

**A SECOND AMENDMENT IN JEOPARDY OF ARTICLE V
 REPEAL, AND “AMFIT,” A LEGISLATIVE PROPOSAL
 ENSURING THE 2ND AMENDMENT INTO THE 22ND
 CENTURY: AFFORDABLE MANDATORY FIREARMS
 INSURANCE AND TAX (AMFIT), A SOLUTION TO
 MAINTAINING THE RIGHT TO BEAR ARMS AND
 PROMOTING THE GENERAL WELFARE**

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As the United States continually suffers its mass shootings, its black market of illegal firearms, and its recurrent tragic firearm accidents in which children kill or maim themselves, a call has manifested on both sides of the political spectrum for Second Amendment repeal. Repeal is a process under Article V of the United States Constitution. Concurrent with the call for repeal is a call for legislative bans over the types of ammunition as well as the firearms available for consumption. Gun advocates have outright rejected both the calls for repeal and limits to ownership. However, that rejection jeopardizes the Second Amendment, as the calls will burgeon against the status quo.

This proposal offers an even-handed legislative concept that can address the tragedies generating calls for Second Amendment repeal and can insulate the right to bear arms from future risk of repeal. The proposal is the *Affordable Mandatory Firearms Insurance and Tax* ("AMFIT"). AMFIT's constitutionality rests on Congress' powers under Article I of the United States Constitution. AMFIT would be a tax, which a taxpaying gun owner can annually avoid by purchasing an AMFIT insurance policy. That AMFIT policy premium would be administered privately, and the taxpayer could lower the tax by purchasing safety devices for tax-deduction. The premium cost-calculation would be assessed based on the risk of the firearm subject to the risk of the household in which the firearm is stored. AMFIT's constitutionality is

within the U.S. Supreme Court case-law of *National Federation of Independent Business v. Sebelius*,¹ *District of Columbia v. Heller*,² and *McDonald v. City of Chicago*.³

Congress, by the power of taxation, by that of raising an army, and by their control over the militia, have the sword in one hand, and the purse in the other. Shall we be safe without either?

Patrick Henry⁴

It is obviously impracticable in the federal Government Of these States to secure all Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all—Individuals entering into Society must give up a Share of Liberty to preserve the Rest.

George Washington⁵

A well-regulated militia.” If the militia- which was going to be the state army- was going to be well-regulated: Why shouldn’t 16, and 17, and 18, or any other age persons be regulated in the use of arms the way an automobile is regulated?

Chief Justice Warren Burger⁶

This country and its Constitution face two problems: frequent mass shootings increasing in death toll and a Second Amendment vulnerable to calls for repeal. One constitutional option is Article V Repeal,⁷ the

1. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

2. Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

3. McDonald v. City of Chicago, 561 U.S. 742 (2010).

4. Patrick Henry, Speech at the Virginia Ratifying Convention, (June 9, 1788), https://www.constitution.org/rc/rat_va_07.htm#henry-03; see also WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 285 (1817).

5. From George Washington to the President of Congress, 17 September 1787, *Founders Online*, National Archives, last modified June 13, 2018, <https://founders.archives.gov/documents/Washington/04-05-02-0306>.

6. Frank Stahelli, *Warren Burger “2nd Amendment Fraud” – 1991 PBS News Hour*, YOUTUBE (Aug. 28, 2016), https://www.youtube.com/watch?v=Eya_k4P-iEo.

7. Article V of the United States Constitution provides:

[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three

other is a constitutionally sound and politically balanced proposed statute: *The Affordable Mandatory Firearms Insurance & Tax: "AMFIT"*

I. ASSESSING THE PROBLEMS: MASS SHOOTINGS, ACCIDENTAL CHILD DEATHS, AND THE BLACK MARKET FOR FIREARMS

In 2017, the Las Vegas Strip mass shooting at the Harvest Music Festival resulted in the death of 58 and became the deadliest mass shooting in the United States.⁸ More recently, in 2018, the Marjory Stoneman Douglas High School Shooting, also known as the "Parkland" school shooting⁹ resulted in the death of 17.¹⁰ These mass shootings have become commonplace, increasing in both frequency and death toll since 1999's Columbine shooting.¹¹ These, and others like the Sandy Hook Elementary school shooting, have been detailed at length in the media and will not be repeated here.¹² In addition to these mass shootings, recurrent headlines surface; tragedies in which children shoot themselves (or each other) with their relatives' unsecured guns.¹³ Champions of the

fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

8. Doug Criss, *The Las Vegas attack is the deadliest mass shooting in modern US history*, CNN (Oct. 02, 2017, 12:48 PM), www.cnn.com/2017/10/02/us/las-vegas-attack-deadliest-us-mass-shooting-trnd/index.html.

9. See, e.g., Ray Sanchez & Kevin Conlon, *Parkland School Shooting Surveillance Video Released*, CNN (August 22, 2018, 8:00 PM), <https://www.cnn.com/2018/08/22/us/parkland-high-school-surveillance-video-release/index.html>.

10. Lisa Marie Segarra et al., *Sheriff's Office Had Received About 20 Calls Regarding Suspect: The Latest on the Florida School Shooting*, TIME (Feb. 18, 2018, 1:51 PM) time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school/.

11. *Columbine Shooting*, A&E TELEVISION NETWORKS (Nov. 9, 2009), <http://www.history.com/topics/columbine-high-school-shootings>; *Rapid Rise in Mass School Shootings in the United States, Study Shows*, SCIENCE DAILY (April 19, 2018), <https://www.sciencedaily.com/releases/2018/04/180419131025.htm>.

12. Edgar Sandoval & Corky Siemaszko, *Inside Adam Lanza's Lair: Newtown Shooter Plotted Own Death, Obsessed with Columbine Shooting, Report Details*, N.Y. DAILY NEWS (Nov. 26, 2013, 4:04 AM), www.nydailynews.com/news/national/newtown-shooter-planned-death-obsessed-columbine-article-1.1528626

13. APPENDIX A

The following is a list of gun owners from within the last two years whose family members, ages 2–9, were tragically killed upon accidentally finding a firearm in the home.

(1) Sierra Pedraja, Jermont Terry, *Child accidentally shoots self after finding gun in mother's purse, police say*, WDIV CLICKONDETROIT (Mar. 25, 2017), <https://www.clickondetroit.com/news/9-year-old-boy-shoots-self-in-hand-after-finding-gun-in-mothers-purse>.

The mother of a 9 year-old-boy from Detroit, Michigan who accidentally shot himself in 2017 after he found his mother's firearm in her purse. The mother was a law-abiding concealed carrier. Detroit Police Chief James Craig said the boy was "possibly looking for candy." Chief Craig, stated he supports law-abiding gun-ownership, but distinguished this owner therefrom, stating: "I do support law-abiding citizens . . . to have CPLs [a concealed carrying license], but I've also indicated in a very strong way the importance of training." Chief Craig elaborated his position, stating that "[y]ou're not a responsible CPL holder if children gain access to your weapon." The "[C]hief considers this more than being neglectful; he calls it criminal." Chief Craig, stated explicitly, "[m]y position is simple: We will vigorously go after the parent or adult that allows a child to gain possession . . . The child is in critical condition. We're prayerful that he's going to pull through, but we are going to make sure the parent is held responsible." *Id.*

(2) Katie Delong, *8-year-old suffers life-threatening injuries, shot in the face by his 13-year-old cousin*, FOX6 NOW, (Jan. 28, 2018, 2:32 PM), fox6now.com/2018/01/28/8-year-old-suffers-life-threatening-injuries-shot-in-the-face-by-his-13-year-old-cousin/; *see also* Bill Novak, *Boy, 8, shot by 13-year-old in Grant County*, WIS. STATE J. (Jan. 26, 2018), https://madison.com/wsj/news/local/crime/boy-shot-by--year-old-in-grant-county/article_806fdbf0-a5b7-5c36-a209-6afafb45d6de.html.

An 8-year-old boy in Livingston, Wisconsin was "accidentally shot in the face" by his 13-year-old cousin. The boy's teenage cousin had learned the combination to the gun-safe. Reportedly, the 13-year-old was babysitting his cousin and believed the gun to be unloaded. *Id.*

(3) Brandon Varner, *7-year-old boy dies after accidentally shooting himself in Jefferson County*, WIAT CBS 42, (Jan. 1, 2018, 7:23 PM), www.wiat.com/news/8-year-old-transported-with-critical-injuries-after-jefferson-county-accidental-shooting/906170065; *see also* *7-year-old accidentally kills himself after finding gun, authorities say*, USA TODAY, (Jan. 2, 2018, 9:53 AM), <https://www.usatoday.com/story/news/nation-now/2018/01/02/7-year-old-accidentally-kills-himself-after-finding-gun-authorities-say/995343001/>.

A 7-year-old, Trenton Levi Thomas, fatally shot himself after finding the gun in a bedroom. After this tragedy, *USA Today* noted that Alabama, the state in which the boy shot himself, "is not included in a list of 27 states and the District of Columbia with laws that punish adults if kids get access to their guns." *Id.*

(4) Deborah Wrigley, *6-year-old accidentally shot to death with siblings inside NW Houston apartment*, ABC13, (Jan. 28, 2018), <https://abc13.com/6-year-old-dies-after-shooting-himself-with-siblings-at-home/2999951/>; Keri Blakinger & Alyson Ward, *Police: 6-year-old dies after accidentally shooting himself*, HOUS. CHRON. (Jan. 30, 2018, 1:53 PM), <https://www.chron.com/news/houston-texas/article/6-year-old-child-accidentally-shoots-himself-in-12531945.php>.

In Houston, Texas, a negligent owner's storage of "an unsecured 9 mm pistol" resulted in the death of her 6-year-old brother who shot himself in the head. Despite being left with "an older sibling in charge," the boy found the sibling's gun. Then, after "[f]amily members heard a sudden loud noise," they "discovered the 6-year-old lying on the floor with a gunshot wound to the

right to bear arms, such as the National Rifle Association (NRA), already advocate for firearm safety among children in campaigns featuring

head.” Houston Police reminded the public “weapons should be locked in safes and out of children’s reach.” Wrigley, *supra* note 13(4). “Maybe you put it in a drawer or somewhere else you don’t think the kids are going to go through.

Unfortunately, they find it and you wind up with situations such as this.” *Id.*

(5) Leroy Polk, *5-year-old Anchorage boy dies from self-inflicted gunshot wound*, KTUU2 (Dec. 5, 2017, 8:42 AM), www.ktuu.com/content/news/5-year-old-child-found-dead-from-self-inflicted-gunshot-wound-police-say-462098633.html

In Anchorage, Alaska, a 5-year-old boy named Christian Johnson fatally shot himself, after he allegedly found his parents’ loaded “gun inside the drawer of a bedroom nightstand.” In the wake of his death, an Anchorage Police Department spokesperson stated it was a “tragic reminder” about gun safety,” and reminded the public “[d]on’t leave guns unattended and easily accessible, use a gun lock or secure guns in a safe.” *Id.*

(6) Ryan Foley et al., *Chronicle of agony: Gun accidents kill at least 1 kid every other day*, USA TODAY (Oct. 14, 2016, 3:03 AM), <https://www.usatoday.com/story/news/2016/10/14/ap-usa-today-gun-accidents-children/91906700/>.

4-year-old, Bryson Mees-Hernandez, shot himself in the face with his grandmother’s .22-caliber Derringer, which she evidently kept unlocked under her bed. The shot from the Derringer left a hole in Bryson’s face, resulting in his death. *Id.*

(7) *Marion County toddler shot in face, remains in critical condition*, THE MARSHALL NEWS MESSENGER (Jul. 12, 2016), <https://www.marshallnewsmessenger.com/news/2016/jul/12/marion-county-toddler-shot-face-remains-critical-c/>; see also Ryan Foley et al., *supra* note 13, at (6).

A 3-year-old shot himself in the face killing himself with his father’s gun in July 2016. Sheriff David McKnight of Marion County, Texas, who investigated the death of the toddler, warned *USA Today* that the “3 to 5-year-old age group . . . are going to be looking at the gun when they shoot it. They point the gun barrel at themselves and put their thumbs on the trigger.” While Sheriff McKnight stated the “primary concern . . . is for the welfare of the child and his family,” he emphasized, “it cannot be stressed enough that firearms must be stored in a manner that eliminates any possible for a child to access them.” *Id.*

(8) Pat Reavy, *2-year-old girl killed in shooting accident in Uintah County*, DESERT NEWS (Dec. 11, 2017, 1:41 PM), <https://www.deseretnews.com/article/900005534/2-year-old-girl-killed-in-shooting-accident-in-uintah-county.html>.

The negligence of a gun owner from Uintah County, Utah resulted in the death of a 2-year-old girl. The owner’s gun had been “brought inside the house following a hunting trip the day before and leaned against a wall.” While the 2-year-old was “cleaning up toys . . . one of the older siblings went to move the gun from inside the house to another location.” The discharge killed the 2-year-old toddler. *Id.*

(9) Foley, *supra* note 13, at (6).

USA Today found that in 2016, “[d]uring the first six months of [2016,] minors died from accidental shootings — at their own hands, or at the hands of other children or adults — at a pace of one every other day.” *USA Today* found other information on accidental shootings as well. These findings included the fact that “[d]eaths and injuries spike for children under 5, with 3-year-olds the most common shooters and victims among young children.” *Id.*

cartoon characters.¹⁴ Nonetheless, these tragic accidents and attacks have left some Americans largely dissatisfied with the status quo and calling for serious change ranging from weapons bans to outright repeal. For that reason, there is a demonstrable need to address all parts of the rhetoric surrounding firearms.

A. Assessing Second Amendment Risks

1. Article V: Repeal of the Second Amendment

Concurrent with America's mass shootings, proposed gun regulations have been continually rejected by some gun advocates as unconstitutional¹⁵ or declared "tyranny."¹⁶ Furthermore, such proposals are politicized by those who oppose regulation.¹⁷ The recurring mass shootings have morphed the calls for reform into calls for repeal, and those calls will only continue with the mass shootings America has seemingly come to expect.¹⁸ The Second Amendment's future will, therefore, be determined by the choices taken now. The question for those who wish to maintain the right to bear arms becomes whether the choice made is action or inaction. This current generation of people may very well be able to tolerate and rationalize firearm statistics. In the wake of Parkland, however, this next generation (a post-Columbine generation) has captivated national attention through its use of school protests and marches across America. That generation will vote for the

14. See, e.g., *Eddie Eagle Gunsafe® Program*, NAT'L RIFLE ASS'N, <https://eddieagle.nra.org/> (last visited Feb. 4, 2018) (showing the NRA's animated cartoon character promoting gun safety to children).

15. See, e.g., Lana Shadwick, *Texas Republican Leaders Condemn Obama's Unconstitutional Executive Gun Control Action*, BREITBART (Jan. 6, 2016), <https://www.breitbart.com/texas/2016/01/06/texas-republican-leaders-condemn-obamas-unconstitutional-executive-gun-control-action/>.

16. Awr Hawkins, *South Carolina Reps. Talk Secession in Face of Federal Gun Laws*, BREITBART (Apr. 9, 2018), www.breitbart.com/big-government/2018/04/09/south-carolina-reps-secession-federal-gun-laws/; see also Awr Hawkins, *Gun Control: A Tyrant's Tool in World History*, BREITBART (Nov. 10, 2014), www.breitbart.com/national-security/2014/11/10/gun-control-a-tyrant-s-tool-in-world-history/.

17. Chris Pandolfo, *Rand Paul: 'Massacre' of the unarmed if not for Capitol Police*, CONSERVATIVE REV. (Jun. 14, 2017), <https://www.conservativereview.com/news/rand-paul-massacre-of-the-unarmed-if-not-for-capitol-police/> ("[w]hile the Left will spend today politicizing the shooting, calls for gun control did not save a single person's life today.").

18. Joe Concha, *NYT conservative Bret Stephens: 'Repeal the Second Amendment'*, THE HILL (Oct. 05, 2017, 10:12 AM), <https://www.thehill.com/homenews/media/354017-nyt-conservative-bret-stephens-repeal-the-second-amendment>.

next 70 years or more.¹⁹ What then will come of the Second Amendment? This next generation may be swayed by the growing calls for repeal as the number of mass shootings in the United States continue to mount. Second Amendment advocacy for the Founders' intent, made in response to repeal arguments,²⁰ will only do so much for the right to bear arms. With regard to the Founders' intent, one must remember that the very Framers who eventually signed the Second Amendment, first ratified Article V (the U.S. Constitution's textual basis for repeal) on September 17, 1787.²¹ The Founders envisioned Article V as a means for subsequent generations to amend their Constitution.²² The Constitution was purposed "to form a more perfect union,"²³ and to that end bestowed upon "the People"²⁴ a means to amend the Constitution.²⁵ The Framers, in fact, exercised that very power and adopted the Second Amendment just four years later on December 15, 1791, when "the People" amended their Constitution to guarantee a right to bear arms.²⁶

Politicians who avidly profess faith in the Constitution understand this and invoke amendment proposals into their political platforms. For instance, Senator Ted Cruz (R-TX) advocates for Article V changes to the Constitution while also maintaining a platform of "upholding" the Constitution.²⁷ Senator Cruz wants a constitutional Amendment to bar the federal government and the courts from striking down state marriage laws.²⁸ However, for Cruz and his constituency, to amend evidently does not violate the pursuit of "upholding" the Constitution—nor should it.

19. Dakin Andone, *What you need to know about the national school walkout*, CNN (Mar. 12, 2018, 11:57 AM), <https://www.cnn.com/2018/03/11/us/national-school-walkout-march-14/index.html>.

20. Justin Haskins, *Justice Stevens's delusional assault on the Second Amendment*, THE HILL (Mar. 29, 2018), <https://www.thehill.com/opinion/civil-rights/380798-justice-stevens-delusional-assault-on-the-second-amendment>.

21. *Nat'l Const. Ctr., Art. V*, INTERACTIVE CONSTITUTION, <https://constitutioncenter.org/interactive-constitution/articles/article-v> (last visited Sept. 28, 2018).

22. See THE FEDERALIST NO. 43, at 284 (James Madison) ("That useful alteration will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided.")

23. U.S. CONST. pmbl.

24. *Id.*

25. U.S. CONST. art. V.

26. U.S. CONST. amend. II; *Amendment II: Right to Bear Arms*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/amendment/amendment-ii> (last visited Oct. 1, 2017).

27. Nolan Feeney, *Ted Cruz: We Must Amend U.S. Constitution to Defend Marriage*, TIME (Oct. 6, 2014), <http://time.com/3476241/ted-cruz-constitutional-amendment-same-sex-marriage-laws/>; see also *Constitution and Bill of Rights*, U.S. SENATOR FOR TEXAS TED CRUZ, <https://www.cruz.senate.gov/?p=issue&id=32> (last visited Feb. 3, 2018).

28. *Id.*; see S. 2024, 113th Cong. § 3 (2014).

Repeal is constitutional. Therefore, the next generation may both conceivably *uphold* the Constitution and *amend* it to repeal the Second Amendment. The Constitution last had an Article V change in recent history on May 7, 1992.²⁹ Therefore, while gun rights may presently *feel* constitutionally secure, the sense of security derived therefrom may be no greater than the safety that is ultimately derived from carrying an unloaded handgun. As the United States approaches the 22nd Century, its tragedies and its political climate put the Second Amendment in jeopardy of Article V.

In the wake of the Vegas Strip mass shooting, the New York Times printed an article titled “Repeal the Second Amendment.”³⁰ In that article, Bret Stephens opined that “the more closely one looks at what passes for ‘common sense’ gun laws, the more feckless they appear.”³¹ Just days earlier, the Vegas Strip shooting became “the deadliest mass shooting in the United States.”³² He rallied in the Times to strive for more than feeble attempts at regulating gun ownership.³³ Rather, Stephens stated, “Americans who claim to be outraged by gun crimes should want to do something more than tinker at the margins” of gun reform and merely restrict the right to bear arms.³⁴ Instead, “they should want to change it fundamentally and permanently.”³⁵ He wrote explicitly, “[t]here is only one way to do this: Repeal the Second Amendment.”³⁶ Stephens reminded readers that repeal “may seem like political Mission Impossible today, but in the era of same-sex marriage it’s worth recalling that most great causes begin as improbable ones.”³⁷ Remember that Stephens’ New York Times piece preceded both the 2018 Parkland shooting, and an op-ed by Justice John Paul Stevens (addressed below) in which he too urged for repeal.³⁸

29. U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

30. Bret Stephens, *Repeal the Second Amendment*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html>.

31. *Id.*

32. Criss, *supra* note 8.

33. Stephens, *supra* note 30.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. John Paul Stevens, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

Following the 2017 Las Vegas Strip shooting, author and filmmaker Michael Moore advocated for a “28th Amendment,” which he proposed would read as follows:

A well regulated State National Guard, being helpful to the safety and security of a State in times of need, along with the strictly regulated right of the people to keep and bear a limited number of non-automatic Arms for sport and hunting, with respect to the primary right of all people to be free from gun violence, this shall not be infringed.³⁹

A Twenty-Eighth Amendment limiting the Second Amendment, or a complete repeal of the Second Amendment, may sound unthinkable to many and therefore dismissible. However, there were surely those who took the ostrich’s heed before the Civil War only to pull their heads from the sand to find a far different United States approaching Reconstruction. Against the background of mass shootings, there is only so long the legislature advocating for an unrestricted right to bear arms can survive. At some point, the calls for prayers without further action will lose their meaning.⁴⁰

2. Weapons’ Bans

The technological advancements of firearms and the illegal actions of some have unfortunately necessitated measures to shield the general public from dangers arising out of contemporary ownership.⁴¹ Second Amendment advocates who wish to maintain the right must examine the options. As such, a recurring alternative to repealing the Second Amendment is enacting an “assault weapons ban.”⁴² Similarly, gun

39. *Michael Moore Calls for Repeal of ‘Ancient & Outdated’ Second Amendment*, FOX NEWS INSIDER (Oct. 4, 2017, 1:46 PM), <http://insider.foxnews.com/2017/10/04/michael-moore-proposes-repeal-second-amendment-oppose-gun-violence>; Michael Moore, FACEBOOK (Oct. 4, 2017, 7:00 AM), <https://www.facebook.com/mmflint/posts/10154778028796857>.

