (5) a grenade launcher.²⁷ The AWB further banned possession of large-capacity magazines—those capable of holding more than ten rounds of ammunition—as well as the production of nineteen specific semiautomatic firearms classified as assault weapons, including the AR-15, all models of the AK, and Uzis.²⁸

From its enactment, the AWB was met with both criticism and pushback. Within three months of it going into effect, Maryland Representative Roscoe Bartlett introduced legislation to repeal the AWB;²⁹ two weeks later, he filed a second bill aimed at removing restrictions on semiautomatic weapons and large-capacity magazines.³⁰ The legislature failed to enact either bill into law. In 1998, Alaska Representative Don Young introduced the Second Amendment Restoration and Protection Act, designed not only to repeal the AWB, but also to nullify the Brady Handgun Violence Prevention Act that had, among other things, established the National Instant Criminal Background Check System (NICS) following an assassination attempt on President Ronald Reagan in 1981.³¹ Like the earlier legislation, it failed to make it past its introduction.

One of the features of the AWB that worked in the favor of its critics was that it had been crafted to include a sunset provision, meaning that the ban was only good for ten years.³² Prior to its expiration, individual legislators made

²⁵ H.R. 3355, 103d Cong. (1994); *see also* Robert J. Spitzer, *Assault Weapons*, in *GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW* 53 (Gregg Lee Carter ed., 2d ed. 2012).

²⁶ H.R. 3355.

²⁷ *Id.*; *see also* 18 U.S.C. § 921(a)(30)(B) (repealed 2004); Schildkraut, *supra* note 5, at 7.

²⁸ 18 U.S.C. §§ 921–922 (2012); *see also* Robert Singh, *Gun Politics in America: Continuity and Change*, 52 *PARLIAMENTARY AFF.* 1 (1999).

²⁹ H.R. 464, 104th Cong. (1995).

³⁰ H.R. 698, 104th Cong. (1995).

³¹ H.R. 4137, 105th Cong. (1998); Jaime Fuller, *It's Been 20 Years Since the Brady Bill Passed. Here Are 11 Ways Gun Politics Have Changed.*, WASH. POST, <https://www.washingtonpost.com/news/the-fix/wp/2014/02/28/its-been-20-years-since-the-brady-law-passed-how-have-gun-politics-changed/> (last updated Feb. 28, 2014, 12:30 PM).

³² Singh, *supra* note 28, at 2.

several attempts to overcome it. Senator Dianne Feinstein of California³³ and Representative Michael Castle of Delaware³⁴ each introduced legislation in their respective chambers of Congress to extend the AWB for an additional ten years. Senator Feinstein also introduced legislation to completely eliminate the sunset provision,³⁵ as did New Jersey Senator Frank Lautenberg³⁶ and New York Representative Carolyn McCarthy.³⁷ Each attempt failed, and Congress subsequently allowed the AWB to lapse on September 13, 2004.³⁸ Some lawmakers made subsequent efforts to reinstate the ban after its lapse, but to no avail.³⁹ Similarly, attempts to enact a new assault weapons ban have been equally unsuccessful.⁴⁰

B. Public Opinion About an Assault Weapons Ban

As divisive as the issue of banning assault weapons has been among members of Congress, similar discord has also been found among the populace. Though one poll found that in the month prior to the enactment of the AWB, support for such a policy outweighed its opposition more than three to one, that differential has waned over the years,⁴¹ though findings vary based on the poll. For instance, an October 2004 Gallup poll found that respondents were nearly evenly split (50% favor, 46% oppose) in their opinions about an assault weapons ban just one month after the lapse of similar legislation.⁴² A 2012 poll from

³³ S. 2498, 108th Cong. (2004); S. 2109, 108th Cong. (2004).

³⁴ H.R. 3831, 108th Cong. (2004).

³⁵ S. 1034, 108th Cong. (2003).

³⁶ S. 1431, 108th Cong. (2003).

³⁷ H.R. 2038, 108th Cong. (2003). Carolyn McCarthy's husband, Dennis, was among the six people killed in the December 7, 1993 mass shooting on the Long Island Rail Road. See Michael Gormley, *Carolyn McCarthy Reflects on 1993 LIRR Shooting, Gun Violence, Activism*, NEWSDAY, <https://www.newsday.com/long-island/carolyn-mccarthy-lirr-shooting-1.24081714> (last updated Dec. 3, 2018, 6:00 AM). Her son, Kevin, was also severely wounded in the attack, along with eighteen others. *Id.* Four years after the shooting, she was elected to a seat in the House of Representatives for New York's Fourth Congressional District, where she served until 2015. *Id.*

³⁸ JACLYN SCHILDKRAUT & GLENN W. MUSCHERT, *COLUMBINE, 20 YEARS LATER AND BEYOND: LESSONS FROM TRAGEDY* 115 (2019).

³⁹ H.R. 6257, 110th Cong. (2008); H.R. 1022, 110th Cong. (2007); S. 645, 109th Cong. (2005); H.R. 1312, 109th Cong. (2005); S. 620, 109th Cong. (2005); H.R. 5099, 108th Cong. (2004); H.R. 5100, 108th Cong. (2004).

⁴⁰ H.R. 2959, 116th Cong. (2019); H.R. 1296, 116th Cong. (2019); S. 66, 116th Cong. (2019); H.R. 282, 116th Cong. (2019); H.R. 5087, 115th Cong. (2018); H.R. 5077, 115th Cong. (2018); S. 2095, 115th Cong. (2017); H.R. 4269, 114th Cong. (2015); H.R. 437, 113th Cong. (2013); S. 150, 113th Cong. (2013).

⁴¹ See, e.g., *The Economy, the Budget Deficit and Gun Control*, CBS NEWS/N.Y. TIMES (Jan. 20, 2011, 6:30 PM), https://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf; *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> (last visited Sept. 12, 2019) [hereinafter *Gallup Poll*].

⁴² Darren K. Carlson, *Americans Softening on Tougher Gun Laws?*, GALLUP (Nov. 30, 2004), <https://news.gallup.com/poll/14185/Americans-Softening-Tougher-Gun-Laws.aspx>.

YouGov conducted five days after the Aurora movie theater shooting found that just half of respondents supported banning assault weapons.⁴³ Yet even as mass shootings, particularly those involving semiautomatic assault-style rifles that were more lethal in nature, persisted in capturing national attention, public support for banning such weapons continued to diminish.⁴⁴ In fact, following the Pulse nightclub and Las Vegas shootings,⁴⁵ support for banning assault rifles lingered at 36% and 48%, respectively, despite that the two attacks left 107 people dead.⁴⁶

Nonetheless, some mass shooting events have been successful in garnering added support for an assault weapons ban. In the weeks following the Parkland shooting in 2018, various polls placed the proportion of respondents favoring such legislation between 60% and 63%.⁴⁷ After the mass shootings in El Paso and Dayton left thirty-one people dead in less than twenty-four hours, support for restricting assault-style weapons like those used in the attacks again increased, reaching as high as 70% in one poll.⁴⁸ Notably, however, such backing often is largely limited to the immediate aftermath of the attack, and it may be that such support wanes the further out the nation is from these shootings. Still, the shift in support for a ban also is observable across party

⁴³ YouGov Staff, *After Aurora: Little Change in Opinions About Gun Control Measures*, YOUGOV (July 25, 2012, 8:00 AM), <https://today.yougov.com/topics/politics/articles-reports/2012/07/25/after-aurora-little-change-opinions-about-gun-cont>; see also CNN/ORC POLL (Aug. 9, 2012, 1:00 PM), <http://i2.cdn.turner.com/cnn/2012/images/08/09/rel7a.pdf> (stating that 57% support the ban).

⁴⁴ *Gallup Poll*, *supra* note 41.

⁴⁵ Megan Brenan, *Support for Stricter Gun Laws Edges up in U.S.*, GALLUP (Oct. 16, 2017), <http://news.gallup.com/poll/220595/support-stricter-gun-laws-edges.aspx>.

⁴⁶ Aisch et al., *supra* note 17; Alan Gomez & Kaila White, *Here Are All the Victims of the Las Vegas Shooting*, USA TODAY, <https://www.usatoday.com/story/news/nation/2017/10/06/here-all-victims-las-vegas-shooting/733236001/> (last updated Oct. 8, 2017, 7:39 PM).

⁴⁷ See Christine Filer, *Six in 10 Say Ban Assault Weapons, Up Sharply in Parkland's Aftermath*, ABC NEWS/WASH. POST (Apr. 20, 2018), <https://www.langerresearch.com/wp-content/uploads/1196a5GunPolicy.pdf>; *Fox News Poll*, FOX NEWS (Aug. 14, 2019, 6:00 PM), <https://www.foxnews.com/politics/fox-news-poll-august-14>; *Monthly Harvard-Harris Poll*, HARV. CAPS/HARRIS POLL (Feb. 2018), http://harvardharrispoll.com/wp-content/uploads/2018/02/Final_HHP_20Feb2018_RegisteredVoters_Topline_Memo.pdf; *Large Partisan Gaps in Views on Banning Assault-Style Weapons and Allowing Teachers to Carry Guns*, PEW RES. CTR. (Apr. 17, 2018), https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/ft_18-04-16_teensguns/ [hereinafter *Large Partisan Gaps*]; *U.S. Voter Support for Abortion Is High, Quinnipiac University National Poll Finds; 94 Percent Back Universal Gun Background Checks*, QUINNIPIAC U. POLL (May 22, 2019), <https://poll.qu.edu/national/release-detail?ReleaseID=2623> [hereinafter *U.S. Voter Support*].

⁴⁸ Steven Shepard, *Poll: Most Republicans Support Assault Weapons Ban, Despite Trump Saying 'No Appetite'*, POLITICO, <https://www.politico.com/story/2019/08/07/poll-most-voters-support-assault-weapons-ban-1452586> (last updated Aug. 7, 2019, 6:24 PM); see also *Fox News Poll*, *supra* note 50; *Mass Shootings*, HUFFPOST/YOUGOV (Aug. 2019), <https://big.assets.huffingtonpost.com/athena/files/2019/08/08/5d4c8406e4b0066eb70ee689.pdf>.

divide. Democrats historically have always been considerably more likely to support such legislation,⁴⁹ though the El Paso and Dayton shootings may have served as a tipping point as backing among Republicans increased from 35% support two months after Parkland⁵⁰ to 55% after the pair of attacks nearly eighteen months later.⁵¹ Yet even those pieces of legislation that have been introduced in response to these attacks still fail to garner the necessary support to become law.⁵²

C. Arguments Surrounding an Assault Weapons Ban

Examining the arguments both for and against banning assault weapons may provide necessary insight to the lack of movement in the political arena in spite of public opinion. One of the key arguments for not prohibiting semiautomatic rifles specifically hinges on self-defense. As Andrew Infantino summarized in an op-ed:

Handguns and shotguns usually become significantly less effective at 100 yards, which is problematic for defending large properties such as farms. . . . Rifles make up for this disadvantage and, with the right ammunition, are also effective in shorter ranges. Defensive use, however, requires the ability to fire again—quickly and accurately—if one misses. Manually-loaded firearms are impractical for that purpose, especially without significant practice. As other weapons may not be suitable, law-abiding citizens should be allowed semi-automatic rifles to defend themselves from realistic threats.⁵³

Similarly, the National Rifle Association (NRA) has taken the position that “[t]he only thing that stops a bad guy with a gun is a good guy with a gun” without qualifying what type of gun is required to achieve such an end.⁵⁴ As a result, the conversation to ban assault-style weapons often is portrayed as an attack on the Second Amendment or an attempt to curb gun rights completely,⁵⁵

⁴⁹ YouGov Staff, *supra* note 43.

