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THIS IS GUN COUNTRY: THE INTERNATIONAL IMPLICATIONS OF U.S. GUN CONTROL POLICY

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Abstract: Mexican drug trafficking organizations are the largest providers of illicit drugs to the United States. They have also grown to rely on advanced, high-power weaponry and to use their nearly military-grade armament to maintain control over smuggling corridors, and local drug production areas. Cartels are also linked to nearly 40,000 deaths over the last five years, many of which were committed with guns originating in the United States. The United States is likely the most prevalent source of weapons for the increasingly violent cartels. The U.S. government estimates that nearly ninety percent of all weapons used in the drug war originate in the United States. An analysis of current gun control policy in the United States and Mexico suggests this is likely the case; Mexico has particularly strict gun control laws in contrast to the relatively lenient gun control regulation in the United States. Both countries have implemented domestic policies aimed at reducing the southward flow of arms into Mexico, yet so far have had little success. This Note argues that arms trafficking has been facilitated by current U.S. gun control policy, and it will likely continue without a foundational shift in either U.S. or international policy.

It's a terrible problem. They have to do something about it.

—The Honorable Robert Gottsfield¹

INTRODUCTION

The rhetoric of the “War on Drugs” has been familiar to many U.S. citizens since the days of President Richard M. Nixon.² That language has taken on a more literal meaning in recent years due to the in-

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¹ James V. Grimaldi & Sara Horwitz, *Mexican Cartels Wielding American Weapons*, WASH. POST, Dec. 13, 2010, at A1 (describing the inability to address arms trafficking to Mexico).

² See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 797–98 (2004) (noting that President Nixon increased national focus on drug abuse during the late 1960s and early 1970s).

creased threat posed by Mexican drug cartels and distribution networks.³ The Mexican government now faces an opponent that outspends it in the fight, while utilizing a governmental task force that has been plagued with murders from and defections to the cartels themselves.⁴ Mexico's governmental efforts to reduce drug trafficking and associated gun crime have been met with a violent response from the cartels, including executions and mutilations, as well as a drug-related murder rate that doubled between 2007 and 2008.⁵

The cartels are fueled by U.S. demand for drugs; many use their profits to purchase high-powered firearms from states along the border, where they can legally obtain weapons that are prohibited for sale in Mexico.⁶ In an effort to combat the threat presented by the Mexican cartels, the United States offered Mexico an aid package that provides funding for military, police, and joint intelligence operations.⁷ Yet by increasing support to the Mexican military, the United States has, in essence, armed both sides of the conflict.⁸

Federal gun control policies in the United States, and state-level policies in the southwestern states, are a major factor in the increasing violence against both Mexican and U.S. citizens—that includes both increased murders and kidnappings domestically as well as over 40,000

³ See Stephanie Erin Brewer, *Rethinking the Mérida Initiative: Why the U.S. Must Change Course in Its Approach to Mexico's Drug War*, HUM. RTS. BRIEF, Spring 2009, at 9, 10 (“[I]t reinforces the war-like mentality that has led Mexico to deploy its military and police in a territorial battle as the answer to drug trafficking.”).

⁴ Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT'L L. & COM. REG. 363, 365–66 (2010); Peter Andreas, *The Political Economy of Narco-Corruption in Mexico*, CURRENT HIST., Apr. 1998, at 160, 164 (noting that the head of the federal anti-drug agency was arrested after it was discovered that he worked for the Juárez cartel); *The War Next Door: Horrific Brutality of Mexican Drug Cartels 'Makes al Qaeda Look Tame'*, DAILY MAIL (Oct. 25, 2010), <http://www.dailymail.co.uk/news/article1323458/MeixcandrugcartelshorrificbrutalitymakesalQaedalooktame.html> (noting that a dozen Mexican mayors had been killed in drug related violence).

⁵ Wright, *supra* note 4, at 367.

⁶ *Id.* at 369; James C. McKinley, *U.S. Is a Vast Arms Bazaar for Mexican Cartels*, N.Y. TIMES Feb. 26, 2009, at A1.

⁷ Stephen E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107, 113 (2008); *The Mérida Initiative: Fact Sheet*, U.S. DEP'T STATE (June 23, 2009), <http://www.state.gov/j/inl/rls/fs/122397.htm>.