40. Mallory Shelbourne, *Ryan: Praying the right thing to do after mass shootings because it ‘works’*, THE HILL (Nov. 7, 2017), thehill.com/homenews/house/359079-paul-ryan-praying-is-the-right-thing-to-do-after-mass-shootings-because-it.

41. Jeff Landa & Nathan Rott, *After Mass Shootings, Action On Gun Legislation Soars At State Level*, NPR (July 12, 2016), <https://www.npr.org/2016/07/12/485726439/mass-shootings-influence-spike-in-gun-related-laws-at-state-level>.

42. Larry Keane, *Sen. Kamala Harris’ Call For ‘Assault Weapons Ban’ Doesn’t Square With the Facts*, NAT’L SHOOTING SPORTS FOUND. (Aug. 16, 2017), <https://www.nssf.org/senators-call-for-assault-weapons-ban-doesnt-square-with-the-facts/>; Kamala Harris (@KamalaHarris), TWITTER (Aug. 10, 2017, 4:18 PM),

reformers have advocated for “expanding background checks to cover all gun sales” to “help keep guns out of the hands of criminals, felons, [and] domestic abusers.”⁴³ Those reforms can help to curb recurrent mass shootings, but they are, at best, merely a fragment of a productive solution. After the Vegas mass shootings, Fox News’ Tucker Carlson was skeptical of the purportedly sweeping answer of those legislative solutions.⁴⁴ Indeed, in and of themselves, those solutions are ineffective. Rather, Congress must craft legislation that is deferential to responsible owners, yet hard on irresponsible owners. While constitutional legislation necessitates a regulation of the entire class of firearms owners, the responsible and irresponsible owners must be distinguished. Irresponsible owners of firearms are a risk to the public. Responsible and safe owners should not be punished for the ineptitude of those who prove themselves unfit to own a firearm. Legislation must be structured to effectively prevent tragedies of accident and aggression. It must also succeed in regulating an otherwise irresponsible owner into responsibility. If, however, factions of fervent advocates refuse even the most balanced reform, a weapons ban or constitutional repeal is inevitable.

3. *The Status Quo*

Just as the Founders had a duty to pronounce and extend the rights of the People, fervent advocates of the Second Amendment have a duty to ensure that right is continued for generations to come. Therefore, within the confines of *what is constitutional*, those advocates must consider necessary precautions to ward off the possibility of future repeal. There is a constitutional means available which can appease both those who advocate for gun reform and those who do not—a solution that both maintains the options of firearm ownership and protects the Second Amendment from the risk of repeal. It is AMFIT. If those advocating for the Second Amendment hold out for too long, it may be too late for the right to bear arms. Therefore, while certain aspects within AMFIT may have been previously rejected by gun rights advocates, an adoption of

<https://twitter.com/KamalaHarris/status/895786339945385984> (“It’s long past time we renew the assault weapons ban in this country. It is in the best interest of keeping all of us safe.”).

43. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <https://www.bradycampaign.org/our-work/changing-laws> (last visited Jan. 3, 2018).

44. ‘*What Would’ve Prevented That?*’: Tucker Challenges Gun Control Advocate on Las Vegas Massacre, FOX NEWS INSIDER (Oct. 5, 2017, 9:18 PM), insider.foxnews.com/2017/10/05/tucker-carlson-debates-brady-campaign-member-gun-control-las-vegas-massacre.

legislation such as AMFIT can effectively ward off the calls for massive change such as an assault weapons ban or Second Amendment repeal. However, to refuse any reform whatsoever, even that of an even-handed nature, could eventually lead to more serious problems for the Second Amendment. And so, a Twenty-Eighth Amendment, ratified by a later generation under the terms of Article V, may constitutionally force the gun owners to “[t]ake that thine is, and go thy way.”⁴⁵ Rather, for those concerned, the time to protect the right to bear arms is now.

B. The Solution: AMFIT

An Article V amendment is a constitutional means to effectively ban private ownership of firearms. However, a constitutional means to prevent such repeal and maintain that private ownership is the purpose of this article. As such, it presents a viable legislative proposal entitled, the “Affordable Mandatory Firearms Insurance and Tax” or “AMFIT.” In its simplest sense, AMFIT is a federally administered annual tax functioning as both an insurance policy analogous to car insurance and a tax plan with deductibles acquirable via purchased safety devices.

AMFIT is not the first “gun insurance” proposal. There exists scholarship on this subject.⁴⁶ This is also not the first proposal analogizing car insurance and firearms. Rather, it was proposed by Republican-appointed Chief Justice of the Supreme Court Warren E. Burger (under President Richard Nixon) long before former Justice John Paul Stevens (appointed by President Gerald Ford) published his call for Second Amendment repeal.⁴⁷ In 1991, former Chief Justice Burger advocated for gun regulation analogous to the regulation of automobiles.⁴⁸ Chief Justice Burger rallied, “‘A *well-regulated militia*.’ If the militia—which was going to be the state army—was going to be well-regulated: Why shouldn’t 16, and 17, and 18, or any other age persons be regulated in the use of arms the way an automobile is regulated?”⁴⁹ Chief Justice Burger envisioned a constitutional

45. *Matthew* 20:1-16 (King James) (explaining the Parable of the Workers in the Vineyard).

46. *See, e.g.*, Chris Molina, Note, *A Private Sector Solution to A Public Problem*, 41 HASTINGS CONST. L.Q. 421 (2014); Rob Hillenbrand, Note, *Heller on the Threshold: Crafting A Gun Insurance Mandate*, 95 B.U. L. REV. 1451 (2015).

47. Stevens, *supra* note 38.

48. *May 21, 1969—Warren G. Burger Nominated as Chief Justice of the U.S. Supreme Court*, WORDPRESS (May 21, 2016), <https://legallegacy.wordpress.com/2016/05/21/may-21-1969-warren-e-burger-nominated-as-chief-justice-of-the-u-s-supreme-court/>.

49. Stahelli, *supra* note 6; *see also Warren Burger Biography*, A&E TELEVISION NETWORKS (April 2, 2014), <https://www.biography.com/people/warren-burger-9231479>; *Recipients of the Presidential Medal of Freedom, 1981-1989*, REAGAN LIBR.,

environment in which existing common-sense auto-regulation could be analogously applied to the Second Amendment right without disturbing its guarantees.⁵⁰ Theoretically, under this regulation, a higher-capacity firearm in a household with children could be assessed with risk analogously to that of insuring a 16-year-old driver on a Ferrari. Therefore, AMFIT combines elements of insurance and tax for the general welfare's safety and the Second Amendment's preservation: (1) AMFIT will be a mandatory insurance policy to regulate gun owners via a federal tax on citizens of the United States; (2) AMFIT presents conceptual legislative contours with supporting analysis referencing both the U.S. Constitution itself and the U.S. Supreme Court's governing precedent; and (3) Congress will administer AMFIT pursuant to its constitutionally granted powers of taxation and done so consistent with U.S. Supreme Court precedent.

This article establishes how AMFIT is a constitutional solution to the ongoing issues surrounding firearms in the United States and a solution which can satisfy opponents of gun control. America's mass shootings, along with its recurrent tragic headlines of young children accidentally killing themselves with guns, have necessitated regulatory legislation with concessions and satisfactory features for both sides of the political divide. America is moving toward a change of its right to bear arms in order to promote the general welfare; however, that right can and should avoid repeal.

The increasing debate over firearms continues alongside increasing numbers of mass shootings and at a time in which "Congress is now more polarized than at any time in modern history."⁵¹ When it comes to changing the landscape of private firearm ownership, neither side will let

<https://reaganlibrary.gov/sreference/presidential-medal-of-freedom> (last visited Sept. 28, 2017). Note that Chief Justice Warren E. Burger, appointed as the successor of Chief Justice Earl J. Warren, had been appointed to the U.S. Court of Appeals in 1955 by President Eisenhower and in 1969 to the U.S. Supreme Court by President Nixon. See *Warren Burger Biography*. Chief Justice Burger, after being awarded the Presidential Medal of Freedom from President Ronald Reagan on October 17, 1988, stated in a December 16, 1991 interview on PBS News Hour, "If I were writing the bill of rights now, there wouldn't be any such thing as the Second Amendment." Gregory Clay, Opinion, *What does the Second Amendment's 'well regulated' really mean?*, SUN SENTINEL (Apr. 12, 2018, 11:00 AM), <http://www.sun-sentinel.com/opinion/fl-op-second-amendment-well-regulated-militia-meaning-20180412-story.html>. Chief Justice Burger continued his criticism of the "People's rights to bear arms" stating, "[t]his has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public, by special interest groups, that I have ever seen in my lifetime." *Id.*

50. See Stahelli, *supra* note 6.

51. Rick Adams, *Redrawing the country: How will SCOTUS rule on gerrymandering?*, A.B.A.: BEFORE THE BAR BLOG (Sept. 20, 2017), <https://abaforlawstudents.com/2017/09/20/scotus-to-weigh-in-on-gerrymandering/>.

the other 'win' the issue. Just the same, neither side will allow itself to 'lose' the issue. For those favoring gun control, AMFIT will increase responsibility among those who are presently unequipped for safe ownership and who, because of their shortfalls, increase the risk that avoidable acts of accident or aggression will occur. For those opposed to gun control, AMFIT will maintain the right to bear arms and expand aspects of private ownership.

It is paramount that AMFIT will come as a solution to many and come at a time in which advocates for change discuss repeal after America's recurrent mass shootings.⁵² As the National Sports Shooting Foundation's senior vice-president Larry Keane stated following the shooting at Sandy Hook: "Reasonable minds can disagree on how to make things safer, but we don't believe taking away constitutional rights will achieve that goal."⁵³ Reform is the better alternative to repeal. It may surprise some readers that the NRA has historically supported gun-reform. For instance, "[n]ot only did the NRA support gun control for much of the 20th century, its leadership in fact lobbied for and co-authored gun control legislation."⁵⁴ The NRA "assisted Roosevelt in drafting the 1934 National Firearms Act and the 1938 Gun Control Act," as well as later contributing to The Gun Control Act of 1968, which updated the laws to include: a minimum purchasing age, serial number requirements, identification requirements for certain ammunition, extension of the gun ban to include the mentally-ill and drug addicted, and limitations on gun transportation across state lines to only that of collectors and federally licensed dealers.⁵⁵

In 1968, however, following the assassinations of President John F. Kennedy, Martin Luther King Jr., and Robert Kennedy, the NRA rejected "a national registry of all guns and a license for all gun carriers."⁵⁶ Much has changed, however, in the 50 years since. As such, AMFIT will promote safety and welfare, while maintaining those tenants of The Gun Control Act of 1968, which states in relevant part:

52. Stephens, *supra* note 30; see also Michael Waldman, *Advocating for repeal of the 2nd Amendment is a gift the NRA doesn't deserve*, L.A. TIMES (Mar. 30, 2018), www.latimes.com/opinion/op-ed/la-oe-waldman-2nd-amendment-repeal-20180330-story.html.

53. Brett LoGiurato, *The Second-Most Powerful Gun Lobby Is Located In Newtown, And It Has Its Own Ideas About Gun Control*, BUS. INSIDER (Apr. 2, 2013), <https://www.businessinsider.com/gun-control-national-sports-shooting-foundation-nra-background-checks-2013-4>.

54. Arica L. Coleman, *When the NRA Supported Gun Control*, TIME (Jul. 29, 2016), <https://www.time.com/4431356/nra-gun-control-history>.

55. *Id.*

56. *Id.*

It is not the purpose of the act to place any undue or unnecessary restrictions or burdens on responsible law-abiding citizens with respect to the acquisition, possession, transportation, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity. The act is not intended to discourage or eliminate the private ownership of such firearms by law-abiding citizens for lawful purposes, or to provide for the imposition, by regulations, of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of the act.⁵⁷

As such, without disrupting existing law or options of ownership, AMFIT's proposed concessions and common-sense reform will address both sides of this polarized issue. It is constructed in a manner that addresses the modern phenomenon of mass shootings in an effort to quell the call for repeal. Additionally, on an economic level, AMFIT will not *shrink* the firearms-industry. Rather, it will *expand* the firearms-safety industry. AMFIT will allow firearms manufacturers who may currently be in financial distress, such as Remington, to move into the manufacture of vital safety devices purchased for a tax-deduction under AMFIT.⁵⁸

AMFIT can usher all gun ownership toward qualities of safety and can reduce black market demand. However, to regulate those who will not comply, penalties must be increased at the state and federal level. Lawbreakers must be more severely punished than currently so: from common criminals utilizing guns in the course of a crime, to "straw-purchasers" who break the law by "legally" purchasing firearms for individuals legally unable to purchase. AMFIT can address and prevent

57. See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-14 (1968).

58. Molly Smith, *Cerberus's Remington Debt Fizzles as Trump Cools Firearms Fervor*, BLOOMBERG (Jul. 17, 2017, 6:00 AM), https://www.bloomberg.com/news/articles/2017-07-17/cerberus-s-remington-debt-fizzles-as-trump-cools-firearms-fervor?cmpid=socialflow-facebook-business&utm_content=business&utm_campaign=socialflow-organic&utm_source=facebook&utm_medium=social; see also Luis Sanchez, *Bank of America to stop lending to military-style weapons makers*, THE HILL (Apr. 10, 2018, 3:37 PM), <https://www.thehill.com/policy/finance/banking-financial-institutions/382521-bank-of-america-will-stop-lending-to-assault>. Note that Remington, America's oldest weapons manufacturer, suffered "an investor revolt" after reports that a Remington firearm had been used to carry out the Sandy Hook Elementary School shooting. *Gunmaker Remington files for bankruptcy protection*, CHI. TRIB. (Mar. 26, 2018), <http://www.chicagotribune.com/business/ct-biz-remington-bankruptcy-20180326-story.html>. Remington also suffered a decline upon Donald Trump's election due to the removal of the perceived fear of a Hillary Clinton firearms crackdown. *Id.* Note also that America's financial-sector distanced itself from firearms manufacturers. *Id.*

disasters which spill firearms into the black market from again occurring, disasters like that of the Obama administration's bungled "Operation Fast and Furious"⁵⁹ and repeated logistical failures with firearm transportation robberies.⁶⁰ AMFIT presents an opportunity to crack down on these related firearms issues which reflect negatively upon responsible, law-abiding owners and their right to bear arms.

The goal of AMFIT is three-fold: First, it will be an affordable *and constitutional* means of promoting the general welfare of the United States while also encouraging and enforcing responsible firearm ownership, safe-use, and carry. Second, AMFIT is intended to provide a means to protect the Second Amendment from the increasingly polarized political climate.⁶¹ Third, AMFIT will function nationally as utilitarian recourse for gun victims of both accident and aggression, and will do so by shifting risk and liability from gun importers, manufacturers, and dealers, and properly onto the individual irresponsible gun owners. Nonetheless, those importers, manufacturers, and dealers are already subject to a Congressional "special (occupational) tax" under the 1968 Federal Gun Control Act.⁶² However, that tax engages only one side of the gun-sales counter. AMFIT will engage the other side via its insurance provisions. Generally, the utility of insurance is that it spreads risk. On a specific level, AMFIT addresses multiple issues, but does so while maintaining the existing ability to own the variety of firearms presently available. For an American culture, whose mass shootings have

59. *Operation Fast and Furious Fast Facts*, CNN (Sept. 18, 2017, 2:44 PM), www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/index.html; see also Todd Schwarzschild & Drew Griffin, *ATF loses track of 1,400 guns in criticized probe*, CNN (Jul. 12, 2011, 9:14 PM), <http://www.cnn.com/2011/POLITICS/07/12/atf.guns/index.html>.

60. See, e.g., Jason Meisner, *Felon behind theft of 100 guns from cargo train given 10 years in prison*, CHI. TRIB. (Oct. 3, 2017, 5:50 PM), www.chicagotribune.com/news/local/breaking/ct-met-gun-theft-cargo-train-20171003-story.html.

61. Kristen Parker & Zachary Neal, *Democrat/Republican Divide is Worst it's Ever Been*, MICH. ST. U. TODAY (Oct. 1, 2018), <https://msutoday.msu.edu/news/2018/democrat-republican-divide-is-worst-its-ever-been/>; Laura Paisley, *Political polarization at its worst since the Civil War*, U. OF S. CAL. NEWS (Nov. 8, 2016), <https://news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/>.

President Donald J. Trump has referred to the "assault on your Second Amendment freedoms" of the former administration. *Trump at NRA convention: 'Eight-year assault' on gun rights is over*, FOX NEWS (Apr. 28, 2017), <http://www.foxnews.com/politics/2017/04/28/trump-at-nra-convention-eight-year-assault-on-gun-rights-is-over.html> (quoting President Trump addressing a convention of the National Rifle Association promising "to 'never, ever infringe' on Second Amendment rights and declaring his predecessor's alleged 'assault' on those freedoms is over.>").

62. 26 U.S.C.A. § 5801 (West 1968).

continually increased in both frequency and size, the risks of gun ownership, the threat to the Second Amendment, and the ongoing risks to the American people have all become too great for inaction. Purposeful legislation can effectively spread that risk and reduce the impact if and when mass shootings and accidental child deaths involving firearms occur. For advocates of gun-rights, inaction could lead to America forfeiting its right to bear arms.

AMFIT is a novel solution because it will be an exercise of Congress' constitutional powers under Article I, Section 8, which provide in part that "Congress shall have Power To lay and collect Taxes, . . . and provide for the common Defence and general Welfare of the United States."⁶³ The words of Founding Father and Anti-Federalist Patrick Henry illustrate the relevant convergence of tax and arms: "Congress, by the power of taxation, by that of raising an army, and by their control over the militia, have the sword in one hand, and the purse in the other. Shall we be safe without either?"⁶⁴ Indeed, Congress may regulate gun owners (its modern American militia, if you will) across the 50 states. And so, expanding upon the words of Mr. Henry, the people of this generation may presently shield the citizen's sword (i.e. the firearm) from a future generation's repeal with the sheath of their purse via AMFIT. The preservation of the Second Amendment for the next generations of American gun owners is accomplishable via a federally administered firearms insurance tax, a constitutional solution to maintaining the right to bear arms. There is American precedent for such a mandatory tax plan, as a similar scheme has been upheld twice by the U.S. Supreme Court: the Affordable Care Act (ACA).⁶⁵ As such, AMFIT is in keeping with the constitutional jurisprudence of Chief Justice John Roberts and the current U.S. Supreme Court, as mandatory insurance policies may be considered a tax and therefore within the power of Congress as expressly conferred by the Constitution.⁶⁶

1. How Will AMFIT Function?

AMFIT will function analogously to car insurance. Every gun under AMFIT *must* be reported and insured. However, the amount of insurance needed under AMFIT will vary as to characteristics of the firearm and

63. U.S. CONST. art. I, § 8.

64. Henry, *supra* note 4.

65. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) ("The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects.").

66. *Id.* at 563; *see* U.S. CONST. art. I, § 8.

the household in which it is owned. The public will find guidelines for AMFIT insurance promulgated for application in a *private* and *competitive* market of insurance providers with state-to-state competition. From there, an individual will have a tax assessed on each gun he or she owns. That tax, however, will be lowered by an owner's purchases and certifications (i.e. marksmanship), deductibles which will decrease the individual's assessed ownership-risk. With regard to AMFIT's tax-deductibles, the tax may be deducted by the acquisition of a private AMFIT insurance policy. The remaining insurance premium cost may be further lowered by both (1) proof of purchase (i.e., receipts) for safety devices, such as a gun-safe, and (2) an affidavit of implemented use. The insured taxpayer will sign an agreement, under oath, to implement the safety mechanisms purchased to reduce the tax.

Not all individuals will need the same amount or type of safety devices to lower their premium. For instance, an individual who lives alone and owns a gun safe will be low-risk compared to a household with four children and no gun safe. For that household of four to lower their premium will require acquisition of tax-deductible safety devices, and the more devices purchased, the lower the premium will go. Therefore, the AMFIT policy costs will decrease through the purchase of safety devices for deductions balanced against the individually assessed risk categories. Policy costs are subject to promulgated criteria measuring risk. These assessments will include: type of firearm in the household, number of firearms in the household, safety mechanisms owned and used, number of children in the household, household risks, such as family members' past alcohol or substance abuse issues, mental health issues, domestic abuse issues, and/or criminal records.⁶⁷ The private firearms insurance provider will assess the quality of risk(s) for the firearm(s) as promulgated by the AMFIT authorization statute.

A firearm risk-quality will consider the capacity and character of the firearm as well as the environment in which it is kept, thus collectively influencing the cost of the owner's insurance premium. For example, if the firearm mandated to be insured is a non-functioning antique, as required by statute, the cost for that antique will be \$0. Conversely, if the firearm is the type typically referred to as an "assault weapon," AMFIT will ensure the ownership of such a weapon while assessing its higher-risk of ownership.⁶⁸ An owner under AMFIT can privately own virtually

67. HIPAA (Health Insurance Portability and Accountability Act of 1996) would regulate the medical information involved in AMFIT, and therefore requires the insured's approval and consent.