⁵⁰ *Large Partisan Gaps*, *supra* note 47.

⁵¹ Shepard, *supra* note 48.

⁵² See *supra* note 43 and accompanying text.

⁵³ Andrew Infantino, *In Defense of the AR-15*, STATESMAN (Aug. 31, 2019), <https://www.sbstatesman.com/2019/08/31/in-defense-of-the-ar-15/>.

⁵⁴ *Remarks from the NRA Press Conference on Sandy Hook School Shooting, Delivered on Dec. 21, 2012 (Transcript)*, WASH. POST, https://www.washingtonpost.com/politics/remarks-from-the-nra-press-conference-on-sandy-hook-school-shooting-delivered-on-dec-21-2012-transcript/2012/12/21/bd1841fe-4b88-11e2-a6a6-aabac85e8036_story.html?utm_term=. (last visited Feb. 19, 2020); see also Nadia E. Nedzel, *Concealed Carry: The Only Way to Discourage Mass School Shootings*, 27 ACAD. QUESTIONS 429, 433 (2014).

⁵⁵ Marion P. Hammer, *Florida Alert! “Assault Weapons” Ban Amendment Bans ALL SEMIAUTOMATIC RIFLES AND SHOTGUNS*, NRA-ILA (Aug. 19, 2019), <https://www.nraila.org/articles/20190819/florida-alert->

despite that even conservative Justice Antonin Scalia noted in the majority opinion of *District of Columbia v. Heller*, a landmark Supreme Court case that resulted in a victory for gun rights advocates, that “the right secured by the Second Amendment is not unlimited.”⁵⁶

Conversely, those in favor of banning these firearms argue that “easy access to assault weapons makes it unconscionably simple” to kill people.⁵⁷ People routinely argue that assault-style firearms marketed to civilians closely resemble that of their military counterparts that were designed to be used in combat.⁵⁸ The main difference, however, is that military variants of the weaponry are fully automatic (though they also can fire one round at a time).⁵⁹ The civilian version of semiautomatic firearms, on the other hand, do not have fully automatic capabilities but instead have a mechanism that autoloads a new round into the chamber after one is discharged, meaning that the user only needs to pull the trigger to fire the gun.⁶⁰ This eliminates the need to eject spent cartridges, such as with a bolt-action mechanism, thereby eliminating steps between rounds and speeding up the rapidness of the shooting.⁶¹ It bears noting, however, that semiautomatic firing mechanisms are not unique to rifles; instead, they also are available on handguns (including the two used in Virginia Tech) and shotguns.⁶²

Still, the increased lethality of mass shootings in which the perpetrators used semiautomatic assault-style rifles raises concerns that the perpetrators arm themselves in a manner akin to the military.⁶³ The box magazines typically used with these rifles hold thirty rounds of ammunition, meaning that perpetrators can

assault-weapons-ban-amendment-bans-all-semiautomatic-rifles-and-shotguns.

⁵⁶ 554 U.S. 570, 626 (2008). While the *Heller* case did not address ownership or possession of semiautomatic assault-style weapons, federal appellate courts have, on occasion, upheld the constitutionality of bans on such firearms. See, e.g., *Wilson v. Cook Cty.*, 937 F.3d 1028, 1029 (7th Cir. 2019); *Worman v. Healey*, 922 F.3d 26, 30 (1st Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114, 144, 149 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 407–08 (7th Cir. 2015).

⁵⁷ Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL’Y REV. 488, 489 (1992).

⁵⁸ Chivers et al., *supra* note 18; see also *Assault Weapons*, VIOLENCE POL’Y CTR., <http://vpc.org/regulating-the-gun-industry/assault-weapons/> (last visited Jan. 28, 2020).

⁵⁹ Tom Kertscher, *Bernie Sanders Says Private Citizens Have up to 10 Million Assault Weapons, More Than US Military*, POLITIFACT (Aug. 8, 2019), <https://www.politifact.com/truth-o-meter/statements/2019/aug/08/bernie-sanders/do-private-citizens-have-5-10-million-assault-weap/>.

⁶⁰ Gary Kleck, *Mass Shootings in Schools: The Worst Possible Case for Gun Control*, 52 AM. BEHAV. SCIENTIST 1447, 1457 (2009).

⁶¹ *Id.*

⁶² SCHILDKRAUT & ELSASS, *supra* note 2.

⁶³ Chivers et al., *supra* note 18.

shoot longer without having to reload.⁶⁴ Larger magazines can hold between 60 and 100 rounds.⁶⁵ In fact, 100-round “drums,” as they are called, were used in both the Aurora and Dayton shootings; the perpetrator of the latter attack was able to fire more than forty rounds in just thirty-two seconds.⁶⁶ Similarly, several shooting events also have highlighted that police officers responding to the scene may be outgunned by the perpetrators.⁶⁷ Further supporting this argument is the fact that the family of the creator of the AR-15—the civilian version of the military’s M16 and “America’s rifle,” as it has been dubbed by the NRA⁶⁸—has spoken out in the wake of mass shootings, saying that the firearm never was intended for civilian use.⁶⁹

Such discord aside, an important consideration that must be factored into the discussion of whether to implement an assault weapons ban is if it will achieve its intended goal. Certainly, basing responses on evidence rather than emotion is vital to any policy’s sustainability, and responses to the phenomenon of mass shootings are no exception to this. As such, the now-lapsed AWB provides an important opportunity to assess what impact similar future legislation may have. Research, however, has been scarce in this area due to a lack of federal funding of studies on gun violence stemming from the introduction of the Dickey Amendment in 1996.⁷⁰

⁶⁴ *Id.* A companion argument for gun control advocates, both among legislators and the public, is to limit the capacity of magazines to no more than ten rounds. See Griff Witte, *As Mass Shootings Rise, Experts Say High-Capacity Magazines Should Be the Focus*, WASH. POST (Aug. 18, 2019, 6:23 PM), https://www.washingtonpost.com/national/as-mass-shootings-rise-experts-say-high-capacity-magazines-should-be-the-focus/2019/08/18/d016fa66-bfa3-11e9-a5c6-1e74f7ec4a93_story.html. By limiting the available clip size, it would force shooters to have to reload more often, thereby giving people more opportunities to escape. *Id.*

⁶⁵ Chivers et al., *supra* note 18.

⁶⁶ Witte, *supra* note 64.

⁶⁷ See, e.g., Nick Wing, *Houston Shooter Fired 212 Rounds, Outgunned Police with America’s Favorite Rifle*, HUFFPOST (June 1, 2016, 3:55 PM), https://www.huffpost.com/entry/houston-shooting-ar15_n_574efd52e4b0c3752dce134c.

⁶⁸ Watkins et al., *Once Banned, Now Loved and Loathed: How the AR-15 Became ‘America’s Rifle’*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html>.

⁶⁹ Tony Dokoupil, *Family of AR-15 Inventor Eugene Stoner: He Didn’t Intend It for Civilians*, NBC NEWS, <https://www.nbcnews.com/news/us-news/family-ar-15-inventor-speaks-out-n593356> (last updated June 16, 2016, 2:24 PM); see also James Fallows, *Why the AR-15 Was Never Meant To Be in Civilians’ Hands*, ATLANTIC (Nov. 10, 2017, 6:00 AM), <https://www.theatlantic.com/notes/2017/11/why-the-ar-15-was-never-meant-to-be-in-civilians-hands/545438/>. A common misconception about the AR-15 is that the “AR” stands for assault rifle or automatic rifle. In actuality, the AR represents ArmaLite, the original creator of the weapon. See John Haltiwanger, *A Breakdown of Gun Terminology to Help You in Discussions on Mass Shootings and Debates over Gun Control*, BUS. INSIDER (Aug. 12, 2019, 10:06 AM), <https://www.businessinsider.com/terms-to-know-about-guns-when-discussing-mass-shootings-2019-8>.

⁷⁰ Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, AM. PSYCHOL. ASS’N (Feb. 2013), <https://www.apa.org/science/about/psa/2013/02/gun-violence>. The Dickey Amendment was an addition to a congressional spending bill that mandated that no federal funding could be used to promote or

D. Effectiveness of Assault Weapons Bans

Still, the few studies that are available provide important findings for consideration about the efficacy of assault weapons bans. First, though the ban did not completely eliminate the use of assault-style weapons in mass shootings while it was in effect,⁷¹ the relative frequency of the use of such firearms decreased by approximately 25%.⁷² One study, examining gun massacre deaths when the AWB was in effect and comparing it to the first decades both prior and after, found that the number of fatalities decreased 43% during the prohibition period.⁷³ A separate study that examined mass shootings occurring between 1981 and 2017 showed an even more impressive reduction—70% fewer fatalities associated with these events were less likely to occur during the ban period than before or after its occurrence.⁷⁴ This translated into nine fewer mass shooting-related fatalities per 10,000 firearm homicides when the ban was in effect.⁷⁵

Given such evidence, it certainly could be argued that a federal assault weapons ban should be considered with renewed focus. Yet despite bipartisan support for gun control more broadly,⁷⁶ this issue continues to fail to gain any traction due to the ongoing polarity surrounding it, and it remains to be seen if

advocate for gun control. See Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 865 (2018). The result of lobbying efforts by the NRA, the Dickey Amendment, named for Arkansas Representative Jay Dickey, was a response to a study by Arthur Kellerman and colleagues published in 1993 that found that the presence of a firearm in the home increased the risk of homicide. *Id.* at 866. Despite that the legislation did not expressly state that funds could not be used for research on gun violence, only that it could not be used for lobbying efforts related to gun control, Congress did require that the same amount of funding within the Center for Disease Control's (CDC) budget typically earmarked for firearm injury research be reallocated. *Id.* Further, the Dickey Amendment has been applied each year that the CDC has been provided funding by Congress. *Id.*

⁷¹ Notably, one of the firearms used in the April 20, 1999 shooting at Columbine High School—the IntraTec TEC-DC9—was one of the nineteen guns expressly outlawed under the AWB, which was in effect at the time of the attack. See COLUMBINE REVIEW COMM'N, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION 23 n.59 (2001). The firearm was purchased by a friend (via a straw purchase) at a local gun show six months prior to the attack from a private citizen. *Id.*

⁷² SCHILDKRAUT, *supra* note 14, at 8.

⁷³ LOUIS KLAREVAS, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS 47–48 (2016). In this particular study, gun massacres were defined as those events in which six or more people died as the result of gunshots. *Id.*

⁷⁴ C. DiMaggio et al., *Changes in US Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 NAT'L CTR. FOR BIOTECHNOLOGY INFO. 11 (2019).