⁸ See Brewer, *supra* note 3, at 10 (“[T]his strategy has not led to a decrease in drug-related violence but rather has seen a tripling of drug-related homicides in the past three years.”); McKinley, *supra* note 6 (“ATF officials estimate 90 percent of the weapons recovered in Mexico come from dealers north of the border.”).

murders in Mexico since 2006.⁹ Mexican drug trafficking organizations (DTOs) purchase firearms in the United States, where there is greater access to weapons and more lenient regulation on sales.¹⁰ Moreover, many of the relevant purchases are made in Arizona and Texas, where the emphasis on the individual right to own firearms is manifested in relatively lenient gun control laws.¹¹ These two states, along with California, host the top twelve dealers that are allegedly arming the cartels.¹²

Arms trafficking is unlikely to decrease without increased cooperation between the United States and Mexico.¹³ Although regulations restricting trafficking are likely constitutional, cultural factors in the southwestern states make domestic reform, tightening restrictions on firearms sales, unlikely.¹⁴ One commentator suggested that lax regulations in Texas and Arizona “reflect both the libertarian traditions of the West and the anxious vigilance of firearms enthusiasts toward their Second Amendment rights.”¹⁵ State gun control laws impose few restrictions on firearms sales, making prosecution of those accused of transacting with Mexican cartels more difficult.¹⁶ Further, state laws creating an individual right to bear arms now find support in the federal Second

⁹ *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Eric H. Holder, Jr., Att’y Gen. of the United States) [hereinafter Holder, Statement Before the S. Comm. on the Judiciary] (noting that in recent years the trafficking of firearms has led to approximately 40,000 deaths, and that the United States has recovered 64,000 guns attributable to U.S. sales); see also *U.S. Ambassador to Mexico Resigns After Public Spat*, REUTERS (Mar. 20, 2011), <http://www.reuters.com/article/2011/03/20/us-mexico-usa-idUSTRE72J09F20110320> (noting that the death toll was at 36,000 in March 2011).

¹⁰ See McKinley, *supra* note 6.

¹¹ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL’Y 191, 193, 203 (2006) (noting that Arizona and Texas have recognized a constitutional individual right to own firearms since 1912 and 1836, respectively).

¹² See Grimaldi & Horwitz, *supra* note 1.

¹³ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-709, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 4 (2009) (describing several challenges to combating arms trafficking due to a lack of cooperation within U.S. agencies and between the United States and Mexico).

¹⁴ See, e.g., Jerod E. Tufte, Comment, *Some Explicitly Guaranteed Rights Are More Fundamental Than Others: The Right to Bear Arms in Arizona*, 33 ARIZ. ST. L.J. 341 *passim* (2001). This comment was written from the perspective of an Arizona resident and suggests that the “right to bear arms is sufficiently important that it deserves stronger protection from the courts.” *Id.* at 342.

¹⁵ Karl Vick, *Gun-Trafficking Crackdown Hits Hurdle*, WASH. POST, Apr. 19, 2009, at A3.

¹⁶ See Grimaldi & Horwitz, *supra* note 1 (quoting Arizona Judge Robert Gottsfeld (“There certainly was evidence that [arms dealer] Iknadosian was selling to people who were not buying the guns for themselves, and that’s a class one misdemeanor.”). *But see* *United States v. Hernandez*, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a sentence imposed against an arms dealer convicted of supplying Mexican drug cartels).

Amendment policy that was incorporated to the states in *McDonald v. City of Chicago*.¹⁷

Despite Mexican attempts to regulate the illicit arms trade,¹⁸ arms trafficking has proliferated, operating either in accordance with gun control regulations or outside the reach of government action.¹⁹ Mexico is known for its particularly strict gun control laws and has only one operating gun store in the country.²⁰ Yet, between 2004 and 2008, the government seized nearly five times as many firearms from drug crimes as there are legal permits.²¹ Government efforts to restrict access to firearms have thus proven ineffective in the drug war.²²

This rise in international crime, or “crime that crosses international borders,”²³ has not been met with a coherent international effort intended to reduce access to high powered weapons by the DTOs.²⁴ Under the current legal framework, it is likely that arms trafficking will continue, and any attempt by Mexico to reduce the illicit arms trade and related violence will be undermined by U.S. policy.²⁵

¹⁷ 130 S. Ct. 3020, 3050–51 (2010).