68. Jesse Berney, *Clinton and Sanders Should Unite to Ban Assault Weapons*, ROLLING STONE (Jun. 13, 2016, 1:40 PM), <http://www.rollingstone.com/politics/news>

any firearm; however, the permitted highest-risk weapons bear higher insurance premiums and require comparable safety protocols for tax-mitigation.⁶⁹ To demonstrate AMFIT's varying application for the firearms owned, an "assault weapon," for example, would carry with its ownership a higher insurance premium than would a hunting rifle owned in a state that has large areas for hunting to control animal overpopulation.

The private sector will administer AMFIT insurance policies in the interests of a competitive marketplace. A government insurance provider will *not* administer them. However, as AMFIT is a tax, the Internal Revenue Service (IRS) will administer its regulation and enforcement. The IRS will, therefore, pursue and prosecute individuals who attempt to circumvent the tax fraudulently. The private sector of policy providers will conduct oversight (i.e., background checks and household firearm inquiries) beyond the existing framework that currently attaches to firearms purchases. Some may advocate that the oversight of the private sector is superior to the government's in efficiency and productivity, while others may claim it is inferior.⁷⁰ In either case, it is irrelevant as to which is better. Under AMFIT, the private sector *and* the government will work together. Like that of local legislatures, the private sector may, however, be better able to address the needs of the respective constituencies. Providers can give individual attention through privately administered smaller markets state-to-state rather than that of an overwhelming (and overwhelmed) federal government. Additionally, a private sector can maintain objectivity (freer from political whim and pressure) for individual needs and considerations with each of its policyholders. Analogous, too, is Gregory S. Davidson's "citizen-

/clinton-and-sanders-should-unite-to-ban-assault-weapons-20160613 (arguing for an assault weapons ban and noting their dangers).

69. Tod Burgeen: *Gun Review: LMT's M203 2003 Grenade Launcher*, TACTICAL-LIFE (July 21, 2014), <http://www.tactical-life.com/gear/lewis-machine-tool-m203-2003-grenade-launcher/#lmt-m203-grenade-launcher-ammo-display> (detailing the quality of the M203 and the ability for a "civilian" citizen to privately own the grenade launcher). For the purposes of this proposal, only mainstream firearms are under consideration. A firearm such as an M203, a "grenade launcher" presently capable of private civilian ownership, is the type presumed to be outside the scope of "firearms" as laid forth under this proposal. Therefore, weapons outside of a truly conventional definition of firearms are not included in this analysis.

70. See, e.g., Dean Baker, *Government Is More Efficient Than The Private Sector In The Biggest Social Services, Contrary To Right-Wing Claims*, ALTERNET (Nov. 25, 2014, 12:45 PM), <https://www.alternet.org/economy/government-more-efficient-private-sector-biggest-social-services-contrary-right-wing-claims>; see also Andrew Simms & Stephen Reid, 'The private sector is superior.' *Time to move on from this old dogma*, THE GUARDIAN (April 25, 2013, 6:22 AM), <https://www.theguardian.com/commentisfree/2013/apr/25/private-sector-superiority-mythbuster>.

legislator” concept of the “citizen first, elected official second” approach to government.⁷¹ The AMFIT policy provider is like the citizen-legislator, who “is accessible to the constituency,” as well as “responsive to the needs of the community from which he is elected . . . and is capable of being more in tune with needs and desires of his constituency.”⁷² Under AMFIT, the policy providers are capable of giving individualized attention to the gun owner. The providers may, without the bureaucracy of a federal agency, assess the individual policyholder’s needs and risks. Moreover, such an individual-centered policy, in terms of representation, is superior to the broad brush of a federally administered program. On an immediate level, the policy providers will double-check the work of the government’s existing background checks. Such additional attention will reduce the risks of poor oversight and error. Furthermore, the private sector will allow for more options and representation under AMFIT.

Concerns may linger, however, that AMFIT may appear not as a tax but as a “penalty.”⁷³ Similarly, some Americans hold disdain over any taxation whatsoever.⁷⁴ However, there is a characteristic distinguishable from the ACA’s mandatory tax to counter such concerns. Under AMFIT, all tax premiums will be reduceable with the purchase and implementation of physical safety mechanisms. The AMFIT deductions will function analogously to income tax deductions. Optional means for deduction will include, but will not be limited to that of gun locks, gun safes, marksmanship classes, gun safety classes, state-issued concealed

71. Gregory S. Davidson, *Rejuvenating the Role of State Political and Governmental Institutions in the American Federal System*, in MAKING GOVERNMENT WORK: A CONSERVATIVE AGENDA FOR THE STATES 471, 485 (Tex Lezar ed., 1994).

72. *Id.*

73. Brooke Singman, *Trump touts elimination of 'cruel' ObamaCare tax in State of the Union*, FOX NEWS (Jan. 31, 2018), www.foxnews.com/politics/2018/01/30/trump-touts-elimination-cruel-obamacare-tax-in-state-union.html.

74. *Magna Carta: Muse and Mentor*, LIBR. OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/no-taxation-without-representation.html> (last visited Feb. 7, 2018). Note that some critics, with regard to this proposition of taxation, are likely quick to claim that the Founders rejected a government of taxation only to establish (shortly thereafter) a Constitution granting to Congress that very power. It was, however, taxation *without representation* from which the Founders fled. *Id.* The exception was not simply with the means of taxation itself. The colonies while subjected to taxation, claimed Britain’s “tax was illegal on the grounds that they had no representation in Parliament.” *Id.* By contrast from that which the Founders fled, legislation such as AMFIT, or moreover any modern taxation, bears a representative intent flowing from the established Congress. Regardless of the support that legislation may earn from the people, it is nonetheless representative of those people, as it is enacted by senators and congressmen who those people elected.

carry permits, hunting permits, digital safety devices that determine identity, and other technology to guarantee safe, private ownership. These purchases made by the owner, lower the insurance premium upon both proof of purchase and written statement-of-use issued by the owner to the insurer (via affidavit).

The following illustrates how AMFIT would work for a gun owner: an owner of two revolvers in a household with two children will be issued a tax for each revolver based upon the calculated risk that the firearms impose as well as the risk imposed by the presence of children in the home. From there, the provider will issue an annual tax premium amount for those revolvers. For a taxpaying gun owner, however, that tax premium can *and should be* successfully mitigated by the purchase of a combination of safety mechanisms, and thereby lowered to a nominal annual amount. The purpose of the tax is not to price out ownership. Rather, it is to encourage and ensure safer, affordable ownership. For instance, under AMFIT, an individual who owns three guns may offset the calculated tax premium by purchasing three gun locks, a gun safe capable of holding those firearms, and by completing marksmanship certification or safety courses. That individual can thereby mitigate the tax premium to a near non-existent amount. Furthermore, under AMFIT, there would be no proscribed limit to the number of functional combinations that a gun owner may choose in order to lower the premium cost.⁷⁵ Additionally, states may expand the qualifying tax-deductions. As long as the safety mechanisms (and classes or certifications) can be utilized in combination, they can combine to mitigate the tax. Therefore, the incentive will exist to combine tax deductions by purchasing safety devices to achieve a near non-existent insurance premium. As such, a one-time purchase of a gun lock can capably carry its utility over subsequent years and be physically retained for yearly tax deductions by an owner's annual declaration of safety device maintenance and use via affidavit. Under AMFIT, if an owner can own a standard firearm, the owner may own it *affordably* for a nominal to non-existent taxable amount via tax-deductible purchases.

In addition to promoting the general welfare and protecting the Second Amendment, AMFIT will also establish greater uniformity of ownership rights across the United States. This uniformity will provide room to garner national support. For instance, the implications of a federally administered tax on firearms also allow an opportunity to establish federal mandates that favor the interests of gun owners.

75. Note, however, that two locks for one gun would be an illogical safety combination, which AMFIT would account for. Safety mechanisms must differ and function in combination with one another.

Concessions to that group can help to win over its political support. One example of an appealing concession to gun owners is granting interstate reciprocity with respect to a gun owner's ability to carry a concealed weapon across the United States. An individual who wishes to concealed-carry will merely need to comport with any additional state requirements; however, the ability to carry will nonetheless be available. Another concession that can garner the support of conservatives is the imposition of strict-liability of mandatory deportation for undocumented residents found to be in possession of an illegal firearm, without regard to intent. Congressional change to gun laws will allow for such related changes to other laws as well.

More importantly, however, AMFIT will provide uniform recourse for victims of gun violence or accidents, while also providing uniform protections for the gun owner and removing the pressures upon firearms importers, manufacturers, and dealers. AMFIT will provide financial protection to both sides of the gun sales counter. AMFIT can alleviate concern for gun owners over the potential tort liability of defending oneself. For that reason, many American gun enthusiasts and concealed-carry certification instructors already advise acquisition of self-defense insurance.⁷⁶ Furthermore, insurance providers, such as the NRA and the United States Concealed Carry Association, actively offer private gun insurance policies for limiting liability.⁷⁷

AMFIT will allow for risk spreading among those who do not own guns, as they may acquire insurance policies for financial protection if they so desire. That option, under AMFIT, can ensure recourse for incidents arising from the uninsured firearms population. There are some who believe there is no such thing as "gun accidents;" rather, it is held that "there are many people killed by gun *negligence* every year."⁷⁸ As such, that population of negligent gun owners has proven itself unfit for firearm ownership. Every year, American gun owners leave their firearms unsecured and accessible to the owner's children or grandchildren. This unfit ownership, arising typically from firearms

76. See, e.g., Dave Workman, *4 Self-Defense Insurance Options To Protect Your Six*, GUN DIG. (Aug. 10, 2017), <https://gundigest.com/handguns/concealed-carry/4-self-defense-insurance-options>.

77. See NRA, CARRY GUARD, <https://www.nracarryguard.com> (Last visited Feb. 4, 2018); see also *Choose The Protection That's Right For You*, USCCA, <https://www.usconcealedcarry.com/membership/> (last visited Feb. 4, 2018).

78. Bob Owens, *Secure your guns*, BEARING ARMS (Jan. 20, 2014, 12:32 PM), <https://bearingarms.com/bob-o/2014/01/20/secure-your-guns/>; see also CandaceTX, *Dear Gun Owner, I DO NOT WANT YOUR GUN.*, DAILY KOS (Oct. 1, 2015, 10:07 PM), <https://www.dailykos.com/stories/2015/10/1/1426910/-Dear-Gun-owner-I-DO-NOT-WANT-YOUR-GUN> (emphasis added).

legally owned, results in the deaths of children and is but one more issue surrounding the Second Amendment.⁷⁹ Tax-incentivized safety mechanisms can help to prevent incidents like a New Year's Eve tragedy in 2017 when a 16-year-old killed his family and a family friend with his parent's semi-automatic rifle.⁸⁰ That rifle was legally owned and registered to the family's New Jersey home.⁸¹ AMFIT's tax-incentivized precautions can also help to prevent tragedies like Sandy Hook, as its policy providers will examine the environment in which firearms will be kept. Stories differ exactly as to *how* the Sandy Hook shooter Adam Lanza acquired his mother's firearms. For example, there are accounts stating that the mother's gun safe may have been in Adam's bedroom,⁸² or that Adam stole her guns,⁸³ or that Adam did not break into the safe,⁸⁴ or there was perhaps actually no gun safe in the Lanza house.⁸⁵ In any case, there are two certainties. First, Lanza was not legally old enough to

79. See, e.g., Foley, *supra* note 13 at (6) (noting that southern states "including Alabama, Louisiana, Mississippi, Tennessee, and Georgia, are among those with the highest per capita rates of accidental shooting involving minors.").

80. Brian Thompson et al., *16-Year-Old Boy Killed Parents, Sister, Friend, in New Year's Eve Shooting: Prosecutor*, NBC N.Y. (Jan. 1, 2018, 2:12 AM), <https://www.nbcnewyork.com/news/local/Shooting-New-Years-Long-Branch-Shooting-Assault-Weapon-467494383.html>.

81. *Id.*

82. Save Altimari, *Lanza Had Arsenal Of Guns, Ammunition, Swords, Knives*, THE HARTFORD COURANT (Mar. 29, 2013), articles.courant.com/2013-03-29/news/hc-newtown-search-warrants-20130327-1_1_adam-landa-nancy-landa-gun-range.

83. Awr Hawkins, *Sandy Hook Report: Adam Lanza Broke Laws to Acquire Guns, Broke More Laws Using Them*, BREITBART (Nov. 25, 2013), www.breitbart.com/big-government/2013/11/25/sandy-hook-report-adam-landa-broke-laws-to-acquire-guns-broke-more-laws-using-them/.

84. *Newtown gunman spent more than 150 rounds, killed victims within 5 minutes*, FOX NEWS (Mar. 28, 2013), <https://www.foxnews.com/us/2013/03/28/warrants-to-be-released-in-newtown-investigation.html>.

85. OFFICE OF THE STATE'S ATTORNEY JUDICIAL DISTRICT OF DANBURY STEPHEN J. SEDENSKY III, STATE'S ATTORNEY, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012* 24–27 (Nov. 25, 2013), http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf. Note that the detailed 44-page State's Attorney's report makes no mention of a gun safe, in spite of the Daily News article crediting the office with information and a photo of a safe. Sandoval & Siemaszka, *supra* note 12. Nonetheless, the warrant cites the presence of a "brown gun safe" within the Return for and Inventory Property Seized on Search and Seizure Warrant. Return for and Inventory: Property Seized on Search and Seizure Warrant, Item #13 (Dec. 14, 2012), <http://ftpcontent.worldnow.com/wfsb/warrant1.pdf>. In fairness, however, that report was criticized subsequent to its release. Among the criticisms: "The report doesn't offer an analysis . . . It doesn't offer anything new . . . It was a mistake to release . . . If people weren't affected by it, they may want to read it. But for the families who are affected, it opens wounds all over again." Sandoval & Siemaszka, *supra* note 12.

own firearms and nonetheless gained illegal access to his mother's firearms.⁸⁶ Second, Nancy Lanza's firearms were all purchased legally.⁸⁷

Regardless of how Lanza may have overcome his mother's safe, a gun safe is only *one* part of safer ownership. AMFIT's multiple preventative measures can thwart unfit possession of a firearm. Providers could outright deem some households unfit without the purchase of precautionary safety measures. For instance, insurance policy questionnaires will require reporting of the household size and character, and can inquire whether there is a history of mental illness. It can assess an environment to require that the purchaser take more vigorous steps than merely keeping a safe. As an example, the policy provider can assess it to be a risk if a member of the household is under 21 years of age. Combinations of safety devices are endless, and their utility varies. Consequently, the gun owner may effectively mitigate the premium's risk-costs with a gun safe and locks, or may even do so by a one-time installation of a device such as a biometric pistol grip unique to the owner's handprint.⁸⁸ That biometric technology is already conventionally used with gun-safes that are unlockable via fingerprint.⁸⁹ The viability of application here is that a biometric reader would *never be mandated* by law. Only AMFIT's tax is mandated. The mitigating safety devices are optional. Instead, and only in households of risk, such safety devices are heavily incentivized as a means to mitigate the tax premium. Furthermore, AMFIT is structured to keep pace with the ongoing

86. Hawkins, *supra* note 83.

87. OFFICE OF THE STATE'S ATTORNEY JUDICIAL DISTRICT OF DANBURY STEPHEN J. SEDENSKY III, STATE'S ATTORNEY, *supra* note 85, at 2.

88. See Issie Lapowsky, *A Biometric Gun Lock That Even the NRA Might Like*, WIRED (May. 2, 2014, 6:30 AM), <https://www.wired.com/2014/05/sentinel-gun-lock/>. For readers who may be unfamiliar with this technology, but have a recent knowledge of pop culture: the 2012 James Bond 007 film "Skyfall" serves as a paramount illustration. SKYFALL (Eon Productions 2012). The film showed viable firearm-safety technology in the form of an electronic palm reader. *Id.* The palm reading biometric pistol-grip functions in the film insofar as his Walther PPK was fit with a pistol-grip that read his palm print. *Id.* It works in such a manner that unless the imprinted individual is holding it, it will not fire. See Joe Pappalardo, *Fact vs. Fiction: The Truth About Skyfall's Weapons*, POPULAR MECHANICS (Nov. 7, 2012), www.popularmechanics.com/culture/movies/a8200/fact-vs-fiction-the-truth-about-skyfalls-weapons-14544466/. Curiously, this technology is apparently so cutting-edge that actor, Daniel Craig, decided on his own to wear gloves while filming, and as such, necessitated expensive digital edits to render Bond's gloved hand bare. See Plutarc Sicut, *James Bond 'Skyfall' Error Cost Millions To Repair: Daniel Craig's Fault?*, INQUISITR (July 6, 2016), <https://www.inquisitr.com/3277059/james-bond-skyfall-error-cost-millions-to-repair-daniel-craig-fault/>. Nonetheless, this technology differing from past "gadgets" is as commercially viable as the iPhone's thumbprint security reader.

89. Pappalardo, *supra* note 88.

innovations in firearm safety. If an individual will pay for new safety technologies,⁹⁰ in pursuit of a lower (or effectively non-existent) annual premium, that individual is entitled to do so under AMFIT. Therefore, an owner is free to reduce the risk of an unfit party acquiring the firearm by implementing as many tax deductions as the owner may wish.

Some skeptics may fear that those who should not possess a firearm can pick locks and digitally manipulate safety devices. However, that does not equate with ineffectiveness.⁹¹ Just as laws and precautions cannot eliminate the risk of a crime's commission, their utility—like that of AMFIT—is to minimize risk and deter. Analogously, crimes like bank robberies still occur, in spite of preventive alarms, security systems, and other precautions that deter crime and minimize risks. The viability for AMFIT's utility to deter is also analogous to the arguments favoring concealed carry. The Washington Times stated that, according to a 2015 Crime Prevention Research Center report, as the number of concealed carry handgun permits “skyrocketed,” murder rates fell.⁹² The success of the safety devices encouraged under AMFIT are like that of concealed carry and are dependent upon the skill and competence of the individual in control thereof.⁹³ The more protections an owner combines, the more protected one becomes.

An insurance provider's premium costs will assess the household size and character. A minor present in the household will increase the premium, and that premium can be offset with tax deductions awarded for using safety devices capable of preventing or deterring the minor from accessing the firearm. In any case, AMFIT will financially dissuade parents from purchasing firearms for their teenage children, as Nancy Lanza reportedly did for her son.⁹⁴ In contrast to those owners, however,

90. *Id.* Similar to the palm reader, the New Jersey Institute of Technology patented a system that identifies gun users by the unique manner in which they squeeze the grip. *Id.* Consistent with the more innovative methods of security, there are other modern technologies which utilize advanced radiofrequency identification by means of anything from jewelry devices to communicative digital chips implanted in the owner's hand. *Id.* In Hong Kong, researchers suggested that the patterns on the tongue could be used as a reliable way to identify a gun user. *Id.*

91. While the variety of safety mechanisms encouraged under AMFIT may not wholly prevent the execution of mass shootings and accidents (at the hands of the most highly savvy and resourceful individuals), the devices can retard the individual's conduct and effectively limit the potential damage.

92. Kellan Howell, *Murder rates drop as concealed carry permits soar: report*, WASH. TIMES (July 14, 2015), <http://www.washingtontimes.com/news/2015/jul/14/murder-rates-drop-as-concealed-carry-permits-soar-/>.

93. This is one reason why marksmanship training and certification will help to mitigate the tax premium.

94. Jessica Jerreat, *Disturbing photo of toddler boy gnawing on handgun and Nancy Lanza's huge arsenal of weapons revealed*, DAILY MAIL (Dec. 28, 2013, 10:50 PM),

responsible owners who own a gun safe in which they keep their guns *only* for their personal enjoyment, do so with the vast majority of those guns unloaded and with gun locks fastened to the guns inside. In contrast are also those who have effective marksmanship and understand the operations of their own firearm. Some owners educate their children through classes for proper safety precautions, which helps to ensure that the child never comes in dangerous contact with a firearm while unsupervised. Safety courses are one method of mitigation, but, again, are only effective for safety and prevention of disaster in combination with other precautions.⁹⁵

Reasonable owners, like the types above, are the type AMFIT ideally accommodates. That individual can mitigate the premium to a nominal value via the use of presently available safety precautions as tax deductions. Others will be incentivized to own firearms in those responsible ways in order to mitigate the tax. For many, the utilization of tax-deductible safety devices in a high-risk environment (e.g., an owner's semi-automatic firearms kept in a household with children) will be essential in order to affordably own those firearm(s). In making ownership affordable and responsible, it is also made safer.

2. AMFIT and Mental Health

Some politicians emphatically characterize many of the issues surrounding firearms not as gun-law issues, but as issues of mental health.⁹⁶ As such, AMFIT is an opportunity to anticipate and address potential mental infirmities that an owner may suffer. A gun owner may elect to lower the insurance premium by authorizing the policy provider access to private healthcare records in order to lower the potential risk. Under AMFIT, if a gun owner suffers a mental health issue or physical ailment affecting capabilities of ownership, the insurance will reflect these instances. For the insured's benefit as well as the public's general welfare, an AMFIT insurance provider will confiscate the owner's

www.dailymail.co.uk/news/article-2530239/Police-files-reveal-picture-gun-obsessed-mother-son-communicated-email-loved-shooting-together.html.