⁷⁵ *Id.*

⁷⁶ See generally Alison Durkee, *Are Republicans Really Turning the Corner on Guns?*, VANITY FAIR (Aug. 15, 2019), <https://www.vanityfair.com/news/2019/08/republican-response-mass-shootings-background-checks-red-flag-laws>; Deirdre Walsh, *Signs of Republican Movement to Support Gun Bills with New Restrictions*, NPR (Aug. 7, 2019, 5:00 AM), <https://www.npr.org/2019/08/07/748827083/signs-of-republican-movement-to-support-gun-bills-with-new-restrictions>.

any of the pending bills at the time of this writing will be enacted into law.⁷⁷ As one journalist noted, it takes time to move the political dial,⁷⁸ and perhaps the finding of common ground on other firearms legislative issues such as red flag laws—those policies that enable law enforcement or family members to petition a state for the removal of firearms from individuals who are a danger to themselves or others—is an indicator that progress is coming in the seemingly locked gun control-gun rights debate.⁷⁹ Still, it is insufficient to put all of the proverbial eggs in the assault weapons basket; instead, consideration should be given to how to keep firearms out of the hands of individuals who should not have them in their possession.

II. BACKGROUND CHECKS

While assault weapons bans may be one of the most divisive issues related to mass shootings and gun control, background checks are arguably among the least contentious. In fact, of all the regulatory provisions related to guns offered in the aftermath of mass shootings, background checks garner the greatest support. Regularly, public opinion polls find support for such a procedure to be greater than 90% among respondents,⁸⁰ even reaching as high as 97%—nearly unanimous support—following the Parkland shooting.⁸¹ Support for background checks legislation even bridges party lines, with around eight out of every ten Republicans expressing backing for the policy,⁸² despite that Democrats typically are more likely to support gun control measures on the whole.

⁷⁷ As of September 2, 2019, there are four active assault weapons bills in Congress. H.R. 2959, 116th Cong. (2019); H.R. 1296, 116th Cong. (2019); S. 66, 116th Cong. (2019); H.R. 282, 116th Cong. (2019). Each bill had a 4% prognosis for successful passage according to GovTrack.us predictions as of April 28, 2020.

⁷⁸ Amber Phillips, *Why Doesn't Support for Gun-Control Laws Translate to Gun-Control Laws?*, WASH. POST (Aug. 30, 2019, 11:18 AM), <https://www.washingtonpost.com/politics/2019/08/30/why-doesnt-support-gun-control-laws-translate-gun-control-laws/>.

⁷⁹ Walsh, *supra* note 76.

⁸⁰ *Gallup Poll*, *supra* note 44; Tom Kertscher, *Do 90% of Americans Support Background Checks for all Gun Sales?*, POLITIFACT (Oct. 3, 2017), <https://www.politifact.com/wisconsin/statements/2017/oct/03/chris-abele/do-90-americans-support-background-checks-all-gun-/>; Shephard, *supra* note 51; *U.S. Voter Support*, *supra* note 50.

⁸¹ *U.S. Support for Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds; Let Dreamers Stay, 80 Percent of Voters Say*, QUINNIPIAC U. POLL (Feb. 20, 2018), <https://poll.qu.edu/search-releases/search-results/release-detail?ReleaseID=2521> [hereinafter *U.S. Support for Gun Control*].

⁸² Pub. Policy Polling, *National Survey Results*, CTR. FOR AM. PROGRESS (Nov. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/11/17054452/PPP-GunOwnersPollResults-11.17.15.pdf>; Shephard, *supra* note 48.

Similarly, individuals identifying as firearms owners also are likely to support such a measure,⁸³ as are registered members of the NRA.⁸⁴

The goal of background checks is to keep people who should not be in possession of firearms from being able to legally acquire them, and legislation has sought to clarify who would fall within such categories. The first group of prohibited persons came courtesy of the Federal Firearms Act of 1938 (FFA), which, though focused on regulating interstate firearms commerce,⁸⁵ expressly barred some convicted felons, a fugitive from justice, or a person under indictment from purchasing, possessing, or owning a gun.⁸⁶ The FFA did not, however, require individuals transferring the firearms to verify the identification of customers.⁸⁷ Thirty years later and following the high-profile assassinations of President John F. Kennedy, Martin Luther King, Jr., and Robert F. Kennedy, the Gun Control Act of 1968 (GCA) was enacted into law.⁸⁸ In addition to placing additional restrictions on interstate firearms commerce, the GCA also expanded the categories of prohibited persons to include individuals who were deemed mentally defective, those who used drugs, minors, persons who are in the United States illegally or on a nonimmigrant visa, those who have been dishonorably discharged from the military, persons who have renounced their citizenship, and domestic abusers.⁸⁹ A glaring flaw of the GCA's limitations on prohibited persons, however, was the fact that while the Federal Firearms Licensee (FFL) was required to have the purchaser complete a questionnaire, there was no verification of the information provided.⁹⁰ Thus, even if a purchaser

⁸³ *U.S. Support for Gun Control*, *supra* note 84; see also Colleen L. Barry et al., *After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 *NEW ENG. J. MED.* 1077, 1078 tbl.1 (2013); *Gun Policy: Universal Background Checks and Armed Guards*, CBS NEWS/N.Y. TIMES (Jan. 17, 2013, 7:00 AM), <https://www.scribd.com/document/120711121/CBS-News-New-York-Times-Poll>.

⁸⁴ *Pub. Policy Polling*, *supra* note 85; see also Barry et al., *supra* note 86; *Gun Policy: Universal Background Checks and Armed Guards*, *supra* note 86; W. Gardner Selby, *Lee Leffingwell Says Polls Show 90 Percent of Americans and 74 Percent of NRA Members Support Criminal Background Checks Before All Gun Buys*, POLITIFACT (Apr. 4, 2013), <https://www.politifact.com/texas/statements/2013/apr/04/lee-leffingwell/lee-leffingwell-says-polls-show-90-percent-america/>.

⁸⁵ Alfred M. Ascione, *The Federal Firearms Act*, 13 *ST. JOHN'S L. REV.* 437, 437–38 (1939); Franklin E. Zimring, *Continuity and Change in the American Gun Debate 2–3* (UC Berkeley Pub. Law & Legal Theory Working Paper Series, Paper No. 50, 2001), http://papers.ssrn.com/paper.taf?abstract_id=266680.

⁸⁶ Federal Firearms Act of 1938, Pub. L. No. 75-785, ch. 850, §§ 2(c)–(d), 52 Stat. 1250, 1251, *repealed* by Gun Control Act of 1968, Pub. L. No. 90-618, ch. 44, § 921, 82 Stat. 1213, 1214.

⁸⁷ Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 *J. LEGAL STUD.* 133, 140 (1975).

⁸⁸ Gun Control Act § 101. The Gun Control Act of 1968 amended 18 U.S.C. § 44. See David T. Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 *CUMB. L. REV.* 585, 585 & n.2 (1986); Singh, *supra* note 31; Zimring, *supra* note 90.

⁸⁹ 18 U.S.C. § 922(b)(1), (d) (2012).

⁹⁰ Zimring, *supra* note 87, at 152–53.

provided false information, such as misrepresenting that they were not a member of a prohibited category when they actually were, they would still be able to legally purchase a firearm.⁹¹ Moreover, verification of the information provided, when conducted, was even more challenging due to the decentralized nature of the recordkeeping associated with firearms purchases.⁹²

A. *National Instant Criminal Background Check System (NICS)*

The Brady Handgun Violence Prevention Act of 1993, named for Ronald Reagan's press secretary who was wounded in the assassination attempt on the President in 1981, sought to overcome the limitations of the GCA by mandating, among other things, that for every sale or transfer of a firearm by a licensed firearms dealer, the purchaser must undergo a background check designed to ensure that they are not part of one or more of the prohibited categories.⁹³ In order to facilitate this process, the Brady Act, as it is more commonly known, also required that a centralized database of disqualifying records be established within five years of the law's enactment.⁹⁴ The National Instant Criminal Background Check System (NICS) launched in November 1998 under the administrative control of the Federal Bureau of Investigation.⁹⁵ When a person seeks to purchase a firearm from a FFL, they must complete a Firearms Transaction Record form (ATF Form 4473), which requires the applicant to provide their name, address, and identifying information; they also must indicate whether they are members of a prohibited category.⁹⁶ Once the form is complete, they present it to the FFL along with government-issued photo identification, at which time, provided that they are not self-identified members of a prohibited category or have given the transferee reasonable cause to believe they are prohibited, a NICS check will be conducted either by phone or electronically.⁹⁷ Depending on the outcome of the check, the transaction may either proceed (meaning that no prohibitive criteria was found), be delayed (potentially

⁹¹ *Id.*

⁹² *Id.* at 151.

⁹³ § 922(s).

⁹⁴ *Id.*

⁹⁵ *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Feb. 9, 2020).

⁹⁶ *NICS & Reporting Procedures*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/> (last visited Feb. 19, 2020).

⁹⁷ *Id.*; see also *About NICS*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Feb. 19, 2020). As of December 31, 2018, thirty-six states submit their NICS checks directly to the FBI. See U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) SECTION: 2018 OPERATIONS REPORT 4 (2018). Thirteen states use fully conducted state level Point of Contact (POC) accesses, while seven states use a combination of FBI and POC accesses based on the type of firearm (handguns vs. long guns like shotguns or rifles) being purchased or transferred. *Id.*

prohibitive criteria was found and further information is needed), or be denied (prohibitive criteria was found and the purchaser is disqualified).⁹⁸

Between 1998 when the system was first introduced and 2018 (the year of the most recent operations report), the NICS system has been used to process 304,634,316 background checks.⁹⁹ These include both federal and state level, with the latter (comprised of both purchasing- and permitting-related checks) accounting for approximately 58% of transactions.¹⁰⁰ On average, approximately 1.5% of transactions result in a denial, with a felony conviction being the most common reason for disqualification.¹⁰¹ Audits of the system have found that even with the volume of checks conducted annually, it has a nearly perfect (99.8%) accuracy rate for transactions processed.¹⁰²

B. Shortfalls of Background Check Systems

One specific mass shooting, however, highlighted a significant issue with background check systems—the fact that they are only as good as the records within them. On April 16, 2007, a twenty-three-year-old senior at Virginia Tech entered the West Ambler Johnston (WAJ) dormitory around 7:15 a.m.¹⁰³ He made his way to the fourth floor, where he shot and killed freshman Emily Hilscher and her resident advisor, senior Ryan Clark.¹⁰⁴ The perpetrator then left the building and, two hours later, entered Norris Hall, which housed the campus's engineering program, and opened fire.¹⁰⁵ Over approximately ten minutes, he killed thirty additional students and faculty members and injured seventeen others before committing suicide as law enforcement entered the building.¹⁰⁶

⁹⁸ About NICS, *supra* note 97.

⁹⁹ U.S. DEP'T OF JUSTICE, *supra* note 97, at 13.

¹⁰⁰ *Id.*

¹⁰¹ JENNIFER C. KARBERG ET AL., BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2015—STATISTICAL TABLES 5 (2017); *see also* U.S. DEP'T OF JUSTICE, *supra* note 100, at ii.

¹⁰² OFFICE OF THE INSPECTOR GEN., AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM ii (2016).

¹⁰³ VA. TECH REVIEW PANEL, *supra* note 20, at 77.