¹⁸ David B. Kopel, *Mexico's Federal Law of Firearms and Explosives* 5–6 (Univ. Denver Legal Sturm Coll. of Law, Working Paper No. 10-12, 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588296 (describing Mexican Gun Control regulations).

¹⁹ See James C. McKinley, *U.S. Stymied as Guns Flow to Mexican Cartels*, N.Y. TIMES, Apr. 15, 2009, at A1.

²⁰ *Id.*

²¹ *Id.*

²² Colby Goodman & Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges*, in SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 167, 169–70 (Eric L. Olson et al. eds., 2010).

²³ Herbert Morais, *Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 584 (2005).

²⁴ See Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 296 (2002) (noting that international crimes that “involve or impact” human rights violations, including arms trafficking, are increasing); Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 425 (2005) (“The United States has dominated and exerted controlling influence over the efforts to evolve the hemisphere’s criminal justice toward harmonization and improve international criminal cooperation.”).

²⁵ See discussion *infra* Part III; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 58 (“U.S. and Mexican government officials in locations we visited told us that, while they have undertaken some efforts to combat illicit arms trafficking, they are concerned that without a targeted, comprehensive, and coordinated U.S. government effort, their efforts could fall short.”); cf. Donald E. deKieffer, *The Mexican Drug Connection: How Trade in Pharmaceuticals Has Wrecked the FDA*, 9 SW. J.L. & TRADE AMS. 321, 328–29 (2002) (suggesting that domestic regulations become meaningless when undermined by a prevalent illegal black market trading system).

Part I of this Note outlines the Mexican cartels' rise to power as the prominent source of wholesale drugs for the U.S. market. Additionally, Part I highlights the current state of legal policy in relation to arms trafficking as demonstrated by the attempted prosecution of prominent arms dealer George Iknadosian. Part II discusses the implications of the asymmetries between U.S. and Mexican gun control policy in the context of arms trafficking to Mexican cartels. Specifically, Part II notes that U.S. gun control regulations dominate the arms trafficking pattern, and for practical purposes are the only relevant authority in terms of regulating arms trafficking to Mexico. Finally, Part III argues that regulations directed at arms trafficking would be constitutional, but are unlikely to be made without consideration of foreign implications of domestic policy. It notes that Mexico's gun-control regulations are at continued risk of arbitrage without potential for remedy, and that the United States may be the only entity capable of providing a solution.

I. BACKGROUND

A. *The Rise and Operation of Mexican Drug Trafficking Organizations*

The nearly 2000 mile border between the United States and Mexico represents the trade boundary where large amounts of illicit drugs are smuggled into the United States and where many illegal firearms, weapons and currency are shipped back into Mexico.²⁶ Mexican DTOs are currently the predominant source of illicit drugs in the United States, having largely replaced the Colombian cartels.²⁷ It is estimated that the DTOs earn tens of billions of dollars each year as wholesale providers of illicit drugs.²⁸ Mexican drug trafficking organizations have grown to be so powerful that they have been called "driving forces, pillars even, of [Mexican] economic growth."²⁹ The U.S. Drug Enforcement Agency (DEA) estimates that billions of dollars enter the Mexican

²⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 20; Andreas, *supra* note 4, at 160; see also Grimaldi & Horwitz, *supra* note 1. Texas gun dealer Bill Carter, who has sold more guns seized in Mexico than any other dealer in Houston, commented on the border traffic: "Why all the talk about guns going south when so many drugs are coming north that our cows along the interstate are gettin' high off the fumes!" *Id.*

²⁷ See DEP'T. OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., 2010-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2010, at 9 (2010); Luis Astorga & David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context*, in SHARED RESPONSIBILITY, *supra* note 22, at 33; Andreas, *supra* note 4, at 160-61.

²⁸ DEP'T. OF JUSTICE, *supra* note 27, at 9.