95. Firearm advocacy groups such as the NRA offer safety courses for both children and adults. However, safety courses alone are not enough. For instance, both Nancy Lanza and her son Adam Lanza, the 2012 Sandy Hook Elementary School shooter, took NRA safety courses. Therefore, incentives must be *strongly* encouraged via incentives, such as tax-deductible safety mechanisms, thus placing a responsibility upon parents with children in their home. See OFFICE OF THE STATE'S ATTORNEY JUDICIAL DISTRICT OF DANBURY STEPHEN J. SEDENSKY III, STATE'S ATTORNEY, *supra* note 85, at 31.

96. Jesse Byrnes, *Rubio: Gun control 'would have done nothing' to prevent Oregon shooting*, THE HILL (Oct. 6, 2015), <https://thehill.com/blogs/blog-briefing-room/news/256025-rubio-gun-control-proposals-would-have-done-nothing-to-stop>.

firearms *and* compensate an incapacitated owner for the firearms' value. The following illustrates how AMFIT will function with regard to issues of mental incapacity: AMFIT purchasers may consent to an insurance provider's continual review of health records in exchange for a lower premium.

The provider's review of medical records will function similarly to the review that some states conduct for concealed carry licenses. An AMFIT provider will receive notice of an appointed guardian, a state of coma, or a medical infirmity such as, but not limited to, schizophrenia or dementia. The insurance provider will take custody of the firearms *and pay* to the estate an amount of just compensation. That provider will be bound by the Health Insurance Portability and Accountability Act (HIPAA) and the Genetic Information Nondiscrimination Act (GINA).⁹⁷ This compensatory aspect of AMFIT will make the afflicted party whole and help prevent disasters caused by those mentally or physically unfit to own a firearm. Individuals and their estates who suffer infirmity will be fiscally encouraged to seek firearm-reimbursement from the provider. Therefore, their mental illness will likely be detectable by the private-sector AMFIT insurance providers upon treatment, and in compliance with HIPAA and GINA. As a result, this aspect of AMFIT serves to address the relevant issues surrounding the right to bear arms, even in cases of "mental illness."⁹⁸

3. *AMFIT and Criminal Regulation*

a. Criminal Enforcement: Fraud Prevention

While AMFIT federally requires both the report of private firearm ownership and the purchase of insurance, it is foreseeable that some individuals will operate outside of the law. As such, higher penalties must be imposed to deter such illegal conduct. Therefore, crimes committed utilizing an unregistered or uninsured firearm must have increased penalties. Individuals found to be in possession of an unregistered or uninsured handgun would be committing a federal crime and would suffer a more severe punishment. In areas suffering from high levels of gun violence, the use of a firearm in the commission of a crime

97. WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID ENGLISH, *PRINCIPLES OF WILLS, TRUSTS AND ESTATES* 684 (West Acad. Pub., 2d ed. 2012) (stating adult guardianship renders the loss of "many basic rights, including the right to vote, to travel, to decide where to live, to divorce or marry, to keep and care for children, and even to drive a car").

98. Byrnes, *supra* note 96.

could be disincentivized through greater penalties. Another option could be comparatively lighter sentences for criminals who use a firearm in the commission of a crime that is both registered and insured, regardless of the criminal's motives. While under that logic, for instance, a criminal may commit a robbery. The penalty to commit this crime with an unregistered firearm would, however, carry a much greater sentence, thereby disincentivizing the use of an unregistered firearm. Under AMFIT, all firearms owned will require registration, regardless of the owner's legal intent or purpose. This is analogous to the taxpayer's obligation to declare *all* income, which Chief Justice Earl J. Warren called "the obvious intent of . . . Congress to tax income derived from both legal and illegal sources."⁹⁹ Such a clampdown with ramifications of strict liability will help to deter gang activity across the United States, an issue over which the Trump administration has expressed concern.¹⁰⁰

It is foreseeable also that individuals may falsify their annual AMFIT report. That report, administered in conjunction with federal income taxes, will carry a penalty of tax fraud with the discovery of false reports.¹⁰¹ The IRS would appropriately administer the investigation and prosecution. In order to deter individuals from misreporting on the insurance premium calculations, the discovery of false reports to the firearms insurance provider will carry the penalties of federal insurance fraud under 18 U.S.C. § 1033.¹⁰² Conspiratorial actions to falsify,

99. *James v. United States*, 366 U.S. 213, 218 (1961).

100. Roberta Rampton & Mica Rosenberg, *Trump asks Congress to help in fight against gangs, illegal immigration*, REUTERS (July 28, 2017), <https://www.reuters.com/article/us-usa-trump-gangs-idUSKBN1AD0GK>.

101. The relevant federal statute on tax fraud provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C.A. § 7201 (West 1982).

102. This statute provides, in relevant part:

(a)(1) Whoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security—

(A) in connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and

(B) for the purpose of influencing the actions of such official or agency or such an appointed agent or examiner, shall be punished as provided in paragraph (2).

committed by a provider or preparer, would follow with similar deterring effect via the relevant applicable laws. The resulting convictions would render such individual(s) incapable of future ownership, thereby further deterring illegal behavior.

b. Criminal Enforcement: Black Market Reduction

The black market is a concern for issues surrounding gun control. This illegal activity reflects negatively upon responsible owners. Nonetheless, it is something that AMFIT will control. Higher criminal penalties will minimize the size of the market and the entry of new firearms into that market. Due to both the black market and mass shootings, there is a demonstrable need to regulate what happens *after* a firearm is purchased. Congress must offer incentives that motivate honest owners to be responsible, while also reducing the risk of black market activity by leveling heavier penalties for participation in the illegal trade of straw-purchasing and dealing of unregistered firearms.¹⁰³

4. AMFIT and Loopholes

Loopholes exist within the current gun laws. “Federal law requires that persons who are engaged in the business of dealing in firearms be licensed by the federal government.”¹⁰⁴ And yet, some individuals who “sell” are simply *not recognized* under law as having dealt firearms.¹⁰⁵ Therefore, while “Federally licensed gun sellers are required to run background checks,” at the same time, “not all *sellers* are required to be [federally] licensed.”¹⁰⁶ As a result, some unlicensed sellers could deal firearms without regulation at gun shows.¹⁰⁷ Some firearms are sold

(2) The punishment for an offense under paragraph (1) is a fine as established under this title or imprisonment for not more than 10 years, or both, except that the term of imprisonment shall be not more than 15 years if the statement or report or overvaluing of land, property, or security jeopardized the safety and soundness of an insurer and was a significant cause of such insurer being placed in conservation, rehabilitation, or liquidation by an appropriate court.

18 U.S.C.A. § 1033 (West 1994).

103. LoGiurato, *supra* note 53. Note that “straw purchasing” describes when an individual illegally purchases a gun for an individual prohibited from purchase. *Id.*

104. Amy Sherman, *PolitiFact Sheet: 3 things to know about the ‘gun show loophole’*, POLITIFACT (Jan. 7, 2016), <http://www.politifact.com/truth-o-meter/article/2016/jan/07/politifact-sheet-3-things-know-about-gun-show-loop/>.

105. *Id.*

106. *Id.* (emphasis added).

107. *Id.*

without a record of to whom it was sold and to where the firearm went.¹⁰⁸ Proposed laws presented to remedy this loophole, however, have only created other loopholes. For instance, U.S. Representative (D-NY 12th Dist.) Carolyn B. Maloney,¹⁰⁹ recently introduced a 12-page bill before Congress purposed to remedy that loophole.¹¹⁰ That bill is the Gun Show Loophole Closing Act of 2017 (the “Act”).¹¹¹ It would mandate a background check before transfers of firearms between unlicensed persons.¹¹² This bill would also render some *but not all of the ‘loopholes’* unlawful. The proposed legislation states that it is “unlawful for a person who is not” a licensee “to transfer possession of, or title to, a firearm at . . . a gun show, to another person,” *if* that person to whom the firearm is rendered, is also “not so licensed.”¹¹³ However, as necessary as the Act is to closing the loopholes associated with gun shows, it does nothing to regulate private exchanges between individuals. Moreover, the Act itself has an exception (or perhaps, better yet, another loophole). The Act does not apply to gun shows at which less than “100 firearms are offered or exhibited for sale, exchange or transfer.”¹¹⁴ Thus, small events with gun sales could occur undetected. The Act does not apply to exchanges that “are conducted by private, not-for-profit organizations whose primary purpose is owning and maintaining real property for . . . hunting activities.”¹¹⁵ It also does not apply to membership organizations events “attended only by permanent or annual dues-paying members” and their immediate families.¹¹⁶ Finally, not within its legislative ambit are personal sales, exchanges, or transfers at an owner’s home, “if the individual is not required to be licensed under section 923” of the Act.¹¹⁷

Contrary to Maloney’s bill, AMFIT’s broad mandate (which applies to *all* sales, exchanges, and transfers) is the most effective way to combat the issue of loopholes for the sake of the general welfare and the Second

108. *Id.*

109. *Representative Carolyn B. Maloney (1946–)*, LIBR. OF CONGRESS, <https://www.congress.gov/member/carolyn-maloney/M000087> (last visited Sept. 30, 2018).

110. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. (2017).

111. *Id.*

112. *Id.*

113. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. § (c) (2017).

114. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. § (b)(36)(C)(i) (2017).

115. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. § (b)(36)(C)(ii) (2017).

116. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. § (b)(36)(C)(iii) (2017).

117. Gun Show Loophole Closing Act of 2017, H.R. 1612, 115th Cong. § (b)(36)(B) (2017).

Amendment's preservation. In defense of Maloney's Act, these exceptions, presumably, were the result of bipartisan-minded balancing. However, AMFIT features better avenues for bipartisan-minded concessions, and it will better satisfy gun owners while more effectively accomplishing safety goals. The Act's exceptions are not going to close the regulatory loopholes that allow guns to be purchased without recordation. To effectively close the loophole is *not* simply to stop *some of the unregulated transfers*. It is not to even stop *most*. Instead, it must be to stop *all*. AMFIT, therefore, better addresses loopholes since it offers *no exceptions*. *All* sales, transfers, gifts, bequeaths, and other related transactions require reporting to the policy provider.

The Gun Show Loophole Closing Act is nothing more than a starting point necessitating relevant input from gun advocacy groups and organizations. For instance, the National Sports Shooting Foundation (NSSF) "wants gun-control measures to focus on making guns inaccessible to those with mental health risks and imposing stricter penalties on so-called 'straw purchasing'"¹¹⁸ "Don't Lie for the Other Guy" is the NSSF's "National Campaign to Prevent the Illegal 'Straw Purchase' of Firearms."¹¹⁹ The NSSF has worked in conjunction with law enforcement to prevent "[c]onvicted felons, minors, persons determined by a court of law to be 'mentally defective' and certain others are prohibited by law from buying a firearm."¹²⁰ NSSF's mission (consistent with AMFIT) is "[t]o promote, protect and preserve hunting and the shooting sports."¹²¹ As a private organization, the NSSF pursues its mission by partnering with law enforcement to educate retailers "to be better able to identify and deter illegal straw purchases of firearms."¹²² AMFIT will bring stricter mandatory penalties for the illegal possession, use, sale or unauthorized transfer of a firearm to carry out the NSSF's mission to "deter illegal straw purchases."¹²³

5. AMFIT and Transfers

With the ownership of a firearm comes potential liability. Therefore, for an owner to fully transfer the ownership of a firearm, by any means,

118. LoGiurato, *supra* note 53.

119. *FAQ*, NAT'L SHOOTING SPORTS FOUND., <http://www.dontlie.org/faq.cfm> (last visited Oct. 8, 2018).

120. NAT'L SHOOTING SPORTS FOUND., <http://www.dontlie.org/> (last visited Oct. 8, 2018).

121. *About*, NAT'L SHOOTING SPORTS FOUND., <http://www.dontlie.org/about.cfm> (last visited Oct. 8, 2018).

122. *Id.*

123. *Id.*

to another individual, notice to the policy provider will be required. Proper notice transfers both the ownership of *and* liability for the firearm to the receiving individual. If an owner merely passes the firearm to the other individual, discontinues the firearm's AMFIT policy payment, and fails to transfer the title and liability of the firearm to the other individual, *both* parties are at-fault under AMFIT. In that instance, the intended transferee possesses an unregistered and uninsured firearm, and the transferor's attempt to transfer the firearm was unsuccessful. The transferor still technically "owns" the firearm, which is then unregistered and uninsured. Expressly, to combat administrative difficulties, there shall be no good-faith exception. Rather, strict liability is necessitated to elicit compliance. Under AMFIT, transfers cannot occur by accident, thereby removing concern for such error. The strict liability which shall come with all transfers will impart a necessary responsibility to *all* parties in the process of a firearm's transfer.

Private owners under AMFIT *must* report sales, loss, or theft. The provider will receive a paper form of the report through the mail or by electronic submission. It jeopardizes the Second Amendment for firearms to be sold, lost, or transferred without the accessible knowledge of *when, where, and with whom* that firearm went. The tracking and reporting of a firearm will function analogously to the regulations of the car industry. The serial numbers of guns will act similar to an automobile's Vehicle Identification Number (VIN) in the administration of insurance. Criminal laws cannot remain as they currently are. Current laws will undermine the lawful conduct of individuals who abide and report their ownership under AMFIT. Therefore, changes must be made to criminal laws to ensure that individuals who do not follow AMFIT's reporting requirements are severely penalized.

6. AMFIT and (Self-Manufactured) Homemade Guns

Individuals who will build their own guns still remain a problem under AMFIT. Nonetheless, they, too, are capable of regulation. For instance, the 2017 Rancho Tehama mass shooting was carried out with two homemade AR-15 type semi-automatic rifles, which the shooter illegally made from parts he purchased.¹²⁴ A court previously prohibited

124. Damon Arthur, *California shooter built his own illegal guns, officials say*, USA TODAY, (Nov. 15, 2017) <https://www.usatoday.com/story/news/nation-now/2017/11/15/california-shooter-built-his-own-illegal-guns-rancho-tehama/868778001/>. Note that the Rancho Tehama Mass shooting occurred in November 2017, when Kevin Janson Neal killed five people in a rampage through Rancho Tehama across several locations, one of which included an elementary school. *Id.* He utilized homemade firearms in the process. *Id.*

the shooter from possessing firearms.¹²⁵ Similarly, in July 2016, shooter Dayten Harper used an untraceable homemade AR-15 style weapon to fire upon Baltimore City police officers.¹²⁶ These homemade guns are known as “ghost guns,” which lack the requisite serial numbers used to trace them.¹²⁷ According to Special Agent Dave Cheplak of the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives, information which uniquely identifies a firearm “is vital for ATF to track the life of the gun.”¹²⁸ When “ghost guns” are sold on the black market, police are unable to trace from where the gun came and how the criminal acquired it.¹²⁹ However, heavier penalties leveled against lawbreakers and tracking the sale of parts consistent with tracking gun sales can regulate the supply of ghost guns.

Currently, “ghost guns” can be made using legal kits (costing approximately \$450 to \$1,000) purchasable on the Internet.¹³⁰ However, in addition to the concern for the do-it-yourself firearms kits, there are individuals resourceful enough to completely self-manufacture a firearm at home.¹³¹ Some readers may recall the 1993 Clint Eastwood film, “In the Line of Fire,” in which John Malkovich’s character built a lethal composite gun, capable of evading metal-detectors in a plot to assassinate the President of the United States.¹³² It is often legal to build a gun at home, and the advances in 3-D printing have made this easier.¹³³ However, this is a problem that AMFIT will address, and a hobby which regulation can safely maintain. Under AMFIT, states may license citizens to manufacture their own firearms. Manufacturing may occur via 3D-printing, parts assembly, composite manufacture, or by several other related methods. However, home-manufacture *without* an applicable

125. *Shooting rampage in California highlights “ghost guns” and their dangers*, CBS NEWS (Nov. 16, 2017), <https://www.cbsnews.com/news/ghost-guns-shooting-rancho-tehama-california/>.

126. Brian Kuebler, *Homemade, untraceable guns pose threat to police*, WMAR-2 NEWS (Sept. 23, 2016), <https://www.abc2news.com/news/crime-checker/baltimore-city-crime/homemade-untraceable-guns-pose-threat-to-police>; see also *Ghost Guns: Homemade, Untraceable, Lethal*, WMAR-2 NEWS (Sept. 23, 2016), <https://www.abc2news.com/news/crime-checker/baltimore-city-crime/ghost-guns-homemade-untraceable-lethal>.

127. *Shooting rampage in California highlights “ghost guns” and their dangers*, *supra* note 125.

128. *Ghost Guns*, *supra* note 126.

129. *Id.*

130. *Shooting rampage in California highlights “ghost guns” and their dangers*, *supra* note 125.

131. *Ghost Guns*, *supra* note 126.

132. *IN THE LINE OF FIRE* (Castle Rock Ent. 1993).

133. *Shooting rampage in California highlights “ghost guns” and their dangers*, *supra* note 125.

license would carry a penalty, accordingly. After an individual completes a licensed home-manufacture, that individual must report the manufacture to the policy provider within a reasonable period, which would be determined at the discretion of the states (72 hours, for instance). Then, the AMFIT provider generates a serial number for the manufactured firearm. That number is given to the IRS and is subject to the same regulation as any conventionally purchased firearm under AMFIT. Any individual who does not report, however, shall be prosecuted under a strict liability standard of care. This greater penalty will deter individuals who would otherwise completely self-manufacture firearms in an attempt to live "off-the-grid" and evade AMFIT-reporting. Strict-liability deters such conduct and increases the criminal-risk of ownership without reporting. The license to manufacture would be limited to validity within the state(s) of licensing. In deference, however, to those home-manufacturers who will take the requisite steps to follow the law and obtain a license: once the individual has manufactured, reported, and insured a homemade-firearm, that individual may enjoy the firearm in AMFIT-participating States like any other firearm. Under AMFIT, *all* components sold to make a gun will be tracked along the same procedures of gun sales. However, ammunition, cleaning materials, and accessories such as holsters would not fall within such a category. The *non-tracking* of ammunition sales is a necessary concession to gun advocates. Tracking the purchase of additional magazines, while perhaps ultimately unfeasible, may be wise in the interests of safety; however, that is not in the AMFIT proposal. Such tracking of magazine sales (or the decision not to do so) is the type of concession that is still viable within AMFIT (in either case) and can be properly subjected to a bipartisan legislative process.

7. AMFIT and Concessions

a. Continental Reciprocity of Concealed carry

As a concession to garner approval of responsible owners and gun-rights advocates, reciprocity of concealed-carry is a reasonable measure. It is feasible that Hawaii and Alaska may prove difficult to incorporate into that reciprocity, in which case it could be limited to the continental states. Continental reciprocity of concealed-carry would guarantee the ability for an American to carry across the country, only subject to additional state requirements as promulgated. For instance, it would be a state's prerogative to prohibit concealed-carry at schools, nursing homes, taverns, or government property. While some are skeptical or fearful of concealed-carry, others look to concealed carry as a protective measure

against the ongoing epidemic of gun violence. For example, in Chicago, Illinois, known for its ongoing shootings,¹³⁴ concerned citizens have pursued the formal requirements of concealed-carry.¹³⁵ “Given the level of violence and easy availability of guns in minority communities, most people there tend to think guns are the problem, not a solution,” said Vernetta Robinzine, a South-side Chicagoan, who brought positive attention to concealed-carry in Chicago.¹³⁶ A step-further than Ms. Robinzine’s solution, AMFIT will ensure general welfare on all fronts, even allowing the protection of owners from undue risks of personal liability upon engaging in self-defense.

b. Illegal Firearm Strict Liability Immigration Reform

Another concession that can garner the support of conservative-minded immigration reformers is the imposition of a strict liability standard of care for undocumented residents found to be in actual or constructive possession of an unlicensed or unregistered firearm. The law recognizes no distinction between actual and constructive possession of a firearm, and either form of possession is sufficient.¹³⁷ As such, undocumented residents found with an illegal firearm will be subject to mandatory deportation. Such a concession can garner support, especially among conservative groups and voters. Currently, under federal law, undocumented citizens cannot own or possess a firearm.¹³⁸

134. Elvia Malagon & Elyssa Cherney, *Nearly 40 shot in Chicago over weekend as city nears 500 homicides*, CHI. TRIB. (Sept. 11, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-39-wounded-6-fatally-in-weekend-shootings-20170911-story.html> (noting Chicago is a city ridden with gun-violence, approaching 500 homicides in 2017).

135. Yuliana Romanyszyn, *Safety concerns spur more black women in Chicago to receive concealed-carry gun permits*, CHI. TRIB. (Sept. 12, 2017), <http://www.chicago.tribune.com/news/local/breaking/ct-black-female-gunowners-chicago-20170831-story.html>.

136. *Id.*

137. *United States v. Booth*, 111 F.3d 1, 2 (1st Cir. 1997) (“Constructive possession exists when a person knowingly has the power and the intention at a given time of exercising dominion and control over an object or over the area in which the object is located.”).

138. 18 U.S.C. § 922(g)(5) prohibits the following from possessing, shipping/transporting, or receiving any firearm or ammunition: an alien who is “unlawfully in the United States” or who “has been admitted to the United States under a nonimmigrant visa.” 18 U.S.C.A. § 922 (West 2013).