¹⁰⁴ *Id.* at 25.

¹⁰⁵ During the two-hour break between attacks, the shooter returned to his dormitory, changed clothes, disposed of evidence including the hard drive to his computer (which was never recovered), and mailed a package to NBC News that contained his multimedia manifesto, including an 1,800-word diatribe, video clips, and numerous photos. *See Timeline of the April 16 Shootings*, WE REMEMBER 32, <http://weremember32.com/timeline/> (last visited Feb. 19, 2020). He also mailed a letter to the English Department, within which he was a major, attacking one of the professors he had previously had issues with. *Id.*

¹⁰⁶ VA. TECH REVIEW PANEL, *supra* note 20, at 28.

As the shooting was investigated, the mental health and behavioral issues of the perpetrator became a considerable focus. From a young age, when his family immigrated to the United States from South Korea, he struggled with social isolation, eventually being diagnosed with selective mutism and major depression, issues that continued to plague him through high school.¹⁰⁷ He was discouraged from going to college away from home but ignored such advice, eventually enrolling at Virginia Tech for the Fall 2003 semester.¹⁰⁸ During his time at the university, his mental health continued to deteriorate. He remained withdrawn but his writings became increasingly violent and hostile.¹⁰⁹ His behavior also grew increasingly erratic and threatening to the point of where he was removed from a class due to creating fear among the other students and was taught one-on-one by the department chairperson.¹¹⁰ Though she attempted to help him seek out resources and counseling to address the issues, he refused.¹¹¹

On November 27, 2005, the perpetrator had his first run-in with the university's police department when a female student who lived on the fourth floor of WAJ reported that, after the pair had been texting, he appeared at her dorm room wearing sunglasses and a pulled-down hat and introduced himself as "Question Mark," his imaginary twin brother.¹¹² The officer who responded to the complaint advised him not to contact the female student again, but no further action was taken.¹¹³ Three days later, he contacted the county's counseling center for a telephone triage and set an appointment for an in-person visit, though he never attended.¹¹⁴

Nearly two weeks later, on December 12, 2005, a complaint from a second female student was received by the campus police.¹¹⁵ The perpetrator, whom the student knew through his suitemates, had been sending her instant messages and posting on her Facebook wall throughout the semester; writings also were also left on her dorm room whiteboard that she believed to be from him.¹¹⁶ Though she reported the incident to the police, the student declined to press charges and

¹⁰⁷ *Id.* at 35–37.

¹⁰⁸ *Id.* at 37, 40.

¹⁰⁹ *Id.* at 41.

¹¹⁰ *Id.* at 43–44.

¹¹¹ *See generally* LUCINDA ROY, NO RIGHT TO REMAIN SILENT: WHAT WE'VE LEARNED FROM THE TRAGEDY AT VIRGINIA TECH (2009).

¹¹² VA. TECH REVIEW PANEL, *supra* note 20, at 45.

¹¹³ The officer stated that the case would be referred to the university's Judicial Affairs office, but it is unclear if this happened or what action, if any, was taken. *See id.*

¹¹⁴ *Id.* at 45–46.

¹¹⁵ *Id.* at 46.

¹¹⁶ *Id.*

the perpetrator was advised the next day by law enforcement to cease communication with her.¹¹⁷ After the meeting with police, the perpetrator made suicidal threats through instant messages that prompted one of his suitemates to report them.¹¹⁸ The authorities returned that evening and took him to the police department for a pre-screening for mental illness.¹¹⁹ Based on the findings of the community service board (CSB) member who conducted the evaluation, a temporary detention order was issued and he was transferred to a local hospital.¹²⁰ Over the next twelve hours, the perpetrator underwent a series of evaluations to assess his mental state ahead of a commitment hearing.¹²¹ At the hearing, he was classified as an imminent danger to himself and others, but only was ordered to undergo outpatient treatment.¹²² He subsequently was discharged from the hospital and no further follow-up with counseling services, beyond the immediate appointment that day, was conducted.¹²³

As it relates to firearms transfers, Virginia is (and also was at the time) a full point-of-contact state, meaning that it conducts its own background checks.¹²⁴ Virginia State code, amended in 2005, required that any person who was admitted to any facility (either voluntarily or involuntarily), had been subjected to a temporary detention order, or who had been prohibited by a judge from possessing a firearm be reported to the Central Criminal Records Exchange (CCRE), used to house information vital to background checks.¹²⁵ Any person who met one or more of these criteria was unable to legally purchase, possess, or transport a firearm,¹²⁶ and only information relevant to making such a

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 47.

¹¹⁹ *Id.*

¹²⁰ *Id.*; see also Richard J. Bonnie et al., *Mental Health System Transformation After the Virginia Tech Tragedy*, 28 HEALTH AFF. 793, 800 (2009). The findings of the CSB screener indicated that the perpetrator was mentally ill, posed an imminent danger to himself or others, and that he refused to seek treatment voluntarily. VA. TECH REVIEW PANEL, *supra* note 20, at 47. These concerns formed the basis of the affidavit for the detention order that was subsequently granted by a local magistrate. *Id.*

¹²¹ During the hospital admission process, the perpetrator was diagnosed with a mood disorder (non-specific). See VA. TECH REVIEW PANEL, *supra* note 20, at 47. The independent evaluator who met with him the following morning found that he was mentally ill but did not pose a specific imminent danger to himself or others, a finding supported by a second evaluation by the hospital's attending psychiatrist, who recommended outpatient treatment without giving a formal diagnosis. *Id.*

¹²² *Id.* at 48.

¹²³ *Id.* at 49.

¹²⁴ U.S. DEP'T OF JUSTICE, *supra* note 97, at 4.

¹²⁵ VA. CODE ANN. § 37.2-819 (West 2015). Only forms related to the person's admission to the facility or their temporary detention order were required to be submitted to the CCRE. *Id.* Medical records more broadly were excluded from the reporting requirement. *Id.*

¹²⁶ VA. CODE ANN. § 18.2-308.1:3 (West 2018).

determination was required to be submitted by state police to the NICS system.¹²⁷

Since the perpetrator's temporary detention in 2005 was never reported to the CCRE, he was not flagged when he went to purchase his firearms that were subsequently used in the shootings. The first gun, a Walther P22 semiautomatic handgun, was purchased in February 2007; the second, a Glock 19 semiautomatic pistol, was purchased just over a month later as Virginia law at the time required individuals to wait a mandated thirty days between firearms purchases.¹²⁸ For each purchase, the perpetrator presented the required identification (proof of residency and a government-issued identification card) and passed the instant background checks, despite that he should have been deemed ineligible under both state and federal law.¹²⁹

In the aftermath of the shooting, Virginia Governor Tim Kaine signed an executive order aimed at closing the loopholes in the state reporting system that allowed the perpetrator to acquire the guns used in the attack legally.¹³⁰ Other states also passed legislation to address gaps in their own respective systems or to require reporting of mental health records.¹³¹ At the federal level, Congress approved and President George W. Bush signed into law the NICS Improvements Amendments Act (NIAA), which required faster reporting to the system, more frequent updates of records, and improved coordination between state and federal agencies.¹³² The NIAA also clarified what types of records should be reported to NICS and created federal funding opportunities to

¹²⁷ VA. CODE ANN. § 37.2-819 (West 2015).

¹²⁸ Joel Roberts, *Guns Used in Rampage Traced to Va. Shops*, CBS NEWS (Apr. 17, 2007, 1:54 PM), <https://www.cbsnews.com/news/guns-used-in-rampage-traced-to-va-shops/>; see also VA. CODE ANN. § 18.2-308.2:2 (repealed 2012). The law that created the mandated waiting period between firearms purchases was subsequently repealed. See David Sherfinski, *Va. Senate Votes to Repeal One-Gun-a-Month Law*, WASH. TIMES (Feb. 6, 2012), <https://www.washingtontimes.com/news/2012/feb/6/va-senate-votes-repeal-gun-month-law/>.

¹²⁹ Roberts, *supra* note 128.

¹³⁰ Va. Exec. Order No. 50 (2007).

¹³¹ AMS. FOR RESPONSIBLE SOLS. & LAW CTR. TO PREVENT GUN VIOLENCE, FOR THE RECORD: NICS AND PUBLIC SAFETY 21 (2016). By the end of 2017, forty-three states had laws requiring reporting of mental health records to NICS in place. Those states without mandatory reporting laws are Arkansas, Michigan, Montana, New Hampshire, Ohio, Utah, and Wyoming; Washington, D.C. also does not have a reporting law in place. While increases in mental health records increased in states both with and without mandatory reporting laws, those states with such policies increased their submissions by eleven times between 2008 and 2017, whereas those without only increased two-fold. The increase between 2008 and 2017 in annual denials for persons prohibited due to a mental defective adjudication also is higher among those states with reporting laws compared to those without (thirteen times compared to five times). See EVERYTOWN FOR GUN SAFETY SUPPORT FUND, FATAL GAPS: HOW THE VIRGINIA TECH SHOOTING PROMPTED CHANGE IN STATE MENTAL HEALTH RECORDS REPORTING (2018).

¹³² NICS Improvement Amendment Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559.

establish new or update existing reporting systems for firearms eligibility verification.¹³³ Federal funding totaling \$1.3 billion was made available to address these loopholes through grants and other programs;¹³⁴ however, between Virginia Tech and the shooting at Sandy Hook Elementary School in December 2012, only about \$50 million had been appropriated by the states.¹³⁵

In the thirteen years since the Virginia Tech shooting, improvements have been made regarding the number of records submitted to NICS. In the year after the shooting, just over 500,000 disqualifying mental health records had been submitted to the system, with thirty-five states and Washington, D.C. each providing less than 100 records.¹³⁶ Ten years later, that number had increased to 4.97 million records, with just two states submitting fewer than 100 files each.¹³⁷ Despite such improvements, however, it is probable that millions of records are still missing from NICS that would otherwise lead to prohibited persons being denied firearms purchases.¹³⁸

In fact, two other mass shootings highlight this continued reporting gap. The perpetrator of the January 8, 2011 attack in Tucson, AZ that killed six and left thirteen others injured—including Congresswoman Gabrielle Giffords—should have been disqualified from legally purchasing the firearm used in the attack.¹³⁹ In 2007, he had been arrested on a drug charge for paraphernalia, though it was dismissed after he completed a diversion program and thus was never reported to NICS.¹⁴⁰ In 2008, he was rejected by the Army, with whom he sought to enlist, for self-reported regular marijuana use.¹⁴¹ The Army, however, never reported

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Gordon Witkin, *On Anniversary of Virginia Tech Shooting, Law to Close Loophole Hasn't Accomplished Much*, CTR. FOR PUB. INTEGRITY, <https://publicintegrity.org/accountability/on-anniversary-of-virginia-tech-shooting-law-to-close-loophole-hasnt-accomplished-much/> (last updated May 19, 2014, 12:19 PM). More recent estimates suggest that nearly \$119 million has been appropriated by states since 2009 to address the reporting system gaps. See EVERYTOWN FOR GUN SAFETY SUPPORT FUND, *supra* note 131.

¹³⁶ EVERYTOWN FOR GUN SAFETY SUPPORT FUND, *supra* note 131.