²⁹ Andreas, *supra* note 4, at 160 (quoting Eduardo Valle, personal advisor to the Mexican attorney general in 1994).

economy each year as a result of the drug trade, and that hundreds of thousands of Mexican citizens earn their living growing drug crops or providing transportation, security, banking, and communications services to the various DTOs.³⁰

The growing violence in Mexico is associated with a few “large, sophisticated and vicious criminal organizations” engaged in the illicit drug trade.³¹ Perhaps as a result of their growing influence, there has been greater conflict between the DTOs over maintenance of “zones of control” and smuggling routes into the United States.³² In addition to the growing conflict between the most predominant DTOs, organizations without established trafficking routes utilize governmental disruption of larger cartels to gain an advantage in the market, leading to “unprecedented, high intensity violence.”³³ In 2009 alone, an estimated 6500 to 8000 individuals were killed as DTOs battled for control over smuggling corridors.³⁴ Although most of the dead were associated with the cartels themselves, since 2006 approximately 2000 police officers and Mexican soldiers have been murdered in drug related violence.³⁵

DTOs have also increasingly engaged in public conflicts and in assassinations of Mexican officials.³⁶ The DTOs’ attempts to exert political and social control signify their intention to expand their power beyond what might typically be associated with criminal organizations.³⁷ For example, drug gangs have enforced their own laws and even impose “fees like taxes” as a means of maintaining social and geographic control over trafficking areas.³⁸

U.S. and Mexican government officials estimate that DTOs primarily use guns originating in the United States.³⁹ The United States estimates that thousands of guns are smuggled into Mexico every year, of-

³⁰ *Id.*

³¹ *Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. 18 (2009) (statement of Stuart G. Nash, Associate Deputy Att’y Gen.; Director, U.S. Dep’t of Justice).

³² See Astorga & Shirk, *supra* note 27, at 33–35.

³³ *Id.* at 13.

³⁴ DEP’T. OF JUSTICE, *supra* note 27, at 15; Julian Miglierini, *Crunching Numbers in Mexico’s Drug Conflict*, BBC NEWS (Jan. 14, 2011), <http://www.bbc.co.uk/news/worldlatinamerica12194138> (suggesting that a new, more complete database estimates that 34,612 people have been killed between 2006 and late 2010).

³⁵ See Elisabeth Malkin, *Lawmakers in Mexico to Debate Drug Fight*, N.Y. TIMES Aug. 18, 2010, at A12.

³⁶ Goodman & Marizco, *supra* note 22, at 168–69, 171–73.

³⁷ See *id.*

³⁸ *Calderon: Mexico Drug Gangs Seek to Replace State*, BBC NEWS (Aug. 5, 2010), <http://www.bbc.co.uk/news/worldlatinamerica10877156>.

³⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 22.

ten orchestrated by the DTOs themselves.⁴⁰ The United States hosts nearly 7000 gun stores along the Mexican border.⁴¹ Moreover, the Bureau of Alcohol, Tobacco and Firearms (ATF) has determined that approximately eighty-seven percent of firearms seized by Mexican authorities in the last five years originated in the United States, with heavy concentrations of relevant purchases in Texas, California, and Arizona.⁴² In total, tracing data from guns seized after drug crimes demonstrate that ninety percent of the firearms originate in the United States.⁴³

Drug-related violence has risen partly due to the cartel's ability to acquire high powered weapons.⁴⁴ It is estimated that over 15,000 people were killed in 2010 alone.⁴⁵ As DTOs increasingly use high-caliber weapons, competing groups must respond by utilizing competitive weapons to maintain their market control.⁴⁶ Mexican officials have noted a trend toward increasingly "powerful and lethal" weapons—specifically higher caliber and high-power weapons.⁴⁷ For example, the Gulf-Zeta cartel now employs RPG-7 rocket launchers, anti-tank missiles, grenades, submachine guns, and "cop killers"—handguns known for their potential to pierce bulletproof vests.⁴⁸ Mexican law enforcement utilizes weapons far less advanced than the DTOs, and is often rendered incapable of effectively responding to instances of gun violence.⁴⁹

⁴⁰ See DEP'T. OF JUSTICE, *supra* note 27, at 16.

⁴¹ *Id.* at 3.