8. AMFIT Utility to the Non-Consumer

a. Relieving Burdens to the Manufacturers, Dealers, and Importers

AMFIT will not only change the expectations and responsibilities of firearm consumers, it will alleviate the undue burden upon firearms dealers, importers, and manufacturers. AMFIT will situate this burden with the private owner. Mass shootings have negatively affected America's firearms manufacturers in multiple ways. For instance, Remington Arms Company, LLC, America's oldest weapons manufacturer suffered "an investor revolt" after reports that a Remington firearm had been used to carry out the Sandy Hook Elementary School shooting.¹³⁹ Additionally, in other economic sectors, Bank of America announced in April 2018 that it would stop lending money to companies who manufacture, what it referred to as, "military-style" rifles available for civilian purchase.¹⁴⁰

Some believe that the negative reflections upon firearms manufacturers, dealers, and importers places an undue burden upon them. For instance, Senator Bernie Sanders (D-VT) in his 2016 Presidential campaign, stated that he believed gun manufacturers *should not be liable* for crimes committed after a legal sale.¹⁴¹ Sanders stated, "[i]n the same sense that if you're a gun dealer and you sell me a gun and I go out and I kill [someone] . . . Do I think . . . that gun dealer should be sued for selling me a legal product that [I] misused?"¹⁴² Senator Sanders answered his own question by shaking his head, and stated that by allowing suits against manufacturers who sold a product to a person who "[bought] it legally, what you're really talking about is ending gun manufacturing in America."¹⁴³ Sanders opposed undue liability imposed on gun manufacturers and stated expressly: "I don't agree with that."¹⁴⁴ In the primary debates, Sanders fended off attacks by opponent Hillary

139. Smith, *supra* note 58.

140. Sanchez, *supra* note 58.

141. Bernie Sanders & New York Daily News Editorial Board, *TRANSCRIPT: Bernie Sanders meets with the Daily News Editorial Board, April 1, 2016*, N.Y. DAILY NEWS (Apr. 4, 2016), www.nydailynews.com/opinion/transcript-bernie-sanders-meets-news-editorial-board-article-1.2588306.

142. *Id.*

143. Elise Foley, *Connecticut Senator Not Happy With Bernie Sanders' View On Sandy Hook Lawsuit*, HUFFINGTON POST (Apr. 5, 2016), https://www.huffingtonpost.com/entry/chris-murphy-bernie-sanders-gun-manufacturers_us_5703e496e4b083f5c608f35d.

144. *Id.*

Clinton for his opinion on this issue.¹⁴⁵ Nonetheless, Sanders used an analogy to explain his logic: “If somebody has a gun and it falls into the hands of a murderer and the murderer kills somebody . . . , do you hold the gun manufacturer responsible? Not any more than you would hold a hammer company responsible if somebody beats somebody over the head with a hammer.”¹⁴⁶

To continue Senator Sanders’ reasoning, in August 2017, James Fields crashed his Dodge Charger into a crowd of peaceful protesters as they rallied against a white supremacist gathering in Charlottesville, Virginia.¹⁴⁷ Fields injured 19 and killed a 32-year-old woman.¹⁴⁸ However, rightfully, neither Dodge nor its parent company, Chrysler, nor its owner, Fiat, were condemned for the actions of James Fields.¹⁴⁹ Consistent with Sanders’ logic, the illegal actions taken by Fields in Charlottesville, or Adam Lanza in Sandy Hook, were not the manufacturer’s fault. Similarly, a dealer who *legally* sold to a bonafide purchaser should not be at fault for a shooting. According to Senator Sanders, his caveat for liability was only insofar as he did “believe that gun manufacturers and gun dealers should be able to be sued when they should know that guns are going into the hands of wrong people.”¹⁵⁰ As Sanders stated, “if somebody walks in and says, ‘I’d like 10,000 rounds of ammunition,’ . . . you might be suspicious about that. So[,] I think there are grounds for those suits, but not if you sell me a legal product.”¹⁵¹ As such, AMFIT will relieve the excessive burdens on dealers, importers, and manufacturers to screen gun owners and assume undue liability.

145. Jonathan Swan, *Sanders: I don't owe Sandy Hook victims' families an apology*, THE HILL (Apr. 14, 2016), <https://thehill.com/blogs/ballot-box/dem-primaries/276402-sanders-i-dont-owe-sandy-hook-victims-families-an-apology>.

146. Mark Joseph Stern, *Bernie Sanders Doubles Down On Support for Law That Protects Gun Sellers From Lawsuits*, SLATE (July 6, 2015), www.slate.com/blogs/the_slatest/2015/07/06/bernie_sanders_doubles_down_on_support_for_gun_sellers.html.

147. Jason Wilson et al., *Man charged with murder after driving into anti-far-right protesters in Charlottesville*, THE GUARDIAN (Aug. 13, 2017), <https://www.theguardian.com/us-news/2017/aug/12/virginia-unite-the-right-rally-protest-violence>.

148. *Id.*

149. Jeff S. Bartlett, *Car brands: Who owns what? A road map to the auto industry partnerships*, CONSUMER REP. (Oct. 23, 2013), <https://www.consumerreports.org/cro/news/2009/06/car-brands-who-owns-what/index.htm> (noting car company ownerships).

150. Bernie Sanders & New York Daily News Editorial Board, *supra* note 141.

151. *Id.*

b. Relieving Burdens Upon Gun Range Operators

AMFIT removes an undue burden upon firing range owners and places it on the individual firearms owner. For instance, gun-ranges implement certain limits, such as: “calibers up to, but not exceeding” a given amount, as well as prohibiting “[a]rmor-penetrating, explosive, incendiary, steel core of any kind[,] and tracer rounds.”¹⁵² Nonetheless, ranges must *still* anticipate individuals who will use (or attempt to use) a “firearm or ammunition that is unsafe or prohibited from use on the range.”¹⁵³ The risks incurred typically require the range owner to absorb those in costs under “general liability insurance,” or an “umbrella policy.”¹⁵⁴ While that policy indeed covers visitors who could suffer injury via slipping, tripping, or falling on the property, it is also structured to cover the possibility of an individual willfully exceeding the posted limitations of the range.¹⁵⁵ Therefore, insurance companies offer range owners policies tailored to address the risks of such violations.¹⁵⁶ While the ranges do and naturally should have insurance policies, the burden is presently imbalanced. That insurance may be adequately procured, and individuals who suffer potential injury are protected under that insurance; however, the potential liability could be better distributed among both the range *and* its many shooters. Presently, for a range owner, what results instead is a financial burden due to the critical need to hold an insurance policy. That need may be said to financially pull the owner from investment in protective infrastructure (i.e., reinforced walls) to the owner’s insurance expenses for economic protection. Instead, under AMFIT, if and when an individual may negligently (or intentionally) exceed the range’s caliber limitations, investments in gun range infrastructure¹⁵⁷ can more effectively insulate the risks of those individuals and also dually hold liable the AMFIT policies of those irresponsible gun owners.

152. *Range Rules*, RAMPART RANGE, https://www.rampartrangeinc.com/rampart_rules.pdf.

153. *Id.*

154. See *Gun Club Insurance*, MY NRA INS., <https://mynrainsurance.com/club-insurance/gun-club> (last visited Oct. 8, 2018).

155. *Id.*

156. *Id.*

157. For the purposes of this Article infrastructure investments may include reinforced walls, through which a much higher impermissible caliber could not penetrate, if an individual should willingly violate range rules and/or the local laws.

c. Relieving Burdens to the Economy

AMFIT also provides an opportunity to fix the injurious economic flux that the gun industry suffers from presidential elections. For gun enthusiasts, unfavorable election outcomes often provoke fear of losing rights, which leads to increased gun sales.¹⁵⁸ Conversely, favorable elections may foster a false sense of security over gun rights and ironically lead to a sales slump.¹⁵⁹ For instance, gun sales plummeted after the election of President Donald Trump, after previously skyrocketing due to fears of losing gun rights under President Barack H. Obama.¹⁶⁰ Tommy Milner, the Chief Executive for Cabela's, one of America's major outfitters for hunting and shooting goods, stated that since the 2016 Presidential Election "we have continued to see a slowdown in firearms and shooting related categories."¹⁶¹ Millner also indicated that calls for gun restrictions "[lead] to an increase in gun sales due to worries . . . about potential new gun restrictions."¹⁶² In some ways, fear of losing guns is good for business. With manufacturers moving into development of in-demand tax deductible safety devices and innovatively pioneering new technology for safety, however, AMFIT will stabilize the firearm market.

d. Holding the Government and Firearm Transporters More Accountable

AMFIT is a chance for change all around. America can demand more of both its government and its stream of commerce. AMFIT will ensure greater accountability and regulation in America's handling and transportation of firearms, providing a chance for the federal government to hold itself more accountable to the people.

Infamously, the "Fast and Furious" investigation into illegal gun trafficking which began in 2009 with a local gun shop's diligent tip to the ATF regarding four persons with suspicious purchases.¹⁶³ The investigation backfired, however, after the government released over two thousand guns into the black market and only "[h]undreds of guns were

158. *Gun Sales Have Dropped Since Trump's Election*, FORTUNE (Aug. 4, 2017), <http://fortune.com/2017/08/04/trump-gun-sales-obama/>.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Operation Fast and Furious Fast Facts*, *supra* note 59; see also Schwarzschild & Griffin, *supra* note 59.

later recovered.”¹⁶⁴ CNN reported that federal agents were unable to “account for more than 1,400 guns.”¹⁶⁵ Once described as an effort to control illegal gun purchases, it became the government’s “widely criticized operation aimed at tracing the flow of weapons to Mexican drug gangs.”¹⁶⁶ AMFIT is an opportunity to prevent these sorts of governmental mishaps; an opportunity to stop the government from ever again knowingly allowing sales of more than one thousand illegal firearms, or any at all, into the black market.¹⁶⁷ AMFIT will include provisions prohibiting controlled government attempts, such as the one described above.

Insufficient logistics have also contributed to the American black market.¹⁶⁸ There is a need for greater responsibility on the part of the private transporters of firearms. For instance, Chicago’s railways have provided an opportunity to steal firearms, when on multiple occasions boxcars have been broken into and guns were stolen.¹⁶⁹ In 2015, those stolen guns immediately went “for sale on the street,” and “[w]ithin days, the weapons were showing up at crime scenes around the city—at shootings, stashed under gutters, left on porches and tossed during police chases.”¹⁷⁰ Chicago had already suffered a “2014 rail car theft of 13 military-style semi-automatic rifles [which] remains unsolved.”¹⁷¹ Commendably, authorities have caught some offenders, but even so, that victory cannot undo the crimes committed (or even those which still may be committed with guns yet to be found).¹⁷²

If railways shall continue as the chosen method of transportation for firearms, something more fortified will be mandated by AMFIT. When deadly weapons are obtainable, leaving “broken locks and bolt cutters lying on the ground,” the need for greater fortification speaks for itself.¹⁷³ Transporters must do more to prevent these break-ins and the subsequent dangers that come with them. Addressing logistical liabilities and mandating more secured transportation is one step to minimizing the black market. Analogously, while bulletproof glass and security guards

164. *Id.*

165. Schwarzschild & Griffin, *supra* note 59.

166. *Id.*

167. *Id.*

168. See Meisner, *supra* note 60; Mark Suppelsa, *How modern day train robberies are bringing more guns to Chicago*, WGN9 (Jan. 12, 2017), <https://wgntv.com/2017/01/12/how-modern-day-train-robberies-are-bringing-more-guns-to-chicago/>.

169. Meisner, *supra* note 60.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

may not render every bank “robbery-proof,” a deterrent effect follows *res ipsa*. Harsher penalties must be imposed to deter those who are in possession of stolen guns, as well as the illegal dealers and “thieves [who] were already busy selling them to whoever could move them quickest.”¹⁷⁴ Thus, AMFIT is an opportunity for the private-sector, and the American government—of the people, by the people, for the people—to hold itself more accountable.

9. AMFIT and States’ Rights

AMFIT will give some control and application to the individual states so that they may tailor it to their specific needs. For instance, AMFIT will permit a state to choose whether or not it will recognize additional safety precautions for tax mitigation. Furthermore, a state may allow for tax mitigation if individuals consent to notifying the local fire department of the presence and approximate amount of ammunition kept in the residence, as this is a danger to responding firefighters.¹⁷⁵ States under AMFIT shall have greater control over additional criteria beyond the base of the federal legislation. For instance, states may choose to indemnify a gun owner from the claims of someone shot by the gun owner in an ordeal deemed “self-defense” by the gun owner’s insurance provider. Alternatively, the state may opt to indemnify based upon a court’s finding of self-defense, or it may operate under its own objective state-promulgated criteria for such a test of self-defense.

States may also choose how to bar collection for liability by a trespasser/aggressor in instances of a gun owner’s self-defense. If, for example, an intruder survives, after having been shot by the gun owner in that owner’s residence, the state can indemnify the owner from liability to the surviving intruder, thus removing possible incentives for that owner to want an intruder dead rather than maimed for purposes of avoiding long-term liability. This type of local policy decision-making should be left to the states, and the individual state’s judgment within its police powers.¹⁷⁶ Additionally, states may choose to join other states for a more competitive reciprocal insurance market if their interests align. To illustrate this, any combination of states could elect for complete indemnification that protects the gun owner under instances of self-defense and prohibits such payouts. If those states further chose to

174. *Id.*

175. See Susan Tamme, *Mitigating the Dangers of Ammunition at Fire Incidents*, FIRE ENGINEERING (May 14, 2015), <https://www.fireengineering.com/articles/2015/05/mitigating-the-dangers-of-ammunition-at-fire-incidents.html>.

176. See U.S. CONST. amend. X.

recognize and incorporate the same safety devices for tax deductions, then the insurance policies would have cross-state application. Those states could thus merge to establish an insurance market. This specific decision-making, however, is best left to the states.

The benefit of tailoring in the interest of states' rights is that the terrain and culture of the states will dictate the different needs and expectations of gun owners. The state legislatures are best situated to recognize and account for their constituency's local needs within AMFIT. For instance, Bernie Sanders, who supports gun rights for law-abiding citizens, stated that those rights are "a matter best left resolved in state capitals."¹⁷⁷ Sanders is a Senator from Vermont, "a state where hunting is prevalent."¹⁷⁸ He recognized that hunting, like in other states, was a distinct characteristic of Vermont.¹⁷⁹ For that reason, AMFIT shall allow states to tailor tax deductions to their individual needs. For example, a state that has public land for hunting may offer its citizens opportunities to mitigate their annual tax upon proof of acquired hunting permits. The rationale of such a concession is that a firearm purchased for hunting exhibits its intended use with the acquisition of a state hunting permit.

Legislative disregard for the unique characteristics of the individual states has long-carried with it a disdain and lack of legitimacy, whether or not it is inherently articulable by the public.¹⁸⁰ For instance, Alexander Hamilton, in Federalist Paper Number 33, wrote "acts of the larger society which are *not pursuant to* its constitutional powers but which are invasions of the residuary authorities of the smaller societies will [not] become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such."¹⁸¹ AMFIT will not invade any residuary authorities, as it is a proper exercise of Congress' taxation powers and it is deferential to the discrete needs of the individual states.

177. Thomas Kaplan, *Bernie Sanders, a Hunting-State Senator, Treads Lightly With Guns*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/politics/bernie-sanders-hillary-clinton-gun-control.html>.

178. *Id.*

179. *Id.*

180. James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 IUS GENTIUM 6-7 (2003).

181. THE FEDERALIST No. 33 (Alexander Hamilton).

II. CONSTITUTIONALITY OF AMFIT

A. AMFIT Insurance as a “Tax” Under *Sebelius*

AMFIT will build upon the general tenets of Chief Justice John G. Roberts’ opinion in *National Federation of Independent Business v. Sebelius*.¹⁸² In *Sebelius*, the Supreme Court upheld the individual mandate of the Affordable Care Act (ACA) as a constitutional exercise of congressional taxation powers.¹⁸³ While many supported the ACA, there are many also who advocated for its repeal or replacement.¹⁸⁴ There were vocal conservatives who criticized the Court as well as the Chief Justice himself,¹⁸⁵ for the respective decisions to uphold the constitutional provisions of the ACA in both *Sebelius*¹⁸⁶ and *King v. Burwell*.¹⁸⁷ However, regardless of its criticisms, *Sebelius* established that the ACA’s tax-application is indeed a constitutional act of Congress.¹⁸⁸

Chief Justice Roberts’ majority opinion in *Sebelius* centered around Congress’ taxation powers and effectively upheld the individual mandate provision of the ACA as a constitutional act under Article I, Section 8, Clause 1 of the U.S. Constitution.¹⁸⁹ *Sebelius*’ paramount issue was the constitutionality of the ACA’s requirement that individuals obtain health insurance.¹⁹⁰ Roberts explained that the ACA requirement to “pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.”¹⁹¹ As a tax, it was therefore constitutional.¹⁹² He cautioned, however, that “Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal

182. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 529 (2012).

183. *Id.* at 574.

184. Robert Barnes, *Affordable Care Act survives Supreme Court challenge*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/politics/courts_law/obamacare-survives-supreme-court-challenge/2015/06/25/af87608e-188a-11e5-93b7-5eddc056ad8a_story.html?utm_term=.d280b09c1db9; see also Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html.

185. *Judge Nap Questions John Roberts: ‘He Sounds Like Two Different People’*, FOX NEWS INSIDER (June 26, 2015), insider.foxnews.com/2015/06/26/judge-napolitano-scotus-gay-marriage-ruling-roberts-sounds-two-different-people.

186. *Sebelius*, 567 U.S. at 574.

187. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015); see also *Judge Nap Questions John Roberts*, *supra* note 185. Note that the Chief Justice chose to author both opinions.

188. *Sebelius*, 567 U.S. at 574.

189. *Id.* at 538.

190. Liptak, *supra* note 184.

191. *Id.*

192. *Id.*

Treasury, no more.”¹⁹³ Moreover, with regard to regulatory legislation, Roberts stated that the Court does “not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose.”¹⁹⁴ However, he reminded that *a tax does not prevent* an activity’s exercise; rather, the “imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.”¹⁹⁵ According to the Chief Justice, “the Constitution permits such a tax” and when Congress validly exercises its powers, the Court will not conduct an inquiry of legislative prudence.¹⁹⁶ He stated, “it is not [the Court’s] role to forbid it, or to pass upon its wisdom or fairness.”¹⁹⁷ Roberts signaled a deeper reasoning when he cited *United States v. Harris*.¹⁹⁸ Roberts stated, “[p]roper respect for a coordinate branch of the government’ requires that we strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’”¹⁹⁹

Roberts’ reasoning in 2012’s *Sebelius* was already articulated in 1893 by scholar James B. Thayer in a Harvard Law Review article.²⁰⁰ Thayer wrote that Courts “can only disregard [an act of Congress] when those who have the right to make laws have not merely made a mistake, but have made a very clear one, so clear that it is not open to rational question.”²⁰¹ The Court holding back from striking down legislation is a principle of judicial restraint, of which this Chief Justice has evinced a desire to exercise.²⁰² Taken from Thayer, the Court should not insert its own bias.²⁰³ A Thayerian Court will therefore not examine whether the legislation in its opinion is the best choice, or even a good choice, as that is properly the job of the legislative branch.²⁰⁴ Hence, the constitutional inquiry for regulatory legislation is limited and two-part: first, whether

193. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Sebelius*, 567 U.S. at 538 (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)). *Harris* is also known as the “Ku Klux Case” because the Supreme Court held that the federal government lacked constitutional authority to legislate penalties for crimes such as assault and murder. *Harris*, 106 U.S. 629. Rather, the Court declared that the local governments may penalize these crimes via their state police powers. *Id.*

199. *Sebelius*, 567 U.S. at 538.

200. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

201. *Id.*

202. *Sebelius*, 567 U.S. at 538.

203. Thayer, *supra* note 200.

204. *Id.*

there exists an articulable Article I power for Congress to exercise; and second, whether the articulable and exercised power permits the regulatory scheme.²⁰⁵ When the regulation is a tax, the buck stops at Article I.²⁰⁶ Consistent with the ACA's constitutionality, AMFIT will, therefore, be a constitutional exercise of Congress' taxation powers. AMFIT will be levied as a tax upon an individual's *optional* choice to exercise the right to own a firearm.

1. AMFIT Distinguished from the Affordable Care Act and Previous Firearm Taxes

a. ACA versus AMFIT

The invocation of the ACA and *Sebelius* may automatically alienate some readers. However, the similarities between the ACA and AMFIT are only so far as the two are a homogeneous exercise of Congress' power to tax. Otherwise, the two are largely distinguishable. It is worth noting, as the Court did in *King*, the ACA frustrated the public because "Congress passed much of the [ACA] using a complicated budgetary procedure known as 'reconciliation,' which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement."²⁰⁷ Roberts wrote that, due to the ACA's reconciliation process, the Act "does not reflect the type of care and deliberation that one might expect of such significant legislation."²⁰⁸ Therefore, it is beneficial to the security of significant federal legislation that it be passed in an above-board manner. AMFIT, or any legislation, can avoid factional antipathy—of the type held toward the ACA—through specific states' rights components that provide an opportunity for democratic input at the local level.

James Madison and the Framers did not intend "to create a direct democracy," that is, a democracy in which the people could directly communicate their desires to the legislature.²⁰⁹ Instead, the Framers envisioned "constitutional filters to ensure thoughtful deliberation rather

205. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596–98 (1984).

206. U.S. CONST. art. I, § 8, cl. 1.

207. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

208. *Id.*

209. Valerie Strauss, *In the age of Trump, a new surge of interest in the Constitution*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/17/in-the-age-of-trump-a-new-surge-of-interest-in-the-u-s-constitution/?utm_term=.c339fb4edf23.

than quick votes, initiatives or snap judgments.”²¹⁰ The Framers intended such deliberation (*sans* direct public engagement) to allow for the emergence of “thoughtful discussion and reasonable compromise.”²¹¹ As such, it would be unwise to use the reconciliation process as a means of enacting AMFIT. It would create division and dissidence, and impart upon AMFIT room for public resentment, which could stymie its long-term success. It would effectively strip the democratic confidence and trust that comes from the debate, floor action, and conferences of a bicameral legislature. It would undermine and effectively remove a stable foundation from AMFIT, something meant to ensure the Second Amendment’s preservation. In a larger sense, the reconciliation process is likely ill-advised for any legislation that strongly implicates constitutional rights, and certainly so for the right to bear arms.