¹³⁷ *Id.* The number of total active records in the NICS Indices as of December 31, 2019 was 20,929,713. See *Active Records in the NICS Indices*, FBI (Dec. 31, 2019), https://www.fbi.gov/file-repository/active_records_in_the_nics_indices.pdf/view. Of these, 6,032,035 (28.8%) were adjudicated mental health records. *Id.*

¹³⁸ EVERYTOWN FOR GUN SAFETY SUPPORT FUND, *supra* note 131; see also JIM KESSLER, THIRD WAY, MISSING RECORDS: HOLES IN BACKGROUND CHECK SYSTEM ALLOW ILLEGAL BUYERS TO GET GUNS 3, 5 (2017); Mayors Against Illegal Guns, *After Arizona Shootings, Background Checks Examined: Congress Refuses to Fund All Changes Made After Virginia Tech*, PR NEWSWIRE (Jan. 14, 2011), <https://www.prnewswire.com/news-releases/after-arizona-shootings-background-checks-examined-congress-refuses-to-fund-all-changes-made-after-virginia-tech-113615164.html>.

¹³⁹ SCHILDKRAUT, *supra* note 14, at 7.

¹⁴⁰ Joshua Norman, *Sheriff Releases Loughner's Arrest Records*, CBS NEWS (Jan. 12, 2011), <https://www.cbsnews.com/news/sheriff-releases-loughners-arrest-records/>.

¹⁴¹ Mark Thompson, *How Marijuana Use Aborted Jared Loughner's Military Career*, TIME (Jan. 10,

this to NICS as required,¹⁴² and within a year, he had passed a background check and purchased a shotgun.¹⁴³ In the year prior to the attack, he had five separate contacts with campus police at Pima Community College, where he was a student.¹⁴⁴ His violent behavior in class had been so concerning that, in 2010, he was asked to leave; he subsequently decided to withdraw and the college advised he would have to be cleared by a mental health professional that he was not a danger to himself and others before he could return.¹⁴⁵ A month after leaving the school, he passed a background check at a local retailer and lawfully secured the Glock firearm used in the shooting less than two months later,¹⁴⁶ despite the fact that he fell into multiple categories of prohibited persons.

Ten years after the Virginia Tech shooting, the gaps in the reporting system were highlighted again after a gunman killed twenty-six and wounded twenty others at the First Baptist Church in Sutherland Springs, TX on November 5, 2017.¹⁴⁷ The perpetrator, a former member of the U.S. Air Force, had a history of domestic violence.¹⁴⁸ In 2012, he had been court-martialed for assaulting his wife and infant stepson, even fracturing the baby's skull.¹⁴⁹ As part of a plea deal, he served twelve months in confinement before being discharged from the Air Force for bad conduct.¹⁵⁰ His domestic violence conviction, however, was never reported to NICS by the Air Force, and he subsequently was able to pass background checks on four separate occasions beginning in 2014 to purchase firearms after his release.¹⁵¹ While the discharge alone would not have

2011), <http://content.time.com/time/nation/article/0,8599,2041634,00.html>.

¹⁴² According to the GCA and the Brady Act, all federal agencies must report information about drug use to NICS.

¹⁴³ Mayors Against Illegal Guns, *supra* note 138.

¹⁴⁴ *Jared Loughner Had 5 Run-ins with College Police*, CBS NEWS (Jan. 10, 2011, 2:53 PM), <https://www.cbsnews.com/news/jared-loughner-had-5-run-ins-with-college-police/>.

¹⁴⁵ *Id.*

¹⁴⁶ Linda Feldmann, *Why Jared Loughner Was Allowed to Buy a Gun*, CHRISTIAN SCI. MONITOR (Jan. 10, 2011), <https://www.csmonitor.com/USA/Politics/2011/0110/Why-Jared-Loughner-was-allowed-to-buy-a-gun>.

¹⁴⁷ Jason Hanna & Holly Yan, *Sutherland Springs Church Shooting: What We Know*, CNN, <https://www.cnn.com/2017/11/05/us/texas-church-shooting-what-we-know/index.html> (last updated Nov. 7, 2017, 6:52 AM).

¹⁴⁸ Pete Williams, *Texas Shooting Exposes Gaps in Gun Background Checks*, NBC NEWS, <https://www.nbcnews.com/news/us-news/texas-shooting-exposes-gaps-gun-background-checks-n820066> (last updated Nov. 12, 2017, 7:40 PM).

¹⁴⁹ Camila Domonoske & Richard Gonzales, *The Texas Church Shooter Should Have Been Legally Barred from Owning Guns*, NPR (Nov. 6, 2017, 3:50 PM), <https://www.npr.org/sections/thetwo-way/2017/11/06/562320017/the-texas-church-shooter-should-have-been-legally-barred-from-owning-guns>; *see also* Kevin Johnson, *Texas Church Shooting: Background Check Breakdown Highlights Federal Gun Record Problems*, USA TODAY (Nov. 9, 2017, 3:38 PM), <https://www.usatoday.com/story/news/politics/2017/11/09/texas-church-shooting-background-check-breakdown-highlights-federal-gun-record-problems/847947001/>.

¹⁵⁰ Domonoske & Gonzales, *supra* note 149.

¹⁵¹ *Id.*; *see also* REPORT OF INVESTIGATION INTO THE UNITED STATES AIR FORCE'S FAILURE TO SUBMIT

disqualified him as a prohibited person (as it was not a dishonorable discharge), the domestic violence arrest and conviction would have if reported, as would the length of time he served in incarceration.¹⁵²

In response to the numerous gaps in the NICS system identified not only by these events but other crimes, attempts were made to address the continued issues that allowed firearms to continue to fall into the wrong hands. In March 2018, less than a month and a half after the Parkland shooting, President Donald Trump signed into law¹⁵³ the Consolidated Appropriations Act.¹⁵⁴ Among the many provisions included in the Act was the Fix NICS Act, which includes amendments to both the Brady Act (federal) and the NIAA (states).¹⁵⁵ At the federal level, the Fix NICS Act requires each agency and department to certify whether it has provided disqualifying records to NICS as required, to establish a plan to maximize record submission and related accuracy verification, and to comply with the procedures created.¹⁵⁶ The amendments to the NIAA under the provision require states also to establish an implementation plan, in conjunction with the Department of Justice, to maximize the submission of criminal and mental health records to NICS; it also authorized the creation of new and extension of existing funding streams to achieve this end.¹⁵⁷ It remains to be seen, however, how effective the Fix NICS Act will be.¹⁵⁸

DEVIN KELLEY'S CRIMINAL HISTORY INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF DEFENSE (2019); Katie Mettler & Alex Horton, Air Force Failed 6 Times to Keep Guns from Texas Church Shooter Before He Killed 26, Report Finds, WASH. POST (Dec. 7, 2018, 7:38 PM), <https://www.washingtonpost.com/national-security/2018/12/08/air-force-failed-six-times-keep-guns-texas-church-shooter-before-he-killed-report-finds/>.

¹⁵² Domonsoke & Gonzales, *supra* note 149; Mettler & Horton, *supra* note 151.

¹⁵³ *President Donald J. Trump Signs H.R. 1625 into Law*, WHITE HOUSE (Mar. 23, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-1625-law/>.

¹⁵⁴ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348. Within the Consolidated Appropriations Act, two specific bills related to remedying the gaps in the NICS system were introduced and subsequently incorporated into the final law. Fix NICS Act of 2017, H.R. 4477, 115th Cong. (2017); Fix NICS Act of 2017, H.R. 4434, 115th Cong. (2017). Previous attempts to ensure that all prohibited individuals were entered into the NICS database, however, were unsuccessful in becoming law. *See* Fix Gun Checks Act of 2011, H.R. 1781, 112th Cong. (2011); Fix Gun Checks Act of 2011, S. 436, 112th Cong. (2011). A separate bill introduced also aimed to encourage reporting to NICS by the states, but it failed to make it past introduction. Strengthening Background Checks Act of 2013, H.R. 329, 113th Cong. (2013).

¹⁵⁵ Consolidated Appropriations Act, 2018, 132 Stat. at 1132, 1135.

¹⁵⁶ *Id.* at 1132–33.

¹⁵⁷ *Id.* at 1135–36.

¹⁵⁸ Given the estimated number of records missing out of NICS, one consideration must be the way in which states are held accountable for their reporting (or lack thereof). The NIAA included noncompliance penalties for states that failed to report the adequate number of records. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 104, 121 Stat. 2559, 2568–69. Each state, through the Edward Byrne Memorial Justice Assistance Program, established by the Omnibus Crime Control and Safe Streets Act of 1968, is eligible to receive funding for (among other things) personnel, equipment or supplies, training, and programming for

III. EXPANDING BACKGROUND CHECKS

While the Brady Act was successful in creating the foundation for NICS, it also contained a very important loophole, something that was identified by one of the Columbine shooters in a class paper months before the attack: “The biggest gaping hole is that the background checks are only required for licensed dealers . . . not private dealers. . . . Private dealers can sell shotguns and rifles to anyone who is 18 or older”¹⁵⁹ When their friend—who purchased three firearms, later used in the shooting, at a local gun show on their behalf—did not want her name tied to the transactions, the pair specifically sought out private individuals who were not required to run a background check.¹⁶⁰ More than twenty years after this issue was identified, the perpetrator of the August 2019 rampage in Midland-Odessa, TX, who previously had failed a background check due to a disqualifying mental health issue, was able to secure a firearm from a

behavioral or crisis intervention teams, crime victims, witnesses, prevention, and education. 34 U.S.C. §§ 10151–10152 (2012). Under the NIAA, however, states that are noncompliant with their record submissions could be subjected to a withholding of up to five percent of this funding based upon the proportion missing. *See* NICS Improvement Amendments Act of 2007, 121 Stat. at 2569. The question becomes whether this minimal deduction is significant enough to encourage better reporting. The Supreme Court’s acknowledgment that the Tenth Amendment may limit Congress’s ability to use its federal spending power as an incentive for the states to comply with federal standards, however, poses a constitutional obstacle in the path of guaranteed state compliance. *See* *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (explaining that Congress’s act of withholding substantial federal funds may unconstitutionally coerce the states into enacting unwanted policies, but concluding that withholding only five percent of highway funds did not amount to such coercion); *see also* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581, 588 (2012) (holding that the Affordable Care Act of 2010’s provision that would withhold all federal Medicaid funding from states that failed to comply with the act served as a symbolic “gun to the head” of the states and therefore violated the Constitution). In sum, if reporting is seemingly voluntary due to a minimal penalty for noncompliance, it begs the question as to what can be done (aside from continuing to offer additional funding avenues specifically aimed at increasing record submission) to improve reporting by the states.

¹⁵⁹ Jefferson County Sheriff’s Office, *Columbine Documents: JC-001-025923 through JC-001-026859*, SCHOOLSHOOTERS.INFO, <https://schoolshooters.info/sites/default/files/JCSO%2025%2C923%20-%2026%2C859.pdf> (last visited Mar. 13, 2020); *see also* 18 U.S.C. § 922(s) (2012). Daniel Mauser, a Columbine student who was killed in the attack, also had identified the same loophole as part of research for the school’s debate team, of which he was a member. Mike Soraghan, *Colorado After Columbine: The Gun Debate*, 26 ST. LEGISLATURES 14 (2000).

¹⁶⁰ Soraghan, *supra* note 159. At the time the firearms were purchased, both perpetrators were juveniles and therefore ineligible to acquire the weapons. *Where’d They Get Their Guns?—Columbine High School, Littleton, Colorado*, VIOLENCE POL’Y CTR., www.vpc.org/studies/wgun990420.htm (last visited Feb. 19, 2020); *see also* COLUMBINE REVIEW COMM’N, *supra* note 71, at 24 n.60. At the time, federal law prohibited “straw purchases”—the acquisition of a firearm on behalf of someone who was a prohibited person—but this was applicable only to FFLs and not private sellers. *See id.* at 23 n.59; Schildkraut & Hernandez, *supra* note 12, at 363.

private seller.¹⁶¹ He used it to kill seven people and injured more than twenty others.¹⁶²

Beyond these two examples, however, researchers have found that approximately 22% of gun owners acquire their weapons without submitting to a background check.¹⁶³ When considering just those firearms purchased in private transactions, the proportion reaches 50%.¹⁶⁴ Other estimates suggest that approximately 80% of guns used in criminal activity also have been acquired through transactions that did not involve a background check.¹⁶⁵ Such findings have led to calls for an expansion of the background check requirements to include all firearms transactions (sales and transfers), including those by private sellers and at gun shows.

Public support for “universal background checks” has been found to be particularly high. Across various polls, 86% of all respondents, on average, support such a measure.¹⁶⁶ Regularly, more than nine out of every ten individuals identifying as Democrat say they support background checks for both gun shows and private sales, while nearly 80% of Republicans express similar attitudes.¹⁶⁷

¹⁶¹ Andrew Blankstein & Pete Williams, *Texas Gunman Purchased Weapon in Private Sale, Which Doesn't Require Background Check*, NBC NEWS (Sept. 3, 2019, 4:16 PM), <https://www.nbcnews.com/news/us-news/texas-gunman-purchased-weapon-private-sale-which-doesn-t-require-n1049351>; Tara Law, *A Background Check Loophole Let the Odessa Shooter Get a Weapon. Millions of Guns Change Hands that Way*, TIME (Sept. 4, 2019), <https://time.com/5668471/gun-violence-background-checks-odessa-mass-shooting/>.

¹⁶² Blankstein & Williams, *supra* note 161.

¹⁶³ Matthew Miller, Lisa Hepburn & Deborah Azrael, *Firearm Acquisition Without Background Checks: The Result of a National Survey*, 166 ANNALS INTERNAL MED. 233, 236 (2017).

¹⁶⁴ *Id.* at 237.

¹⁶⁵ Katherine A. Vittes, Jon S. Vernick & Daniel W. Webster, *Legal Status and Source of Offenders' Firearms in States with Least Stringent Criteria for Gun Ownership*, 19 INJ. PREVENTION 26, 29–30 (2013). Interestingly, in a separate study, Siegel and colleagues found that universal background checks correlated with a nearly 15% decrease in overall homicide rates when they are in place. See Michael Siegel et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021, 2024 (2019).

¹⁶⁶ Garen J. Wintemute, Anthony A. Braga & David M. Kennedy, *Private-Party Gun Sales, Regulation, and Public Safety*, 363 NEW ENG. J. MED. 508, 511 (2010); *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support*, PEW RES. CTR. (Oct. 18, 2018), <https://www.people-press.org/2018/10/18/gun-policy-remains-divisive-but-several-proposals-still-draw-bipartisan-support/#in-views-of-gun-policies-partisanship-and-gun-ownership-are-factors> [hereinafter *Gun Policy Remains Divisive*]; Monmouth Univ. Polling Inst., *National: Gun Owners Divided on Gun Policy; Parkland Students Having an Impact*, MONMOUTH U. (Mar. 8, 2018), https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_US_030818/; Domenico Montanaro, *Poll: Americans Not Sold on Trump—Or Democrats*, NPR, <https://www.npr.org/2019/07/22/743516166/npr-newshour-marist-poll-americans-not-sold-on-trump-or-democrats> (last updated July 22, 2019, 12:20 PM).

¹⁶⁷ *Gun Policy Remains Divisive*, *supra* note 169; Monmouth Univ. Polling Inst., *supra* note 169; Montanaro, *supra* note 169; J. Baxter Oliphant, *Bipartisan Support for Some Gun Proposals, Stark Partisan Divisions on Many Others*, PEW RES. CTR. (June 23, 2017), <https://www.pewresearch.org/fact-tank/2017/06/23/>

Even the majority of gun owners who are not NRA members, as well as those who are NRA members, have been found to support universal background checks, with 78% and 69%, respectively.¹⁶⁸

As with the assault weapons ban discussed earlier, legislative attempts to address the Brady Act loophole have been largely unsuccessful. Early efforts focused specifically on closing the gun show loophole that allowed buyers to purchase firearms from private dealers without background checks at such events. The first attempt came in 1998, when Illinois Representative Rod Blagojevich introduced a bill to require more detailed records of transactions occurring at gun shows, including the name, address, and age of the purchaser; the make, model, and serial number of the firearm; and the date and location of transfer.¹⁶⁹ The legislation died shortly after introduction, only to be reintroduced—and fail—several times in both the House and Senate.¹⁷⁰ Two additional bills were introduced in early 1999 that sought to require organizations operating gun shows to ensure that background checks were being conducted and that requisite sales were being reported, among other provisions.¹⁷¹ The legislation failed to garner any support and died on the floor. Following the Columbine shooting, renewed attempts to regulate private transactions at gun shows flooded the legislature.¹⁷² Each attempt, however, was as unsuccessful as those introduced prior to the attack.

bipartisan-support-for-some-gun-proposals-stark-partisan-divisions-on-many-others/.

¹⁶⁸ Monmouth Univ. Polling Inst., *supra* note 166.

¹⁶⁹ H.R. 3833, 105th Cong. (1998).

¹⁷⁰ H.R. 109, 106th Cong. § 1 (1999); S. 2527, 105th Cong. § 1 (1998); H.R. 4442, 105th Cong. § 1 (1998).

¹⁷¹ H.R. 902, 106th Cong. § 2 (1999); S. 443, 106th Cong. § 3 (1999). In addition to the background checks and sales reporting requirements, the Gun Show Accountability Act also required operating organizations to register with and pay a fee to the Secretary of the Treasury, notify them of the date and location of the event, and verify the identity and credentials of vendors. *See* H.R. 902, 106th Cong. § 2 (1999); S. 443, 106th Cong. § 3 (1999).

¹⁷² The Youth Gun Crime Enforcement Act, introduced three weeks after the shooting, sought to regulate gun shows more strictly, require background checks at the events, and establish mandated waiting periods for more thorough background checks by law enforcement. *See* H.R. 1768, 106th Cong. tit. I (1999); S. 995, 106th Cong. tit. I (1999). The Gun Show Accountability Act was reintroduced as H.R. 1903. *See* H.R. 1903, 106th Cong. (1999). A separate bill requiring background checks at gun shows and banning associated fees was introduced less than two months after the shooting. *See* Mandatory Gun Show Background Check Act, H.R. 2122, 106th Cong. § 2 (1999). The Gun Show Loophole Closing and Gun Law Enforcement Act also sought to mandate background checks on all firearms transfers taking place at gun shows. H.R. 2377, 107th Cong. tit. I (2001); S. 890, 107th Cong. (2001). So did the Gun Show Background Check Act. *See* S. 22, 113th Cong. (2013); S. 35, 112th Cong. (2011); S. 843, 111th Cong. (2009); S. 2577, 100th Cong. (2008); H.R. 260, 108th Cong. § 3 (2003); H.R. 4034, 107th Cong. § 3 (2002); S. 767, 107th Cong. § 3 (2001). The Gun Show Loophole Closing Act called for similar mandates as well. *See* H.R. 820, 116th Cong. (2019); H.R. 1612, 115th Cong. (2017); H.R. 2380, 114th Cong. (2015); H.R. 141, 113th Cong. (2013); H.R. 591, 112th Cong. (2011); H.R. 2324, 111th Cong. (2009); H.R. 96, 110th Cong. § 3 (2007); H.R. 3540, 109th Cong. § 3 (2005); H.R. 3832, 108th Cong. § 3 (2004); S. 1807, 108th Cong. § 3 (2003).

With attempts to close the gun show loophole failing to gain traction, some legislators shifted gears to focus on expanding background checks to all transactions, which thereby would extend to private sellers and gun shows indirectly. The Fix Gun Checks Act of 2011, in addition to expanding NICS records, proposed to conduct background checks on all firearms sales, not only those conducted by FFLs.¹⁷³ Similar legislation was introduced by Connecticut Senator Chris Murphy, who was the representative in office when the Sandy Hook shooting occurred, as the Background Check Expansion Act.¹⁷⁴ Both sets of legislation failed to garner the necessary support to become law. Most recently, the Bipartisan Background Checks Act was introduced to expand the requirement to all firearms sales.¹⁷⁵ Though the bill passed the House, it has yet to clear the Senate.¹⁷⁶

IV. STATE LEGISLATION

While assault weapons bans and expanded background check provisions have yet to gain the necessary support of Congress to become law, legislative efforts at the state level to address these identified issues have been more successful. Regarding assault weapons, for instance, seven states and the District of Columbia presently have some form of a ban in place. California was the first to pass such a law following a mass shooting at an elementary school in Stockton in 1989,¹⁷⁷ prohibiting nearly seventy-five specific types, models, and series, as well as identifying additional characteristics of semiautomatic handguns, shotguns, and centerfire rifles that qualified as assault weapons.¹⁷⁸ Connecticut,¹⁷⁹ the District of Columbia,¹⁸⁰ and New Jersey¹⁸¹ each offer similar

¹⁷³ Fix Gun Checks Act of 2011, H.R. 1781, 112th Cong. (2011); Fix Gun Checks Act of 2011, S. 436, 112th Cong. (2011).

¹⁷⁴ Background Check Expansion Act, S. 42, 116th Cong. (2019); Background Check Expansion Act, S. 2009, 115th Cong. (2017). As of the time of this writing, the 2019 bill has a 4% passage projection.

¹⁷⁵ Bipartisan Background Checks Act of 2019, H.R. 8, 116th Cong. (2019).

¹⁷⁶ Sheryl Gay Stolberg & Catie Edmondson, *Keeping Focus on Gun Bills, Democrats Urge McConnell and Senate to Act*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/us/politics/democrats-mcconnell-guns.html>.

¹⁷⁷ Eric Escalante, *Need to Know: The 1989 Cleveland School Shooting*, ABC10, <https://www.abc10.com/article/news/local/stockton/need-to-know-the-1989-cleveland-school-shooting/103-bf6463b2-ce78-4ba1-9216-fc2c79907f82> (last updated Jan. 17, 2019, 5:31 PM). The initial law, the Roberti-Roos Assault Weapons Control Act of 1989, was amended in 1999, *see* CAL. ATTORNEY GEN., ASSAULT WEAPONS IDENTIFICATION GUIDE (2001); *see also* S.B. 23, S. Comm. Public Safety (Cal. 1999), and again with the passage of the .50 Caliber BMG Regulation Act of 2004, *see* A.B. 50, Gen. Assemb. (Cal. 2002).