AMFIT, in major distinction from the ACA, will have no such “exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on . . . insurance.”²¹² Under AMFIT, if there are individuals impoverished to such an extent that they cannot afford it, their rights will not be restricted under the Constitution. Only poverty would prevent that individual from exercising his or her right Second Amendment right. The Court, in *San Antonio Independent School District v. Rodriguez*, stated that “personal poverty is not a permanent disability” and “its shackles may be escaped.”²¹³ In fact, according to the Supreme Court, wealth discrimination does not provide “an adequate basis for invoking strict scrutiny.”²¹⁴ Therefore, the Court would likely find it constitutional for Congress to omit from AMFIT a welfare provision that would create such an entitlement.

The lack of a welfare provision for the poor may incur backlash. However, claims of discrimination against the poor would only be subject to the Court’s rational basis review.²¹⁵ That review requires only that “the challenged state action rationally furthers a legitimate state purpose or interest.”²¹⁶ AMFIT’s welfare omission would likely satisfy a court review as a legitimate cost-saving interest. However, it would be a state’s prerogative to offer an insurance subsidy to its impoverished gun owners. Any state-subsidized individuals would still be required to meet AMFIT’s federal requirements.

210. *Id.*

211. *Id.*

212. *Burwell*, 135 S. Ct. at 2486.

213. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

214. *Id.* at 29 (establishing that poverty is not a suspect class, and education is not a fundamental right).

215. *Id.* at 55 (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)).

216. *Id.*

While wealth discrimination is not subject to a strict scrutiny standard of review, racial discrimination is subject to this high bar.²¹⁷ According to the concurrence in *Rodriguez*, “[b]ecause of the historic purpose of the Fourteenth Amendment, the prime example of such a ‘suspect’ classification is one that is based upon race.”²¹⁸ Therefore, it may be constitutionally impermissible to administer higher premium costs for gun owners in urban areas with higher crime rates, where African Americans are more likely to live.²¹⁹ These high crime areas, unfortunately, are areas in which an individual may have a greater need to own a firearm. The Court could scrutinize premium costs derived from crime rates for purposes of discrimination, as such calculation could disadvantage people of color.²²⁰ It is possible, however, that policy providers could use crime rates to determine premium costs and satisfy the Court’s strict scrutiny test. If the Court finds that such calculation: (1) fulfills a compelling governmental interest of nexus between crime-rates and increased risks for theft; (2) narrowly tailors its cost calculation to crime rates *and not* race demographics; and (3) utilizes the least restrictive means of computing such crime rates, it is likely that strict scrutiny will be satisfied.²²¹ Nonetheless, some critics believe that this sort of legislation is “systemic racism” insofar as it negates precautions that ensure the right to vote for minorities, or worse, actively takes steps to disenfranchise minorities.²²²

b. Previous Taxes versus AMFIT

Historically, politicians have proposed varieties of gun taxes.²²³ The taxes were presented as a sales taxes levied only once at the time of

217. *Id.* at 61.

218. *Id.* at 60 (Stewart, J., concurring).

219. Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2016), http://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html. Farbota states that “[b]lack people, more often than white people, live in dense urban areas. Dense urban areas are more heavily policed than suburban or rural areas In more heavily policed areas, people committing crimes are caught more frequently.” *Id.*

220. *Id.*

221. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50–52 (1973).

222. Dr. Nicki Lisa Cole, *Definition of Systemic Racism in Sociology Beyond Prejudice and Micro-Agressions*, THOUGHTCO (Apr. 14, 2017), <https://www.thoughtco.com/systemic-racism-3026565>. “Systemic racism” is the theory that, due to the presence of racist beliefs and discriminatory values at the time of the founding of the United States, discrimination is still present in American social institutions, structures, and societal relations with benefits and power tendentiously flowing towards white people. *Id.*

223. *See, e.g.*, 26 U.S.C.A. § 4181 (West 1954).

purchase.²²⁴ In 2018, following the Parkland Shooting, U.S. Representative Danny Davis (D-IL) proposed the Gun Violence Prevention and Safe Communities Act of 2018 to tax up to twenty percent on firearms and fifty percent on ammunition.²²⁵ Some critics contend that gun taxes, “may sound attractive to those who want to limit gun ownership. And the idea of using taxes to correct externalities (including the medical and other societal costs of gun violence) is appealing to economists. But such taxes need to be effective.”²²⁶ AMFIT will be effective, however, as it can contribute to the general welfare and will not penalize responsible gun owners. That contribution to the general welfare will distinguish AMFIT from past legislative efforts of gun sales taxes, which Senator Orrin Hatch (R-UT) criticized as serving no other purpose than to “limit the access of law-abiding sportsmen to hunt or shoot upon the nation’s public lands.”²²⁷ Senator Hatch also lambasted the “calls for imposition of exorbitant excise taxes on firearms and ammunition, measures which would simply price the right to keep and bear arms beyond the financial means of many Americans.”²²⁸ For instance, in 1993, Senator Bill Bradley (D-NJ) suggested to the Senate Finance Committee a “25 percent sales tax on guns and \$2,500 license fees for gun dealers.”²²⁹ Hillary Clinton, then First Lady, testified, “[s]peaking personally[,] I’m all for that.”²³⁰ Under such an approach, however, the only option a person would have to lower the tax is to purchase a less expensive firearm. Moreover, once that purchaser departs from the sales counter, there is no further assurance of safe ownership, no guarantee of responsible use, and no reduction of straw purchasing. According to Grover Norquist, president of Americans for Tax Reform, that approach penalizes responsible owners by attempting to “tax guns

224. *Id.*

225. Gun Violence Prevention and Safe Communities Act of 2018, H.R. 5103, 115th Cong. (2018); Mitch Dudek, *Chris Kennedy backs Danny Davis bill to hike federal taxes on guns, bullets*, CHI. SUN-TIMES (Feb. 25, 2018) <https://chicago.suntimes.com/politics/chris-kennedy-danny-davis-gun-violence-federal-taxes-guns-ammunition/>.

226. Robert McClelland, *New Gun And Ammo Taxes Sound Like Promising Ways To Reduce Gun Violence But There Are Problems*, TAX POL’Y CTR. URBAN INST. & BROOKINGS INSTITUTION (May 24, 2018), <https://www.taxpolicycenter.org/taxvox/new-gun-and-ammo-taxes-sound-promising-ways-reduce-gun-violence-there-are-problems>.

227. Orrin Hatch, *Foreward* to LES ADAMS, *THE SECOND AMENDMENT PRIMER: A CITIZEN’S GUIDEBOOK TO THE HISTORY, SOURCES, AND AUTHORITIES FOR THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO KEEP AND BEAR ARMS 1* (Skyhorse Pub. 1996).

228. *Id.*

229. Christopher Connell, *First Lady Says Health Plan Account For Disasters*, ASSOCIATED PRESS (Oct. 1, 1993), <http://www.apnewsarchive.com/1993/First-Lady-Says-Health-Plan-Account-for-Disasters/id-c524b8a26987edd2c3d2026e4dcd6d86>.

230. *Id.*

out of existence.”²³¹ There is not an interest beyond the initial purchase. In contrast, AMFIT will annually engage the owner via tax in the interest of safety. AMFIT will therefore be inherently distinguishable from prior politically contentious gun taxes that have often aggravated gun-rights activists. By contrast, AMFIT will empower gun owners with a customizable means of lowering the firearm’s annual tax via a one-time purchase (and maintained use) of safety devices.

The inherent flaw of a flat tax on firearms is that it does not address safety and takes no interest in the purpose of the firearm purchase or the environment in which it would be kept. AMFIT, as an annual tax regulation, will encourage safety by continually promoting tax deduction through the encouragement of marksmanship certification, submitted proof of intended use as stated, such as hunting permit receipts, and state expansion of other qualifying deductions. How one takes advantage of these safety methods will be left to the discretion of the owner and the state in which the firearm is kept. From there, the tax can be maintained at a low cost while providing a recourse for injured parties, an incentive for safe ownership, sales, transfer, carry, and use, and greater protection for the Second Amendment.

In addition to prior taxes proposed on firearms, there have been prior proposals to require gun insurance in America.²³² Therefore, this proposal of a firearms’ insurance policy is not meant to be groundbreaking as there has been much scholarship on the subject.²³³ Rather, the innovation of this proposal is its concept of a tax insurance policy imposed under the taxation powers of Congress.

B. AMFIT and the Second Amendment Cases (Heller and McDonald)

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects both an individual’s right to bear arms and the individual’s right to possess a firearm for self-defense.²³⁴ The Court in *Heller* struck down as unconstitutional a Washington, D.C. law that banned private possession of handguns in one’s own home.²³⁵

231. John Kartch, *\$1,000 Gun Tax Pushed as “Role Model” for States*, AMERICANS FOR TAX REFORM (Apr. 18, 2016), <https://www.atr.org/1000-gun-tax-pushed-role-model-states>.

232. See, e.g., Chris Molina, *A Private Sector Solution to a Public Problem*, 41 HASTINGS CONST. L.Q. 421, 435 (2014); Rob Hillenbrand, *Heller on the Threshold: Crafting a Gun Insurance Mandate*, 95 B.U. L. REV. 1451, 1455–56 (2015).

233. *Id.*

234. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

235. *Id.*

In *Heller*, writing for the majority, Justice Antonin Scalia reasoned that when interpreting the Second Amendment, one must remember that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary [fashion] as distinguished from technical meaning.”²³⁶ As such, Scalia took a literal interpretation of the Amendment, with which some disagree.²³⁷ Judge Richard A. Posner of the Seventh Circuit Court of Appeals stated that Scalia’s reasoning likely was “erroneous” and found Scalia’s literary response to *Heller*’s critics “unconvincing.”²³⁸ According to the *Washington Post*, Hillary Clinton has also said “that the Supreme Court was ‘wrong on the Second Amendment.’”²³⁹ Nonetheless, *Heller* is valid precedent and governs regardless of the level of controversy, error, or politicization that surrounds it.

Nevertheless, *Heller* left a few blanks. For instance, “Scalia did not identify which form of heightened scrutiny should apply;” instead, he left that “determination for future cases.”²⁴⁰ Scalia stated that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field” of gun rights.²⁴¹ Scalia continued, “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”²⁴²

The Supreme Court indeed had its time to “expound” upon the laws of local municipalities. Two years after *Heller*, it heard the case of *McDonald v. City of Chicago*, which addressed the constitutionality of handgun-banning ordinances in Chicago and Oak Park, Illinois.²⁴³ The holding of *Heller* contrasted with local-level handgun-bans.²⁴⁴ Finally, the Court could fully resolve the question from *Heller* as to whether the Second Amendment applied *only* to the federal government or to the

236. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

237. *Heller*, 544 U.S. at 576.

238. Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

239. Michelle Lee, *Fact check: Clinton on the Heller decision*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-final-2016-presidential-debate/fact-check-clinton-on-the-heller-decision/?utm_term=.1d3e3a10c775.

240. Stephen Kiehl, *In Search of A Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1141 (2011).

241. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

242. *Id.*

243. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

244. *Id.* at 749–50.

States and municipalities as well.²⁴⁵ Unsurprisingly, and similar to *Heller*, the Court in *McDonald* held that local handgun bans are unconstitutional.²⁴⁶ Justice Samuel Alito's majority opinion characterized the restrictive municipal laws as having asked the Court "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause."²⁴⁷ In *McDonald*, the Court ruled the type of local handgun bans at issue, previously upheld by the district court and court of appeals, unconstitutional.²⁴⁸

Some Second Amendment advocates fear *Heller* and *McDonald*'s overturn.²⁴⁹ That fear is why the NRA aggressively fought President Barack H. Obama's Supreme Court nomination of Merrick Garland.²⁵⁰ In 2016, the NRA Institute for Legislative Action stated that "President Obama has nothing but contempt for the Second Amendment and law-abiding gun owners," and that Garland "does not respect [the] fundamental, individual right to keep and bear arms for self-defense."²⁵¹ Additionally, the third progeny in the *Heller-McDonald* lineage could conceivably be a case before the Supreme Court over the constitutionality of states restricting concealed carry.²⁵²

Nevertheless, Second Amendment scholar Adam Winkler said "[g]uns are the new abortion," and he does not foresee an overturn of the case law.²⁵³ Some, like Winkler, may scoff at the notion of overturning, or shrug off any risks of Second Amendment repeal.²⁵⁴ Some may equate

245. *Id.*

246. *Id.* at 791.

247. *Id.* at 780.

248. *Id.* at 791.

249. Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 696–98 (2014).

250. *NRA Opposes Nomination of Merrick Garland to the U.S. Supreme Court*, NRA-ILA (Mar. 16, 2016), <https://www.nra-ila.org/articles/20160316/nra-opposes-nomination-of-merrick-garland-to-the-us-supreme-court>.

251. *Id.*

252. Tim Zubizarreta, *Supreme Court refuses to take up California concealed carry case*, JURIST (Nov. 5, 2018), <https://www.jurist.org/news/2018/11/supreme-court-refuses-to-take-up-california-concealed-carry-case/>; Larry Keane, *Potential Gun-Related Cases That Could Reach The Supreme Court*, THE DAILY CALLER (Aug. 24, 2018, 6:20 PM) <https://dailycaller.com/2018/08/24/potential-gun-related-cases-that-could-reach-the-supreme-court/>.

253. Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, THE ATLANTIC (June 7, 2016), <https://www.theatlantic.com/politics/archive/2016/06/why-the-supreme-court-wont-restrict-gun-rights/485810/>.

254. *Id.*

Heller's security with *Roe v. Wade*.²⁵⁵ *Roe* has fielded proposed constitutional amendments to ban abortion,²⁵⁶ faced risk of overturn, and experienced modification almost twenty years after it was decided in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁵⁷ *Heller* is still relatively recently decided.²⁵⁸

It is false security, however, to believe that *nothing* in the Constitution, or the Bill of Rights, could be repealed. America has repealed a past Amendment via amendment when the Twenty-First Amendment repealed the Eighteenth.²⁵⁹ There is also a false security that comes with rights guaranteed only by relatively recent Supreme Court decisions.²⁶⁰ For gun rights advocates, the false security in the present Court implicates a greater risk with new Supreme Court appointments, which are subject to political party control and the whims of a presidential administration.²⁶¹ The risks to the Second Amendment caused by whom a president could appoint to the U.S. Supreme Court, therefore, increase with each election cycle, as uncertainty grows due to the changing makeup of the Court.²⁶² Just one single Court opinion could undo *Heller* or *McDonald*. Holding out for conservative appointees, in the hopes of preventing the overturn of these cases, is not a sound solution.²⁶³ One must remember the criticisms of the NRA and the Second Amendment, which Chief Justice Warren E. Burger and Justice John Paul Stevens championed.²⁶⁴ Chief Justice Burger harangued

255. See *Roe v. Wade*, 410 U.S. 113 (1973), *modified*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992)); see also 'What Would've Prevented That?': *Tucker Challenges Gun Control Advocate on Las Vegas Massacre*, *supra* note 44.

256. See, e.g., *Human Life Amendment*, HUMANLIFEACTION.ORG, <https://www.humanlifeaction.org/issues/human-life-amendment> (last visited Mar. 26, 2018); ENDRÖE, www.endroe.org (last visited Sept. 28, 2018).

257. *Casey*, 505 U.S. at 875–79.

258. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

259. U.S. CONST. amend. XXI, § 1.

260. *South Carolina v. Gathers*, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (urging that longstanding opinions are due more respect as “long-established practice” than newer opinions).

261. David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033–34 (2008); Nina Totenberg, *Kavanaugh Could Tip Supreme Court Against Gun Control Laws*, NPR (Jul. 23, 2018), <https://www.npr.org/2018/07/23/630286216/kavanaugh-could-tip-supreme-court-against-gun-control-laws>; *NRA Applauds Senate Confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court*, NRA-ILA (Oct. 06, 2018), <https://www.nra.org/articles/20181006/nra-applauds-senate-confirmation-of-judge-brett-kavanaugh-to-the-us-supreme-court>.

262. *Id.*

263. See Vincent J. Samar, *Politicizing the Supreme Court*, 41 S. ILL. U.L.J. 1, 5 (2016).

264. See generally Brannon P. Denning, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273 (2011).

groups like the NRA for, what he called, fraud on the Second Amendment, and Stevens suggested repeal as a pursuit for the schoolchildren who urged change after Parkland.²⁶⁵ One must also remember that both Justices Stevens and Burger were conservative appointees.²⁶⁶ In *Heller*, from which Justice Stevens dissented, Justice Scalia knew that “there will be time enough to expound ... when those exceptions come before us.”²⁶⁷ AMFIT will curb that risk by removing controversies over which a future Supreme Court could “expound” otherwise.

In *Heller*, Justice Scalia wrote that the meaning of the Second Amendment’s “adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.”²⁶⁸ Consistent with *Heller*, AMFIT will incentivize discipline and training without an “imposition” of which Justice Scalia wrote. AMFIT is therefore within the Court’s interpretation of “well-regulated.” The “proper discipline,”²⁶⁹ of which Justice Scalia remarked, will manifest in AMFIT’s available tax deduction and regulation. Moreover, AMFIT will simultaneously permit, encourage, and safely expand gun ownership by promoting marksmanship and safety training, along with other safety measures,

265. *Id.* at 275 (Justice Burger stated “one of the frauds- and I use that term advisedly- on the American people has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn’t guarantee the right to have firearms at all.”); Max Greenwood, *Former Supreme Court Justice: “Repeal the Second Amendment,”* THE HILL (Mar. 27, 2018), <https://thehill.com/blogs/blog-briefing-room/news/380406-former-supreme-court-justice-repeal-the-second-amendment>.

266. *Supreme Court Nominations: Present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/nominations.htm> (last visited Sep. 29, 2018).

267. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

268. *Id.* at 597; see also Brian W. Halonen, *The Meaning of the Phrase “Well-Regulated” in the Second Amendment*, CONST. SOC’Y, <http://www.constitution.org/cons/wellregu.htm> (last visited Oct. 3, 2017). Note that some believe “[t]he phrase ‘well-regulated’ was in common use long before 1789, and remained so for a century thereafter.” Halonen, *supra* note 272. Its use, as scholar Brian W. Halonen put it, was to characterize something as being in “proper working order.” *Id.* Halonen suggested that in 1789, a well-regulated item was merely something “calibrated correctly” or “functioning as expected.” *Id.* He further argued that “establishing government oversight of the people’s arms was not only not the intent in using the phrase in the [Second] amendment, it was precisely to render the government powerless to do so that the [F]ounders wrote it.” *Id.* Halonen meant the federal/national government, and not the state government. Nonetheless, Halonen’s simple explanation contradicts Scalia’s opinion in *Heller*, which is governing dicta. In *Heller*, Justice Scalia wrote that the “adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 597 (2008). If Halonen’s (albeit brief) analysis was as conclusive as it seemed to him, however, Scalia’s opinion in *Heller* would have been far shorter, and the debate over gun ownership would not politically rage on as it does.

269. *Heller*, 554 U.S. at 597.

through tax deductions. AMFIT's options of lowering the tax do not exceed *Heller* or *McDonald*'s constitutionally permissible boundaries.

Even if AMFIT should be characterized as a "limitation," mere limitations on constitutional rights do not automatically constitute an abridgment or a substantial obstacle to the right.²⁷⁰ For instance, *Heller* affirmed the constitutionality of certain Second Amendment limitations.²⁷¹ AMFIT, however, will not pose a substantial obstacle. The right to bear arms will not be obstructed, as the ability to possess, own, and carry firearms will still be significant under AFMIT. With regard to mass shootings and home safety, however, Congress may promote the general welfare via AMFIT under its Article I taxation powers without infringing upon the Second Amendment.

In the 1992 landmark abortion case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court stated that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."²⁷² To "clarif[y] the point" the Supreme Court analogized that "not every ballot access limitation amounts to an infringement of the right to vote. Rather, the states are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote."²⁷³ Moreover, according to the Court in *Whalen v. Roe*, it is not the Court's duty to engage in value judgments of legislative wisdom or necessity.²⁷⁴ Justice

270. See *id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

271. *Heller*, 554 U.S. at 626. The Court stated, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* The Court continued, "[w]e also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." *Id.* at 627.

272. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 873 (1992). Note that *Casey*, decided 19 years after *Roe*, modified and affirmed *Roe*'s central holding. *Id.* The affirmation was in spite of both President Reagan and President Bush's "desire to see *Roe* overturned." Jamin B. Raskin, *Roe v. Wade and the Dred Scott Decision: Justice Scalia's Peculiar Analogy in Planned Parenthood v. Casey*, 1 AM. U.J. GENDER & L. 61, 84 (1993). Moreover, "two new [conservative-appointed] Justices—David Souter and Clarence Thomas—had joined the court, increasing speculation that the newly-composed Supreme Court would now explicitly overturn *Roe v. Wade*." Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 328 (2006).

273. *Casey*, 505 U.S. at 873–74.