¹⁷⁸ CAL. PENAL CODE §§ 16350, 16790, 16890, 30500–31115 (West 2019).

¹⁷⁹ CONN. GEN. STAT. §§ 53-202a–o (2019); *see also* Veronica Rose, *Weapons Banned as Assault Weapons*, OLR RES. REP. (May 29, 2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0241.htm>.

¹⁸⁰ D.C. Code Ann. §§ 7-2501.01(3A)(A), 7-2502.02(a)(6), 7-2505.01, 7-2505.02(a), (c) (West 2019).

¹⁸¹ N.J. STAT. ANN. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (West 2019).

guidelines as California, though their lists of specifically prohibited weapons by model, series, or type are slightly shorter. Maryland¹⁸² and Massachusetts¹⁸³ provide limited lists of firearm type and series that are specifically banned, instead emphasizing general features that qualify as an assault weapon; New York¹⁸⁴ solely emphasizes the general features in its definition. Hawaii's ban covers only handguns classified as assault pistols; rifles and shotguns are not included in its prohibition on assault weapons.¹⁸⁵

In addition to successful legislation related to assault weapons, a number of states also have enacted laws related to background checks, both at the point of transfer and related to private purchases. For firearms transfers involving a private seller, California,¹⁸⁶ Colorado,¹⁸⁷ Delaware,¹⁸⁸ Nevada,¹⁸⁹ New Jersey,¹⁹⁰ New Mexico,¹⁹¹ New York,¹⁹² Oregon,¹⁹³ Vermont,¹⁹⁴ and Washington¹⁹⁵ each require the background checks to be conducted by or processed through dealers who possess federal firearms licenses. Rhode Island requires purchasers to complete a background check form, which is then submitted to a local law enforcement agency for processing.¹⁹⁶ Connecticut,¹⁹⁷ Maryland,¹⁹⁸ and Pennsylvania¹⁹⁹ have provisions to allow for background checks to be processed by either FFLs or law enforcement.

¹⁸² MD. CODE ANN., CRIM. LAW §§ 4-301–4-306 (LexisNexis 2019); *see also* MD. CODE ANN., PUB. SAFETY § 5-101(r) (LexisNexis 2019).

¹⁸³ MASS. GEN. LAWS ch. 140, §§ 121–123, 131M (2019).

¹⁸⁴ N.Y. PENAL LAW §§ 265.00(22), 265.02(7), 265.10, 400.00(16-a) (McKinney 2019).

¹⁸⁵ HAW. REV. STAT. ANN. §§ 134-1, 134-4, 134-8 (West 2019).

¹⁸⁶ CAL. PENAL CODE §§ 27545, 27850–28070 (West 2019).

¹⁸⁷ COLO. REV. STAT. § 18-12-112 (2019); H.B. 1229 (Colo. 2013).

¹⁸⁸ DEL. CODE ANN. tit. 11, § 1448B, tit. 24, § 904A (2019). Interestingly, one study found that after the enactment of the comprehensive background check legislation in Delaware, the number of background checks increased between 22% and 34%, depending on the type of firearm (handgun, shotgun, or rifle). *See* Alvaro Castillo-Carniglia et al., *Comprehensive Background Check Policy and Firearm Background Checks in Three US States*, 24 INJ. PREVENTION 454, 457 (2017).

¹⁸⁹ S. 143 (Nev. 2019). The law went into effect on January 2, 2020.

¹⁹⁰ N.J. STAT. ANN. § 2C:58-3 (West 2019).

¹⁹¹ S.B. 8 (N.M. 2019).

¹⁹² N.Y. GEN. BUS. LAW § 898 (McKinney 2019); 2013 NY ALS 1; *see also* N.Y. GEN. BUS. LAW §§ 895–897 (McKinney 2019).

¹⁹³ OR. REV. STAT. § 166.435 (2019).

¹⁹⁴ VT. STAT. ANN. tit. 13, § 4019 (2019), enacted by 2017 SB 55, Sec. 6.

¹⁹⁵ WASH. REV. CODE § 9.41.113 (2019).

¹⁹⁶ R.I. GEN. LAWS §§ 11-47-35–11-47-35.2 (2019).

¹⁹⁷ *See* CONN. GEN. STAT. §§ 29-33(c), 29-36(f), 29-37a(e)–(j) (2019).

¹⁹⁸ *See* MD. CODE ANN., PUB. SAFETY § 5-124(a)(2) (West 2019). Maryland's background check requirement applies only to handguns and assault weapons. *Id.*

¹⁹⁹ *See* 18 PA. CONS. STAT. § 6111(b), (c), (f)(2) (2019). The requirement on background checks at point of transfer in Pennsylvania, however, only applies to handguns. 18 PA. CONS. STAT. § 6111(f)(2) (2019).

Additionally, a number of states require that purchasers have a license or permit in place after the completion of the background check but prior to the transfer of the firearm. Connecticut,²⁰⁰ the District of Columbia,²⁰¹ Hawaii,²⁰² Illinois,²⁰³ Massachusetts,²⁰⁴ and New Jersey²⁰⁵ require that permits be in place for the purchase of any firearm prior to transfer. Conversely, such licenses are only required on transfers of handguns in Iowa,²⁰⁶ Maryland,²⁰⁷ Michigan,²⁰⁸ Nebraska,²⁰⁹ New York,²¹⁰ North Carolina,²¹¹ and Rhode Island.²¹² Finally, a number of states also require background checks on private sellers transferring firearms at gun shows.²¹³ In short, many of the provisions that have garnered public support but failed to gain traction at the federal level have found success in various states.

V. DISCUSSION

Despite the reactions and demands for change elicited in the wake of mass shootings, little in the way of responding to these events legislatively has occurred at the federal level. Oftentimes, this comes as the result of the “perpetual stalemate” between the Democrats and Republicans on issues related to gun control.²¹⁴ Given the fact that a firearm is a prerequisite for a mass shooting (as opposed to a bomb, knife, or car, for example), it is not entirely

²⁰⁰ See CONN. GEN. STAT. §§ 29-33, 29-36f–29-36i, 29-37a (2019). One study found that the implementation of Connecticut’s permit-to-purchase law correlated with a forty percent reduction in firearm-related homicide. See Kara E. Rudolph et al., *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH e49 (2015).

²⁰¹ See D.C. Code Ann. §§ 7-2502.01–7-2502.10 (West 2019); D.C. Mun. Regs. tit. 24, §§ 2311–2320 (2019).

²⁰² See HAW. REV. STAT. ANN. §§ 134-2, 134-13 (West 2019).

²⁰³ See 430 ILL. COMP. STAT. 65/1–65/15a (2019); 720 ILL. COMP. STAT. 5/24-3(k) (2019).

²⁰⁴ See MASS. GEN. LAWS ch. 140, §§ 121, 129B, 129C, 131, 131A, 131E, 131P (2019).

²⁰⁵ See N.J. STAT. ANN. § 2C:58-3 (West 2019).

²⁰⁶ See IOWA CODE §§ 724.15–724.20 (2019).

²⁰⁷ See MD. CODE ANN., PUB. SAFETY § 5-117.1 (West 2019).

²⁰⁸ See MICH. COMP. LAWS §§ 28.422–28.422a (2019).

²⁰⁹ See NEB. REV. STAT. ANN. §§ 69-2404, 69-2407, 69-2409 (West 2019).

²¹⁰ See N.Y. PENAL LAW §§ 400.00–400.01 (McKinney 2019).

²¹¹ See N.C. GEN. STAT. §§ 14-402–14-404 (2019).

²¹² See R.I. GEN. LAWS §§ 11-47-35–11-47-35.1 (2019).

²¹³ The specific states are California (A.B. 295, Gen. Assemb. (Cal. 1999)), Colorado (COLO. REV. STAT. § 18-12-501), Connecticut (CONN. GEN. STAT. § 29-37g(c)), Delaware (DEL. CODE ANN. tit. 11, § 1448B(a)), Illinois (430 ILL. COMP. STAT. 65/3(a-5)), Maryland (MD. CODE ANN., PUB. SAFETY § 5-124(a)), New York (N.Y. PENAL LAW § 400.00), Oregon (OR. REV. STAT. §§ 166.434(1), 166.438), and Pennsylvania (18 PA. CONS. STAT. ANN. § 6111(c); 37 PA. CODE § 33.111(g)). Depending on the state, the background checks may be performed on behalf of the seller by a FFL or local law enforcement agency.

²¹⁴ Austin Sarat & Jonathan Obert, *What Both Sides Don’t Get About American Gun Culture*, POLITICO (Aug. 4, 2019), <https://www.politico.com/magazine/story/2019/08/04/mass-shooting-gun-culture-227502>.

surprising that much of the focus in the discourse surrounding these events is on the weapons themselves. In essence, however, the gun debate drives all debates and, as a result, other responses can (and do) fall by the wayside, leaving missed opportunities to implement prevention or response strategies.

This is not to say, of course, that lawmakers have done nothing. The federal government banned bump stocks, like those used in the 2017 shooting in Las Vegas that left fifty-eight people dead and more than 400 others injured,²¹⁵ on March 26, 2019.²¹⁶ The devices are stocks that enable a semiautomatic firearm to continuously fire the weapon with a single pull of the trigger, thereby mimicking a fully automatic gun.²¹⁷ Accordingly, people on both sides of the gun debate—including even the NRA²¹⁸—called for them to be reviewed to determine compliance with federal law or banned completely. Three days after the shooting, Senator Dianne Feinstein and Florida Representative Carlos Curbelo introduced the Automatic Gunfire Prevention Act aimed at banning bump stocks,²¹⁹ several weeks later, Pennsylvania Representative Brian Fitzpatrick introduced similar legislation.²²⁰ Both pieces of legislation failed, despite the visceral reactions and demand for action after the shooting. Following the Parkland shooting in February 2018, however, President Trump issued an executive action for the Bureau of Alcohol, Tobacco, Firearms, and Explosives to regulate any devices that turn legal firearms into machine guns,²²¹ and ten months later, the Department of Justice issued the final regulation.²²² In

²¹⁵ Gomez & White, *supra* note 46.

²¹⁶ 27 C.F.R. §§ 447.11, 478.11, 479.11 (2019).

²¹⁷ *Bump Stocks*, ATF, <https://www.atf.gov/rules-and-regulations/bump-stocks> (last updated Feb. 21, 2019).

²¹⁸ *Las Vegas Shooting: NRA Urges New Rules for Gun 'Bump-Stocks'*, BBC NEWS (Oct. 5, 2017), <https://www.bbc.com/news/world-us-canada-41519815>.

²¹⁹ H.R. 3999, 115th Cong. (2017); Automatic Gunfire Prevention Act, S. 1916, 115th Cong. (2017).

²²⁰ Closing the Bump-Stock Loophole Act, H.R. 4168, 115th Cong. (2017).