274. *Whalen v. Roe*, 429 U.S. 589, 598 (1977). In *Whalen*, the Court upheld a "legislature's enactment of the patient-identification requirement" to provide the State with a copy of certain prescriptions for such prescription drugs, stating it "was a

Stevens, similar to Roberts' reasoning in *Sebelius*, stated that "legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."²⁷⁵ To the contrary, the Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."²⁷⁶

The Court's analysis in *Casey* could be applied to any right enumerated in the Bill of Rights and any unenumerated right "retained by the people."²⁷⁷ The Court explained permissible constitutional limitations on voting and stated, "[t]he abortion right is similar."²⁷⁸ Advocates, for either gun rights or abortion rights, may be quick to characterize any limitation as an "abridgment" of a constitutional right. However, according to the Court, those "limitations" may indeed be constitutional.²⁷⁹ For instance, with regard to abortion, the Court stated that "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care...for abortion[s]."²⁸⁰ However, cost increase is insufficient to constitute an abridgment of a right.²⁸¹ "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive . . . cannot be enough to invalidate it."²⁸² Rather, according to the Court in *Casey*, limitations of rights cross the threshold of impermissibility "[o]nly where state regulation imposes an undue burden."²⁸³ It is only then that the State police powers infringe upon "the heart of the liberty protected by the Due Process Clause."²⁸⁴ Therefore, AMFIT's cost increase upon private firearm ownership will not unconstitutionally restrict Second Amendment rights. Moreover, AMFIT's option of incentivized safety devices, as opposed to higher taxes, will not constitutionally infringe ownership. Under AMFIT, one can disregard the insurance provider's recommendations and pay a higher insurance premium. An owner will have that option, albeit an ill-advised choice for the owner to take.

reasonable exercise of [a state's] broad police powers." For Stevens, "[s]tate legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Id.* at 597.

275. *Id.* at 597.

276. *Id.*

277. U.S. CONST. amend. IX.

278. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 873–74 (1992).

279. *Id.* at 874.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

It is foreseeable, given *Sebelius*, that a Roberts Court review could approve AMFIT's regulation to the Second Amendment, under the Constitution's taxation clause and its caselaw of *Heller* and *McDonald*.²⁸⁵ That is the crux of this proposal; AMFIT will operate as viable regulation within explicit congressional powers granted by the Constitution. Operating within the precedents of *Heller* and *Sebelius*, AMFIT may require Chief Justice John Roberts' Thayerian approach to call for abundant unconstitutionality "so clear that it is not open to rational question."²⁸⁶

1. *Debunking Some Constitutional Myths*

a. "Musket-Theorists"

There are some who believe that the Second Amendment's scope ends with the muskets and dueling pistols, which existed at its 1791 ratification.²⁸⁷ In the wake of the Sandy Hook shooting, "States United to Prevent Gun Violence" featured a fundraising campaign video of a disgruntled white male shooter who stormed an office building to kill his coworkers.²⁸⁸ It aimed to generate "calls for an update to our antiquated gun laws."²⁸⁹ In the fictional video, the man attempted to carry out a mass-shooting armed with a musket.²⁹⁰ However, due to his musket's crude capabilities, such as its poor accuracy and slow shooting when compared to modern firearms, no one was hurt.²⁹¹ The video concluded

285. It is worth noting that the decisional breakdown of *Nat'l Fed'n of Indep. Bus. v. Sebelius* consisted of a majority of Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan and a dissent of Justices Scalia, Kennedy, Thomas, and Alito. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). In *King v. Burwell*, the majority consisted of Justices Roberts, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan and the dissent was comprised of Justices Scalia, Thomas, and Alito. *King v. Burwell*, 135 S. Ct. 2480 (2015).

286. Timothy P. O'Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act*, 3 CAL. L. REV. CIR. 170 (2012) (quoting Thayer, *supra* note 200, at 144).

287. See, e.g., Fiona Zublin, *Why the 2nd Amendment Applies only to your Muskets and Dueling Pistols*, OZY: THE DAILY DOSE (Oct. 4, 2016), <https://www.ozy.com/immodest-proposal/why-the-2nd-amendment-applies-only-to-your-muskets-and-dueling-pistols/72045>.

288. PreventGunViolence, *Ed – A Petition for Stronger Gun Laws*, YOUTUBE (Apr. 15, 2013), <https://www.youtube.com/watch?v=LORVfnFtcH0>.

289. *Id.*

290. *Id.*

291. *Id.*

with the final message: “Guns have changed. Shouldn’t our gun laws?”²⁹²

Guns have indeed changed, and in a larger sense, the technology to which the Bill of Rights applies has as well.²⁹³ Such change is especially true across the First, Fourth, Fifth, and Eighth Amendments, as well as the Second Amendment.²⁹⁴ However, none of their protections should be fixed in time to their ratifying date of 1791. Such anachronistic reasoning would render the internet’s press publications unprotected by the First Amendment’s free speech guarantees, as well as Mormonism, which was founded in 1830, 39 years after the Amendment’s ratification, unprotected by the First Amendment’s religious freedoms.²⁹⁵ Such reasoning would have negated constitutional standing and removed a cognizable Fourth Amendment injury from landmark U.S. Supreme Court cases which considered whether the government’s warrantless thermal imaging or electronic eavesdropping violated the Fourth Amendment²⁹⁶ because those search methods do not predate the Fourth Amendment’s ratification.²⁹⁷ Such fixed reasoning, if set at ratification, would allow government property seizures of modern automobiles with no just compensation whatsoever under the Fifth Amendment.²⁹⁸ Similarly, methods of punishment that found their advent after the Eighth Amendment’s 1791 ratification could never be “cruel and unusual.”²⁹⁹ Even outside of the Bill of Rights, such rigid interpretation would prevent the Fourteenth Amendment from incorporating contraceptive freedoms³⁰⁰ that did not exist before its 1868 ratification.³⁰¹ However, the Constitution and its amendments are not to be interpreted with such fixed limitations. Therefore, legislation affecting the Second Amendment, or any Amendment, needs to be approached with the contemporary exercise of that right in mind and not an antiquated practice which the Founders had in mind.

292. *Id.*

293. Zublin, *supra* note 287.

294. See generally Stephen J. Wermiel, *The Bill of Rights and the Constitution: Facing the Challenge of the Future*, 27–SUM HUM. RTS. 5 (2000).

295. *Mormon Church Established*, HISTORY.COM (2010), www.history.com/this-day-in-history/mormon-church-established (last visited Dec. 23, 2017).

296. *Kyllo v. United States*, 533 U.S. 27 (2001); *Katz v. United States*, 389 U.S. 347 (1967).

297. U.S. CONST. amend IV.

298. U.S. CONST. amend V.

299. U.S. CONST. amend VIII.

300. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

301. U.S. CONST. amend. XIV.

b. Absolutists

Antithetical to (what shall be coined here as) the Second Amendment's "musket-theorists" are those who believe that "Every (Yes, Every) Gun Control Law Is Unconstitutional" and "no government entity has the right to infringe on possession of firearms."³⁰² They argue that "[t]he Founding Fathers placed a bright-line prohibition on infringement of the [Second Amendment] right."³⁰³ That argument fails. The Founding Fathers placed no such line whatsoever.³⁰⁴ The Second Amendment, along with the entire Bill of Rights, was ratified on December 15, 1791, two years after the initial enactment of the U.S. Constitution.³⁰⁵ The Bill of Rights, as ratified by the Founding Fathers applied *only* to the federal government and *not* to the states.³⁰⁶ The states were free to infringe.³⁰⁷ So much for the "bright-line."³⁰⁸

In 1833, the U.S. Supreme Court made clear that the Bill of Rights "contains no expression indicating an intention to apply [the amendments] to the state governments. This court cannot so apply them."³⁰⁹ The Court's reasoning was consistent with the American concept of federalism, which always carried a strong presumption of states' rights, especially before the American Civil War (after which came a stronger federal government and the Fourteenth Amendment applying directly to the states).³¹⁰ It was not until the Supreme Court began to incorporate certain amendments that the Bill of Rights would apply to more than just the federal government.³¹¹ In fact, the Second Amendment only became applicable to the States in 2010 in *McDonald*.³¹²

302. Byron Berger, *Why Every (Yes, Every) Gun Control Law Is Unconstitutional*, OFFTHEGRIDNEWS, www.offthegridnews.com/self-defense/why-every-yes-every-gun-control-law-is-unconstitutional (last visited Oct. 8, 2017).

303. *Id.*

304. U.S. CONST. amend. II.

305. *U.S. Bill of Rights*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-constitution-amendments/bill-of-rights/> (last visited Oct. 8, 2017).

306. Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 2 (2007).

307. *Id.*

308. Berger, *supra* note 302.

309. *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833).

310. Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 949–55 (1982).

311. James L. Wright, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 480–82 (2004).

312. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

The debate may rage on about what exactly the Second Amendment means, but for now, Americans have Justice Scalia's interpretation.³¹³ In *Heller*, Scalia wrote that upon interpreting the Second Amendment, one must remember that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary [fashion] as distinguished from technical meaning."³¹⁴ An alternate interpretation of the Second Amendment's current meaning could come in the future via a shift in the Court or among the people. It will not surmount the risk for gun advocates and the NRA to lobby and hold out for conservative Supreme Court appointments.³¹⁵ Even among conservative Justices, the Second Amendment's meaning has never been uniform.³¹⁶ Contrasted from Scalia's interpretation, Chief Justice Burger advocated regulation and an alternative interpretation of the Second Amendment³¹⁷ shortly after President Ronald Reagan awarded him the Presidential Medal of Freedom.³¹⁸ Burger, in a December 1991 PBS interview, recommended regulating guns like automobiles, stating, "If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment."³¹⁹ Chief Justice Burger further criticized both the Second Amendment and groups such as the NRA when he stated that "[t]his has been the subject of one of the greatest pieces of fraud—I repeat the word 'fraud'—on the American public, by special interest groups, that I have ever seen in my lifetime."³²⁰

Little more than a quarter century after Chief Justice Burger's interview, Justice John Paul Stevens published a blistering critique of the Second Amendment's modern interpretation in the *New York Times*.³²¹ In the wake of the Florida Parkland school shooting, which killed 17,³²² Justice Stevens stated that the Founders feared a "national standing army might pose a threat to the security of the separate states," which "led to the adoption of that amendment."³²³ It seems that long ago, the United States put Founders' intent aside, for the country has long had its

313. See generally *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

314. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

315. Samar, *supra* note 263.

316. Denning, *supra* note 264.

317. *Warren Burger Biography*, *supra* note 49.

318. *Recipients of the Presidential Medal of Freedom, 1981-1989*, *supra* note 49.

319. Clay, *supra* note 49.

320. *Id.*

321. Stevens, *supra* note 38.

322. Eric Levenson & Joe Sterling, *These are the victims of the Florida school shooting*, CNN (Feb. 21, 2018), <https://www.cnn.com/2018/02/15/us/florida-shooting-victims-school/index.html>.

323. Stevens, *supra* note 38.

standing army previously feared.³²⁴ As a result, according to Stevens, “[t]oday that concern is a relic of the 18th century.”³²⁵ Stevens lauded the schoolchildren who demonstrated for congressional action in response to school shootings.³²⁶ Stevens advised that the schoolchildren should no longer push for mere reform.³²⁷ Rather, they “should demand a repeal of the Second Amendment” which “would move [the] marchers closer to their objective than any other possible reform.”³²⁸ He stated, such action “would make our schoolchildren safer than they have been since 2008 and honor the memories of the many, indeed far too many, victims of recent gun violence.”³²⁹ As to Stevens’ point, more than half of America’s top-ten deadliest mass shootings have occurred since *Heller*’s 2008 decision.³³⁰ This generation of schoolchildren has grown up with a unique perspective, including a contemporary fear of school shootings, as these schoolchildren were born after the 1999 Columbine shooting, which left 13 dead.³³¹ Nonetheless, as America grows numb to recurrent mass shootings, Columbine is not among the top-ten deadliest.³³²

In 2017, the all-time deadliest mass shooting and the fifth-deadliest occurred only 35 days apart.³³³ This generation of schoolchildren grew

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Deadliest Mass Shootings in Modern US History Fast Facts*, CNN (May 23, 2018) <https://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/index.html>; see also Saeed Ahmed, *2 of the 5 Deadliest Mass Shootings in Modern US History Happened in the Last 35 Days*, CNN (Nov. 6, 2017), www.cnn.com/2017/11/05/health/deadliest-massshootings-in-modern-us-history-trnd/index.html. These mass shootings include the following:

1. 2017 Harvest Music Festival mass-shooting (58 killed)
2. 2016 Pulse Nightclub mass-shooting (49 killed)
3. 2007 Virginia Tech shooting (32 killed)
4. 2012 Sandy Hook Elementary School mass-shooting (27 killed)
5. 2017 First Baptist Church mass-shooting (26 killed)
6. 1991 Texas Luby’s Cafeteria mass-shooting (23 killed)
7. 1984 San Ysidro, California McDonald’s mass-shooting (21 killed)
8. 1966 University of Texas mass-shooting (18 killed)
9. 2018 Parkland Florida Marjory Stoneman Douglas High School mass shooting (17 killed)
10. 2015 San Bernardino mass-shooting (14 killed)
11. 1986 Edmond, Oklahoma mass-shooting (14 killed)

331. *Columbine High School Shootings Fast Facts*, CNN (Mar. 25, 2018), www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html.

332. *Id.*

333. Ahmed, *supra* note 330. Note that the Harvest Music Festival mass-shooting occurred on October 1, 2017 in which 58 were killed, and the First Baptist Church

up concurrently with the children of Sandy Hook Elementary and survived these events to attend high school during the Parkland High School shooting. That generation will grow up and vote. Voting for decades to come, those schoolchildren as adults may vote for leaders who pass an amendment revoking or restricting the right to bear arms. The Constitution's Article V may be the very means by which the next generation repeals the Second Amendment, doing so with a Twenty-Eighth Amendment.³³⁴

c. "Tyranny Theorists"

President Trump characterized Justice Stevens' call for repeal as "tyranny."³³⁵ As such, a brief word seems necessary on the subject of tyranny, as presumably, some will characterize AMFIT as tyranny. In the wake of the Las Vegas mass shooting in 2017, conservative author Dinesh D'Souza responded to outcries for repeal.³³⁶ D'Souza stated that the right to bear arms "exists to protect against government tyranny."³³⁷ D'Souza suggested that "Republicans can pass sensible gun laws, ... but he recommended excluding Democrats from the discussion."³³⁸ D'Souza analogized the First and Second Amendment to one another and acknowledged that the rights are not unfettered.³³⁹ He stated, "[i]t's not that these are amendments that have no exceptions at all[.] You can't shout 'fire' in a crowded theater."³⁴⁰ However, he assured Americans that there is "no imminent danger right now."³⁴¹ Nonetheless, D'Souza advised that the "U.S. should take a 'cautionary lesson' from countries like Venezuela, which used crises to take guns away from citizens,

shooting, Texas' deadliest mass-shooting ever, occurred on November 5, 2017 in which 26 were killed. *Id.*

334. U.S. CONST. art. V.

335. Dave Boyer, *Trump: Repeal of Second Amendment could result in 'tyranny'*, WASH. TIMES (Mar. 29, 2018), <https://www.washingtontimes.com/news/2018/mar/29/trump-repeal-second-amendment-could-result-tyranny/>.

336. *Dinesh D'Souza: Second Amendment Is There to Protect Against Government Tyranny*, FOX NEWS INSIDER (Oct. 7, 2017), <http://insider.foxnews.com/2017/10/07/second-amendment-protects-against-government-tyranny-dinesh-dsouza>.

337. *Id.* Note that on October 5, 2017 Dinesh D'Souza tweeted, "If we went nuts & repealed the Second Amendment, the Left's next target would be the First Amendment—repealing freedom of speech & religion." Dinesh D'Souza (@DineshDSouza), TWITTER (Oct. 5, 2017, 5:44 PM), <https://twitter.com/dineshdsouza/status/916056646199132160?lang=en>.

338. *Dinesh D'Souza: Second Amendment Is There to Protect Against Government Tyranny*, *supra* note 336.

339. *Id.*

340. *Id.*

341. *Id.*

resulting in the government being the only entity with guns.”³⁴² D’Souza was referring to Hugo Chávez’s prohibition of guns in 2012.³⁴³ However, the United States and its actions are distinguishable from “countries like Venezuela” because the American government representatively flows from the people, while Venezuela has been critically described as “A Dictatorship Masquerading as a Democracy.”³⁴⁴ However, in America, power is not in the government; rather, according to Alexander Hamilton, “the power of the people is superior”³⁴⁵ because sovereignty lies with the people.³⁴⁶ As such, gun control in the form of a constitutional repeal enacted by “the People” could never be characterized as tyranny. Surely, if the definition of “tyranny” were so broad to encompass the Amendment process’s representative action, The Reconstruction Era, the Civil Rights Era, Women’s Suffrage, and the Second Amendment itself would all be considered tyrannical acts of a tyrannical government.³⁴⁷ Therefore, a government elected by the people, acting on behalf of the voters, can never truly be said to be tyrannical. Consequently, AMFIT could not be deemed a tyrannical act. Moreover, AMFIT will not deprive arms or abridge the right to bear arms because the ability to both purchase and own shall remain. AMFIT, therefore, will not “tyrannically” strip people of their guns and radically give “all the guns” to the “other side.”³⁴⁸

342. *Id.*

343. Awr Hawkins, *In Gun-Controlled Venezuela, Dictator Promises Gun to Each Socialist Militant*, BREITBART (Apr. 19, 2017), www.breitbart.com/national-security/2017/04/19/venezuelan-president-giving-400000-guns-to-supporters-to-silence-opposition/ (describing President Hugo Chávez as “the late dictator”).

344. Moisés Naim, *Venezuela: A Dictatorship Masquerading as a Democracy*, THE ATLANTIC (Dec. 4, 2015), <https://www.theatlantic.com/international/archive/2015/12/maduro-venezuela-election-democracy/418860/>.

345. THE FEDERALIST NO. 78 (Alexander Hamilton).

346. See U.S. CONST. amend. X.

347. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 65 (Jonathan Bennett ed., 2017) (1690) (“Where as usurpation is the exercise of power to which someone else has a right, tyranny is the exercise of power to which nobody can have a right.”).

348. SAUL D. ALINSKY, *Prologue* to RULES FOR RADICALS, at xx (Vintage Books ed., 1989). Note that Saul Alinsky charged the governmental-move of taking guns as a tactic for tyranny in “Rules for Radicals.” Dylan Matthews, *Who is Saul Alinsky, and why does the right hate him so much?*, VOX (July 19, 2016), <https://www.vox.com/2014/10/6/6829675/saul-alinsky-explain-obama-hillary-clinton-rodham-organizing>. Alinsky was a 20th Century community organizer and graduate of the University of Chicago to whom many have attributed a following by Hillary Clinton, Barack Obama, and the Tea Party. *Id.* In his book, he challenged the notion that “[p]ower comes out of the barrel of a gun! [as] an absurd rallying cry when the other side has all the guns.” Alinsky, *supra* note 348. That power, long before the days of Alinsky, is something the Founders knew all too well, which is why “southern states often prohibited slaves from carrying weapons and strictly regulated access to firearms by” freed slaves. Robert J. Cottrol & Raymond T.

Outside of the American realm of law and order, there are large, powerful national groups, such as the “Oath Keepers,” who advocate for the Second Amendment and vow to resist any limitation on gun rights whatsoever.³⁴⁹ For instance, Oath Keepers “will not obey” what they refer to as “unconstitutional orders, such as orders to disarm the American people.”³⁵⁰ According to its website, “Oath Keepers is a non-partisan association of current and formerly serving military, police, and first responders,” who take an oath to “defend the Constitution against all enemies, foreign and domestic.”³⁵¹ Some readers may recall the national headlines that the Oath Keepers achieved in 2015 during the Ferguson protests over the Michael Brown shooting.³⁵² For example, Fox News described the Oath Keepers as a “far-right anti-government activist group,” and reported that the “armed militia group” patrolled the streets of Ferguson “wearing camouflage bulletproof vests and openly carrying rifles and pistols,” something which St. Louis County Police Chief Jon Belmar stated at the time was “unnecessary and inflammatory.”³⁵³ The next year, during the Presidential election, Oath Keepers’ “urged its members to ‘blend in’ with voters and do ‘incognito intelligence gathering and crime spotting.’”³⁵⁴ In addition to urging its membership to conduct citizen-espionage, Oath Keepers then cautioned that “if Hillary Clinton is chosen by the establishment to take Obama’s place, the result would probably be outright civil war in the U.S.”³⁵⁵

In the future, the Supreme Court may speak conclusively on gun rights whether it affirms, expands, or narrows *Heller* and *McDonald*. That much is well-settled. However, public perceptions and faith in the judiciary are a separate issue for the constitutional right. With regard to the Court’s impact on the Second Amendment, it is prudent to consider

Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 332 (1991).

349. *About Oath Keepers*, OATH KEEPERS, <https://www.oathkeepers.org/about/> (last visited Nov. 20, 2017).

350. *Id.*

351. *Id.*

352. *Armed militia group Oath Keepers in Ferguson raises anger, concern among police, protesters*, FOX NEWS (Aug. 11, 2015), www.foxnews.com/us/2015/08/11/armed-militia-group-oath-keepers-in-ferguson-raises-anger-concern-among-police.html.

353. *Id.*

354. Kevin Sullivan, *Militia Group Calls on Members to Patrol Polls on Election Day*, WASH. POST (Oct. 27, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/militia-group-calls-on-members-to-patrol-polls-on-election-day/?utm_term=.7743822380ef.

355. Brandon Smith, *The Weirdest Possible Outcomes For The Strangest Election In U.S. History*, OATHKEEPERS (Apr. 14, 2016), <https://www.oathkeepers.org/the-weirdest-possible-outcomes-for-the-strangest-election-in-u-s-history/>.

the kneejerk reactions of groups such as the Oath Keepers who have already utilized Civil War rhetoric.³⁵⁶ Oath Keepers requires its members to swear an oath to uphold the Constitution.³⁵⁷ Based on that oath, the Oath Keepers' bylaws require that "[a]ny order, by anyone, that is not constitutional or according to regulations, is unlawful and military personnel are not obligated to follow such orders—and, in fact, are obligated to refuse."³⁵⁸ However, Article V repeal is both explicitly "constitutional" and "according to regulations."³⁵⁹ Pursuant to the Oath Keepers' "Declaration of Orders We Will NOT Obey," they "will NOT obey any order to disarm the American people."³⁶⁰ Thus, the Oath Keepers would likely not recognize an explicitly constitutional Article V repeal, of the Second Amendment. Inevitably, factions such as the Oath Keepers might even declare AMFIT unconstitutional. Similarly, they may view the statements of Chief Justice Burger and Justice Stevens as contrary to their oath. For the Oath Keepers to maintain their sworn dedication to the Constitution, however, they cannot declare a repeal of the Second Amendment unconstitutional. The Oath Keepers state "that the purpose of the Second Amendment is to preserve the military power of the people so that they will, in the last resort, have effective final recourse to arms and to the God of Hosts in the face of tyranny."³⁶¹ As a result, they "oppose any and all further infringements on the right of the people to keep and bear arms."³⁶² It follows *a fortiori* that factions such as Oath Keepers would view Article V repeal as a tyrannical order and *not* constitutional action. So much then for their oath to "support and defend the Constitution of the United States," should the Oath Keepers disregard the Constitution's Article V.³⁶³ However, an order for

356. *See id.*

357. *About Oath Keepers, supra* note 349.

358. *Id.*; *see also* OATH KEEPERS BYLAWS, SECTION 8.02.(B) RESTRICTIONS ON MEMBERSHIP, <https://www.oathkeepers.org/bylaws/> (last visited Nov. 20, 2017). Note that the Oath Keepers specifically emphasize the First, Second, Fourth, and Tenth amendments. The remaining Amendments do not evidently receive the same protection of oath by the group. For instance, the Fourteenth Amendment does not seem to be within the Oath Keepers emphasis, nonetheless, the group does prohibit hate-groups from membership. It states "[n]o person who advocates, or has been or is a member, or associated with, any organization, formal or informal, that advocates discrimination, violence, or hatred toward any person based upon their race, nationality, creed, or color, shall be entitled to be a member or associate member." *About Oath Keepers, supra* note 349.

359. *See* U.S. CONST. art. V.

360. *Orders We Will Not Obey*, OATH KEEPERS, <https://www.oathkeepers.org/declaration-of-orders-we-will-not-obey/> (last visited Nov. 20, 2017).

361. *Id.*

362. *Id.*

363. *About Oath Keepers, supra* note 349.

disarmament via an amendment to repeal providing just compensation for the taking of firearms pursuant to the Fifth Amendment would be constitutional.³⁶⁴ Regardless of the Constitution's explicit text by which the Second Amendment could be reformed or repealed, there are inevitable factions who will view any such action as utter tyranny. So too, within that faction, there are some who would revolt should the government act inconsistently with their perceptions of the Second Amendment. For some, anything less than an absolute right is government tyranny.

2. Returning to Reality and the Second Amendment

There is no absolute Second Amendment.³⁶⁵ Rather, there is well-settled disfavor in both academia and law over absolutism for the Bill of Rights Amendments.³⁶⁶ Second Amendment scholar Nelson Lund stated that “[t]he right to keep and bear arms is a lot like the right to freedom of speech,” and “[n]either right, . . . is absolute.”³⁶⁷ For instance, with regard to the First Amendment, Chief Justice Roberts stated in *McCutcheon v. Federal Election Commission* that the First Amendment is “not absolute.”³⁶⁸ Similar to First Amendment analysis, there are no absolutes for the Second.³⁶⁹ Some interpretative approaches dictate that amendments are to be interpreted within the Constitution's larger context.³⁷⁰ The “people” in the First and Second Amendment are the Preamble's same “people” who “promote the general Welfare . . . in Order to form a more perfect Union.”³⁷¹

364. See U.S. CONST. amend. V.

365. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

366. See Nelson Lund & Adam Winkler, *The Second Amendment*, NAT'L CONST. CTR. (Aug. 10, 2016), <https://poseidon01.ssrn.com/delivery.php?ID=102065004071020079082010010064025077054008067084052039088087093121110014072070011065097018031059009044096126006079024007105007031069088002093016087101064068112067027083041067004065089012112122000027106080067071106000094031020069022108088002121007001&EXT=pdf>.

367. Lund & Winkler, *supra* note 366.

368. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (holding that statutory limits upon the contributions an individual donor may make in total to all political candidates or committees constituted a violation of the First Amendment).

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

370. *Neal v. Clark*, 95 U.S. 704, 708 (1877) (“It is a familiar rule in the interpretation of written instruments and statutes that ‘a passage will be best interpreted by reference to that which precedes and follows it.’ So, also, ‘the meaning of a word may be ascertained by reference to the meaning of words associated with it.’”).

371. U.S. CONST. pmbli.; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 51 (Yale U. Press 1998). Note that Constitutional scholar Akhil Reed

Nonetheless, in 2015, Justice Clarence Thomas was more sensitive to Second Amendment abridgment than his contemporaries.³⁷² In that year, the Supreme Court declined to review a San Francisco law that mandated a trigger-lock or locked container for a handgun in a household.³⁷³ However, wanting to hear the case, Justices Antonin Scalia and Clarence Thomas, dissented from the Court's denial of certiorari.³⁷⁴ Justice Thomas rallied in dissent that "nothing in . . . *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right."³⁷⁵ The San Francisco law was similar to AMFIT, insofar as it involved the use of safety devices. By contrast, AMFIT will be optional. Still, two aspects of Justice Thomas' dissent from the denial of the writ are relevant. First, as Justice Thomas noted, San Francisco's "law applie[d] across the board, regardless of whether children [were] present in the home."³⁷⁶ Distinguishably, AMFIT will not mandate *any* safety devices, and its insurance costs will increase only *if* children live in the home. Second, Thomas' words were a dissent to the denial of the writ, and lack the force of an opinion or the weight of an opinion's dissent.³⁷⁷

Nonetheless, the Constitution does not deal in absolutes and the Second Amendment is far from absolute, even according to *Heller*.³⁷⁸ There are Second Amendment limitations that are commonplace and

Amar, states that "'the people' at the core of the Second Amendment are the same people at the heart of the Preamble and the First Amendment." *Id.*

372. See *Jackson v. City & Cty of San Francisco*, 746 F.3d 953 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 2799 (2015). That is, however, with the exception of Justice Neil Gorsuch. Justice Gorsuch was not on the court at this time, and in fact, replaced Justice Antonin Scalia, who dissented with Justice Thomas on the denial of review for this San Francisco law. See Leigh Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option'*, NBC NEWS (Apr. 7, 2017), <https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766>.

373. See *generally* *Jackson*, 746 F.3d 953. The law at issue stated: "[n]o person shall keep a handgun within a residence owned or controlled by that person unless" (1) "the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice" or (2) "[t]he handgun is carried on the person of an individual over the age of 18" or "under the control of a person who is a peace officer under [California law]." San Francisco Police Code, Art. 45, §§ 4512(a), (c) (2015). The law applies across the board, regardless of whether children are present in the home. A violation of the law is punishable by up to six months of imprisonment and/or a fine of up to \$1,000. § 4512(e). *Id.*

374. *Jackson v. City and Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting).

375. *Id.* at 2801.

376. *Id.* at 2800.

377. *Id.*

378. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

accepted as constitutional.³⁷⁹ For instance, it has been accepted since 1968 that federal law prohibits firearm ownership for: felons, fugitives, those with controlled substance convictions, the mentally afflicted, non-citizens lacking a visa, those dishonorably discharged from the Armed Forces, individuals who renounced their American citizenship, and those under adjudication or convicted of harassment, stalking, threatening, or domestic abuse.³⁸⁰ Also, there exist a number of other limitations, including: waiting periods, financial barriers of paying for ammunition and arms, mandatory background checks, and state limitations on carrying guns (open or concealed).³⁸¹ Regarding constitutional limitations, Nelson Lund wrote, “no reasonable person could believe that violent criminals should have unrestricted access to guns, or that any individual should possess a nuclear weapon.”³⁸² AMFIT’s limitations, should one even go so far as to characterize it as such, on gun ownership will be constitutional.

III. GOING FORTH

The National Rifle Association (NRA) is a nonprofit organization advocating for the constitutional rights of gun owners.³⁸³ The NRA has developed a unique ability to speak authoritatively on the Second Amendment.³⁸⁴ In fact, there are those who “look to the NRA to help [them] understand the weaknesses of proposed gun laws.”³⁸⁵ Some may consider it the NRA’s duty to protect the Second Amendment from repeal. The NRA is best-situated to navigate legislation on gun rights, as well as educate and quell its membership of concerned gun owners.³⁸⁶ The NRA has a serious interest in legislation and its effects on gun ownership.³⁸⁷ For instance, when the ACA was before Congress, the NRA expressed concerns about the risk of ACA record-keeping on gun

379. *Id.*

380. 18 U.S.C. § 922(g) (2013).

381. 18 U.S.C. § 922 (2013).

382. Lund & Winkler, *supra* note 366.

383. ABOUT THE NRA, NRA, <https://home.nra.org/about-the-nra/> (last visited Oct. 13, 2018).

384. *See id.*

385. Adam Winkler, *The NRA doesn't know Merrick Garland: Column*, USA TODAY (Apr. 6, 2016), <https://www.usatoday.com/story/opinion/2016/04/06/nra-supreme-court-merrick-garland-senate-mitch-mcconnell-column/82613644/>.

386. *See* NRA-ILA, <https://www.nraila.org/legal-legislation/federal-legislation/> (last visited Oct. 13, 2018).

387. *Id.*

ownership.³⁸⁸ For that reason, the NRA states that it “acted to ensure that the [ACA] could not be used as a formal legal basis for mandating inquiries and record-keeping about gun ownership.”³⁸⁹ Consequently, ACA section 2716(c) “is titled ‘Protection of Second Amendment Gun Rights.’”³⁹⁰ Under AMFIT, however, providers will administer the insured’s protected health information on a confidential basis. Nonetheless, when a proposal such as AMFIT will not harm gun rights but instead secure those rights from repeal, it would be beneficial for the NRA to consider the long-term interests of the Second Amendment. AMFIT buttresses those interests. As the preserver of the Second Amendment, the NRA’s unflagging rejection of even-handed reform and its perceived double-talk is increasingly dangerous to the Second Amendment.³⁹¹ The NRA will best aid the security of the Second Amendment with consistency in its advocacy.

Reportedly, there is confused frustration among some NRA membership over the constitutionality of firearms limitations.³⁹² The NRA has shared news articles informing its membership that a “[g]un ban for young adults would be wholly unconstitutional,” and claim purported age discrimination.³⁹³ Some NRA members believe that locational limitations, such as gun-free zones of *any kind*, are

388. Dave Kopel, *You May Feel Some Pressure*, NRA-ILA (June 25, 2015), <https://www.nraila.org/articles/20150625/you-may-feel-some-pressure>.

389. *Id.*

390. *Id.*

391. See Heidi Przybyla, *How the NRA undercut the last big gun reform effort*, NBC NEWS (Mar. 1, 2018), <https://www.nbcnews.com/politics/congress/how-nra-undercut-last-big-gun-reform-effort-n852176>.

392. Alex Horton, *The NRA said guns will be banned during a Pence speech. Parkland students see hypocrisy*, WASH. POST (Apr. 30, 2017) https://www.washingtonpost.com/news/post-nation/wp/2018/04/29/the-nra-said-guns-will-be-banned-during-a-pence-speech-parkland-students-see-hypocrisy/?utm_term=.59bd5592183e (reporting of a self-described NRA member, who in light of the NRA convention’s gun-free zone for Vice-President Pence shared, “[o]bviously even republicans and so called leaders don’t trust the ‘good guys.’ . . . I realize it’s the VP, but still makes our whole argument look foolish . . . You may disagree . . . but in my opinion the very people that claim to protect the 2A should never host an event that requires disarming the good guys. Sad. No excuses for this . . . it makes us look stupid.” Another self-identified NRA member stated in agreement, “Me personally, I won’t be listening to [the Vice-President] speak. I won’t be going anywhere that I cant carry my firearm. It’s essentially the nations largest get together for gun owners and they won’t let law abiding legal gun owners carry guns because someone who’s supposedly pro [Second Amendment] thinks its too ‘dangerous’? thats liberal logic right there.”).

393. David Kopel & Joseph Greenlee, *Gun ban for young adults would be wholly unconstitutional*, THE HILL (Mar. 13, 2018), thehill.com/opinion/campaign/378116-gun-ban-for-young-adults-would-be-wholly-unconstitutional#.WqgCPTJNjY.twitter.

unconstitutional.³⁹⁴ Moreover, the NRA tells these individuals that “gun free zone policy is foolish;”³⁹⁵ however, its members may be left confounded when the NRA itself partakes in the very gun-free zones that it condemns. For instance, the NRA advocated that “[t]o criminals, gun-free zones just look like easy targets.”³⁹⁶ So too, the NRA stated, that “media ignore the truth and push a [false] narrative that gun-free zones are safe zones.”³⁹⁷ The NRA has continually blasted gun-free zones, which it sees as an infringement of the Second Amendment.³⁹⁸ President Donald J. Trump has also stated “these gun-free zones are a disaster. Everybody’s just a sitting duck.”³⁹⁹ However, when the NRA invited President Trump to speak in April 2017, the NRA imposed a gun-free zone at the NRA convention.⁴⁰⁰ Such safety is expressly understandable, and likely well-advised as not only is a President’s life in danger, others’ are as well. However, the message that the NRA sent its membership at the convention on gun-free zones was greatly inconsistent with its staunch negative stance on gun-free zones. The NRA’s use of gun-free zones, which it utilized again in 2018 for visits from Vice President Mike Pence and the President, tacitly conceded a potential danger of those carrying concealed firearms.⁴⁰¹ The NRA could make a stronger political

394. See, e.g., *NRA backs lawsuit claiming NJ handgun policy is ‘unconstitutional’*, NEWS 12 N.J. (Feb. 7, 2018), <http://newjersey.news12.com/story/37453873/nra-backs-lawsuit-claiming-nj-handgun-policy-is-unconstitutional>.

395. *Outback Steakhouse: No Rights, Just Rules*, NRA-ILA (Feb. 9, 2018), <https://www.nraila.org/articles/20180209/outback-steakhouse-no-rights-just-rules>; see also *Illinois high court says gun ban near parks unconstitutional*, NRA-ILA (Feb. 5, 2018), <https://www.nraila.org/articles/20180205/illinois-high-court-says-gun-ban-near-parks-unconstitutional>.

396. *Gun-free zones easy targets for would-be killers*, NRA-ILA (Feb. 9, 2017), <https://www.nraila.org/articles/20170209/gun-free-zones-easy-targets-for-would-be-killers>.

397. *Gun-Free Zones Are Targets*, NRA: AMERICA’S 1ST FREEDOM (Mar. 23, 2017), <https://www.americas1stfreedom.org/articles/2017/3/23/gun-free-zones-are-targets/>.

398. Christopher Good & Candace Smith, *Donald Trump Is Against ‘Gun-Free Zones’ But Guns Aren’t Allowed on Many of His Properties, Staff Says*, ABC NEWS (May 20, 2016), abcnews.go.com/Politics/donald-trump-gun-free-zones-guns-allowed-properties/story?id=39266544.

399. *‘Everybody’s Just a Sitting Duck’: Trump Blasts Gun-Free Zones*, FOX NEWS INSIDER (Oct. 4, 2015), insider.foxnews.com/2015/10/04/everybodys-just-sitting-duck-donald-trump-blasts-gun-free-zones.

400. Mark Hensch, *Secret Service: No guns at Trump NRA speech*, THE HILL (Apr. 27, 2017), thehill.com/homenews/administration/330973-secret-service-no-guns-at-trump-nra-speech.

401. *NRA-ILA Leadership Forum*, NRA (May 4, 2018), <https://www.nraam.org/events/2018-events/friday-may-4/nra-ila-leadership-forum/>.

statement against these zones by completely avoiding the privilege of guest speakers who require such a zone.

Spokeswoman Dana Loesch, in an NRA advertisement directed at the *New York Times*, stated, “We’ve had it with your narratives, your propaganda, your fake news. We’ve had it with your constant protection of your Democrat overlords, your refusal to acknowledge any truth that upsets the fragile construct that you believe is real life.”⁴⁰² It is crucial that advocates of the Second Amendment similarly acknowledge the truth that the right to bear arms could be repealed.⁴⁰³ To do otherwise is to establish the type of false narrative, which Loesch and the NRA despise.⁴⁰⁴ Lack of clarity breeds instability, which has no place in the realm of constitutional rights. For the preservation of the right to bear arms, the NRA must first recognize that repeal is possible. Second, the NRA must consider a means like AMFIT to avoid such repeal. The NRA would, therefore, do well to err on the side of caution in avoidance of false constitutional guarantees or dissemination of contradictory information. Inconsistency not only undermines the integrity of the NRA, it erodes the Second Amendment that it exists to protect. Therefore, in order to maintain the right to bear arms, it is vital that NRA’s public statements and narrative are consistent going forth.

IV. CONCLUSION

For the most fervent gun advocates—those who believe the Second Amendment is necessary, not only now, but forever—reform is necessary in order to avoid repeal for the benefit of the generations to follow. That reform should be carried out with an intent to maintain the right to bear arms, rather than risk the possibility of a constitutionally sound repeal while Second Amendment advocates sit in the corner with their hands over their ears.

The Second Amendment *is* in danger of repeal. AMFIT is a precaution that should be taken to avoid such repeal. AMFIT is a remedial and forward-looking proposal for all sides of this issue. Its purpose is not only to address the risks of repeal, but also to adequately confront the ongoing issues surrounding firearms in the United States. This solution, grounded in the text of the Constitution itself, will defend and preserve the Second Amendment while simultaneously quelling the

402. *NRA videos warn elites ‘we’re coming for you’*, FOX NEWS (Aug. 26, 2017), <http://www.foxnews.com/politics/2017/08/26/nras-video-message-to-elites-were-coming-for.html>.

403. *Cf. id.*

404. *Id.*

concerns of those who advocate repeal for the general welfare. A workable plan that can guarantee the right to bear arms while also assuaging its opponents is a two-sided solution and a consummate avoidance of Article V repeal. The benefits and concessions under AMFIT have been balanced to satisfy both sides of this debate and promote gun ownership for generations of responsible gun owners to follow.

The ability to both preserve the Second Amendment and address growing concerns for safer ownership is by no means quixotic. The purpose this legislative proposal is not to punish responsible ownership of arms; instead, it is to encourage and reward safe and responsible private gun ownership. Extremism and outright rejection of deferential regulation, such as AMFIT (which can carry many benefits to firearm owners) can only result in a stronger effort to repeal the Second Amendment. Such rigidity will render the Second Amendment an article of history. The long-term viability of the right to bear arms is within the flexibility of AMFIT, and so, too, is the means of reducing mass shootings without legislating away the right to bear arms.

As Justice Scalia stated in *King v. Burwell*, “the Court forgets that ours is a government of laws and not of men.”⁴⁰⁵ Justice Scalia is correct. It is the law, and not man, which dictates that an Amendment can be repealed via Article V of the Constitution. The men advocating otherwise will be left in tomorrow’s history books, alongside the 19th century’s antiquated conceptions of property rights, slavery, and a repealed Second Amendment in the 22nd century. Society must not tie itself to the ship’s mast and wax its ears with the lulling false guarantees of an unrepealable right. The Constitution’s Article V is a Ulysses pact to future generations. It acknowledges that the document is not perfect and accommodates changes “in order to form a more perfect Union.”⁴⁰⁶ Indeed, from the Founders’ perspective, Article V is the means by which “a more perfect union” is achievable.⁴⁰⁷ That perfection could come via repeal, or it could be via AMFIT.

There are some who may view AMFIT as a weakening of gun rights. To the contrary, AMFIT will strengthen the rights of gun owners with an investment in their future. It also will help protect this nation’s children from both accident and attack. AMFIT is not proposed because gun advocates may *want* it; it is proposed because they *need* it. In conclusion, regardless of whether regulation for all via AMFIT can be said to ruin it

405. *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting).

406. U.S. CONST. pmbl.; see also U.S. CONST. art. V.

407. U.S. CONST. pmbl.

for *some*, tragedy has set the right to bear arms on a course to ruin it for *all*.

The *Affordable Mandatory Firearms Insurance and Tax* has laid forth terms and conditions, has recommended benefits and concessions, and has done so with accompanying constitutional analysis. That legislative proposal shall be known as AMFIT. It can bring order, safety, recourse, and accountability to the ownership and enjoyment of those exercising their Second Amendment rights, while quelling calls for repeal by actively addressing the burgeoning need for safer measures that do not abridge the right. For gun enthusiasts, it will ensure the Second Amendment's protection from repeal. For advocates of gun safety, it will secure the right to bear arms only for those who follow the law. Firearms shall be more effectively kept out of the hands of those who should not possess them, from children to criminals. That is accomplishable via this demonstrably constitutional solution to an ongoing issue across the United States. That solution is AMFIT.