²²¹ Gregory Korte, Nicole Gaudiano & David Jackson, *Trump Takes Executive Action to Ban Bump Stocks that Increase Weapons' Firepower*, USA TODAY, <https://www.usatoday.com/story/news/politics/2018/02/20/trump-takes-executive-action-ban-bump-stocks-rifles-into-automatic-weapons/354536002/> (last updated Feb. 20, 2018, 5:48 PM). It bears noting, however, that bump stocks were only used in the Las Vegas shooting; the perpetrator in Parkland used a semiautomatic rifle with no additional enhancements to speed up the firing. *US Bans 'Bump Stock' Gun Device Used in Las Vegas Mass Shooting*, BBC NEWS (Dec. 19, 2018), <https://www.bbc.com/news/world-us-canada-46614001>.

²²² Charlie Savage, *Trump Administration Imposes Ban on Bump Stocks*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/trump-bump-stocks-ban.html>. At the time of this writing, attempts to block the bump stock ban from taking effect were unsuccessful in the D.C. Court of Appeals, while the U.S. Supreme Court refused to hear the matter. *See* Debra Cassens Weiss, *DC Circuit Refuses to Block Ban on Bump Stocks' SCOTUS Also Had Refused to Intervene*, ABA J. (Apr. 2, 2019, 9:25 AM), <http://www.abajournal.com/news/article/dc-circuit-refuses-to-block-ban-on-bump-stocks-scotus-had-also-refused-to-intervene>; *see also* Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 920 F.3d 1 (D.C. Cir. 2019).

addition to the federal ban, eleven states also have passed similar legislation making possession of bump stocks illegal.²²³

Other measures that also could facilitate keeping firearms out of the hands of prohibited individuals, including potential mass shooters, however, have been met with less legislative success. Since the Parkland shooting, red flag laws, also known as extreme risk protection orders—designed to help remove firearms from the possession of prohibited persons—have been gaining support, even broaching both sides of the congressional aisle.²²⁴ As of September 2019, twelve states and the District of Columbia permit a family or household member to petition for removal, and three of those states and the District of Columbia also allow individuals other than family to petition. Three states allow only law enforcement to seek a removal order.²²⁵ Yet despite such consensus, they have failed to gain traction at the federal level—two bills introduced immediately after Parkland failed at introduction,²²⁶ and four additional bills proposed in the following legislative session each have just a 4% chance of being enacted.²²⁷

Still, a lingering question remains as to whether addressing mass shootings legislatively can ever be a nonpartisan issue or, at the very least, if the stalemate can be broken. Given that bipartisan support for measures like assault weapons bans and universal background checks exists in the populace, it calls for consideration then as to whether elected officials' decisions are reflecting that of their constituents. One impediment to this, however, is the money that is received from lobbyists in the gun industry including (but certainly not limited

²²³ As of September 12, 2019, the following states have bump stock bans in effect: California (CAL. PENAL CODE § 3290), Delaware (DEL. CODE tit. 11, § 1444(a)(6) (2020)), Florida (FLA. STAT. § 790.222 (2018)), Hawaii (HAW. REV. STAT. § 134-8.5 (2018)), Maryland (MD. CODE ANN., COM. LAW § 4-305.1 (2018)), Massachusetts (MASS. GEN. LAWS ch. 140, §121, 131 (2017)), Nevada (2019 Nev. AB 291), New Jersey (N.J. STAT. ANN. § 2C:39-3), New York (N.Y. PENAL LAW § 265.01-c (2019)), Vermont (VT. STAT. ANN. tit. 13, § 4022 (2018)), and Washington (WASH. REV. CODE §§ 9.41.220, 9.41.225 (2019)). Washington, D.C. also has an active bump stock ban. *See* D.C. Code Ann. § 22-4514(a). California's ban was instituted in 1990, while New York's ban went into effect with the passage of the SAFE Act in 2013. All other states' bans were enacted after the Las Vegas shooting.

²²⁴ Jon Schuppe, *Red Flag Laws Often Have Bipartisan Support. But Do They Stop Mass Shootings?*, NBC NEWS, <https://www.nbcnews.com/news/us-news/gun-seizure-laws-often-have-bipartisan-support-do-they-stop-n1039761> (last updated Aug. 7, 2019, 7:50 AM).

²²⁵ *Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Feb. 19, 2020).

²²⁶ Extreme Risk Protection Order and Violence Prevention Act of 2018, S. 2607, 115th Cong. (2018); Federal Extreme Risk Protection Order Act of 2018, S. 2521, 115th Cong. (2018).

²²⁷ Federal Extreme Risk Protection Order Act of 2019, H.R. 3076, 116th Cong. (2019); Extreme Risk Protection Order Act of 2019, H.R. 1236, 116th Cong. (2019); Extreme Risk Protection Order Act of 2019, S. 506, 116th Cong. (2019); Extreme Risk Protection Order and Violence Prevention Act of 2019, S. 7, 116th Cong. (2019). Passage projection statistics are as of February 9, 2020.

to) the NRA. Between 1998 and February 2018, the NRA alone donated more than \$4 million to members of Congress,²²⁸ the majority being Republicans.²²⁹ When factoring in contributions beyond just individual candidates, including those made to political parties more broadly and political action committees (PACs), this figure increases to more than \$13 million.²³⁰ Even more money, however, has been spent by the NRA to further gun rights, including \$45.9 million spent on federal lobbying against gun control bills and \$144.3 million on outside spending and independent expenditures, such as advertising for or against a particular candidate (between 1998 and 2016).²³¹

Collectively, gun rights organizations (including the NRA) outspend gun control advocacy groups more than forty to one.²³² Such contributions also greatly overshadow those made from the constituents themselves.²³³ This is likely why it has been all but impossible to pass meaningful legislation related to firearms regulations, even when broadly supported by the public. Until corporate money is no longer as heavily embedded within politics as it has been in past years, it is likely that the problem of elected officials not supporting constituent interests related to firearms legislation will persist.²³⁴

Where the federal government has failed to make progress on addressing mass shootings legislatively, some states have managed to overcome this stalemate. Seven states plus the District of Columbia currently have an assault weapons ban in place. Each of these jurisdictions is heavily blue, meaning that their government representatives and constituents primarily identify as

²²⁸ Aaron Williams, *Have Your Representatives in Congress Received Donations from the NRA?*, WASH. POST, <https://www.washingtonpost.com/graphics/national/nra-donations/> (last updated Feb. 15, 2018).

²²⁹ Aaron Kessler, *Why the NRA Is So Powerful on Capitol Hill, by the Numbers*, CNN POL., <https://www.cnn.com/2018/02/23/politics/nra-political-money-clout/index.html> (last updated Feb. 23, 2018, 2:12 PM). Of the 307 members of Congress receiving financial support, either directly (e.g., campaign contributions) or indirectly (e.g., campaign support through advertisements) from the NRA, just twenty-four Democrats received such assistance while only six Republicans did not receive such contributions. *Id.*

²³⁰ Louis Jacobson, *Counting Up How Much the NRA Spends on Campaigns and Lobbying*, POLITIFACT (Oct. 11, 2017), <https://www.politifact.com/truth-o-meter/article/2017/oct/11/counting-up-how-much-nra-spends/>.

²³¹ *Id.* In addition to money spent on federal lobbying by the NRA, gun manufacturers also engage in such activity, expending \$1.4 million in 2017 alone to lobby against restrictions. *See* Kessler, *supra* note 232.

²³² Kessler, *supra* note 229.

²³³ *National Rifle Assn.*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000082&cycle=2018> (last visited Feb. 19, 2020).

²³⁴ *See* Sam Musa, *The Impact of the NRA on the American Policy*, 4 J. Pol. Sci. & Pub. Aff. 1, 2 (2016). *See generally* Lee Drutman, *The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (2015) (explaining how the introduction of corporate money into the well-established lobbying practice in Washington has created a more complex legislative process and led to an increase in corporate power).

Democrats.²³⁵ Similarly, Democrats control all but one of the fourteen states with background check requirements prior to transfer, with Pennsylvania being the sole exception.²³⁶ That Democrats typically support gun control measures more than Republicans likely explains why legislative efforts have been successful in places led by officials from the Democratic party.²³⁷ In this era of single party dominance of state legislatures, both red and blue states have effectively enacted a flood of legislation without successful resistance from the opposing party.²³⁸ The unhindered ability of single party legislatures to effectively enact legislation answers why predominately blue states have made significant progress in enacting assault weapons bans and background checks, while a divided Congress has proven unable to keep pace.²³⁹

Certainly, a question on everyone's mind is whether federal legislation on measures such as an assault weapons ban or universal background checks could have an impact on reducing the occurrence of mass shootings. As noted earlier, deaths associated with firearm-related massacres decreased during the ten years that the AWB was in place.²⁴⁰ During that same period, the use of assault-style rifles, particularly the AK-47, by mass shooters also dropped in relative frequency.²⁴¹ Though the ban did not completely eliminate the use of assault weapons by mass shooters, the reduction in deaths associated with such weapons is certainly a worthwhile consideration when deciding whether to pass similar legislation. The loss of one life to a mass shooting is one too many, and every life that can be saved should be.

With mass shootings continuing to occur, it is imperative that changes are made that work to prevent these attacks from happening or, when they do, to

²³⁵ 2016 Presidential Election Results, 270TOWIN, <https://www.270towin.com/maps/2016-actual-electoral-map> (last visited Feb. 19, 2020). Here, the 2016 presidential election results are used as a proxy for political party leaning of constituents. *Id.*

²³⁶ *Id.*; see *supra* notes 186–199 and accompanying text. It bears noting that prior to the 2016 election, where Pennsylvania's electoral votes went to the Republican candidate, Donald Trump, the state had voted blue (Democrat) for the prior seven elections (twenty-eight years). See Brian Taff, *Pa. for Trump: How Pennsylvania Went Red for 1st Time in 28 Years*, WPVI (Nov. 10, 2016), <https://6abc.com/politics/how-pa-went-red-for-trump-for-1st-time-in-28-years/1598897/>.

²³⁷ See, e.g., JoEllen Pederson et al., *Gun Ownership and Attitudes Toward Gun Control in Older Adults: Re-examining Self Interest Theory*, 1 AM. J. SOC. SCI. RES. 273, 275 (2015).

²³⁸ See Timothy Williams, *With Most States Under One Party's Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html> (“It is the first time in more than a century that all but one state legislature is dominated by a single party. Most legislative sessions have ended . . . and Republican-held states have rushed forward with conservative agendas as those controlled by Democrats have pushed through liberal ones.”).

²³⁹ *See id.*

²⁴⁰ *See supra* notes 76–77 and accompanying text.

²⁴¹ SCHILDKRAUT, *supra* note 14, at 7–8.

mitigate the loss of life. While a common argument against the measures proposed here is that “criminals do not follow the law,” the reality is that the gaping loopholes in our systems have made it easier for them to commit their acts with weapons obtained through lawful means. Thus, measures like assault weapons bans and universal background checks—measures that are supported by gun owners, among others—can make it more difficult to acquire the weapons needed to carry out mass violence. Still, it bears noting that mass shootings are a complex issue in need of equally multidimensional responses. Concerned Americans have identified such opportunities for meaningful change that could potentially save countless lives (not only in mass shootings but also related to homicide more broadly). It is time for the federal government to act now to break the cycle of inaction.