⁴² *Id.* at 20. Some commentators have questioned this statistic. *E.g.*, Kopel, *supra* note 18, at 12 ("Professor George W. Grayson [of the Center for Strategic & International Studies] calls the ninety percent factoid a 'widely exaggerated percentage,' which is being pushed by President Calderón for purposes of domestic Mexican politics."). *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 69–72 (acknowledging the controversy but stating that the eighty-seven percent statistic is not misleading).

⁴³ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 15–16 (noting that the data available relates only to gun trace requests submitted from seizures in Mexico, not all guns seized).

⁴⁴ See LUIS ASTORGA, IDPC POLICY BRIEFING—ARMS TRAFFICKING FROM THE UNITED STATES TO MEXICO: DIVERGENT RESPONSIBILITIES 1 (Lucien Chauvin trans., 2010), *available at* <http://www.idpc.net/sites/default/files/library/IDPC%20policy%20briefing%20Mexico.pdf> ("Violence is always a possibility in any illegal activity, but the magnitude of the current violence is largely related to the availability of high powered firearms being trafficked across the border from United States to Mexico.")

⁴⁵ See Malkin, *supra* note 35; *see also* Miglierini, *supra* note 34 (suggesting that 2010 was the "bloodiest year yet").

⁴⁶ See ASTORGA, *supra* note 44, at 2.

⁴⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 17.

⁴⁸ *Id.* at 3.

⁴⁹ See ASTORGA, *supra* note 44, at 1; Goodman & Marizco, *supra* note 22, at 187–88.

Although much of the violence is concentrated in Mexico, the Department of Justice (DOJ) and the National Drug Intelligence Center considers Mexican DTOs the gravest organized crime threat facing the United States today.⁵⁰ In addition to establishing drug distribution networks in at least 230 U.S. cities, Mexican cartels have been associated with shootings, kidnappings and assaults in the United States.⁵¹ Moreover, without increased restrictions on access to weapons, U.S. law enforcement will be unable to effectively respond to any further escalations of gun violence.⁵²

B. *The George Iknadosian Trial: U.S. Treatment of Arms Traffickers*

The United States has acknowledged it is the source of the majority of weapons used by the DTOs.⁵³ Despite this recognition, however, current U.S. gun control regulations do not facilitate the investigation or prosecution of those suspected to be involved in gun smuggling.⁵⁴ Mexican officials have urged the U.S. government to supplement its laws to restrict access to certain weapons, particularly in light of the fact that it is nearly impossible for DTOs to purchase firearms in Mexico.⁵⁵

One of the most prominent attempted prosecutions of a U.S. citizen for supplying guns to Mexican drug cartels occurred in Arizona state court in 2009.⁵⁶ George Iknadosian was charged with fraud, conspiracy, and assisting a criminal syndicate, based on alleged weapon sales to smugglers supplying the Sinaloa drug cartel.⁵⁷ Iknadosian, a native of Egypt, owned a store near the Mexican border named X-Calibur Guns,

⁵⁰ *Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities; Hearing Before the Senate Committee on Foreign Relations*, 111th Cong. *passim* (2009) (joint statement of Joseph M. Arabit, Special Agent in Charge El Paso Div. DEA/DOJ and William McMahon, Deputy Assistant Dir. Field Operations ATF/DOJ). [hereinafter Arabit & McMahon Testimony].

⁵¹ See Randal Archibold, *U.S. Stymied as Guns Flow to Mexican Cartels*, N.Y. TIMES, Apr. 15, 2009, at A1.

⁵² *Id.*

⁵³ See Ginger Thompson & Marc Lacey, *U.S. and Mexico Revise Joint Antidrug Strategy*, N.Y. TIMES, Mar. 23, 2010, at A4 (quoting Sec. of State Hillary Rodham Clinton) (“Yes, we accept our share of the responsibility.”).

⁵⁴ See Grimaldi & Horwitz, *supra* note 1 (describing the dismissal of a case against an accused arms dealer).

⁵⁵ See Mary Beth Sheridan, *Treaty to Curb Gun Smuggling to Mexico Remains Stalled*, WASH. POST, Oct. 22, 2010, at A19.

⁵⁶ See McKinley, *supra* note 6; Dennis Wagner, *Trial of Phoenix Gun Seller to Start*, ARIZ. REPUBLIC, (Mar. 9, 2009), <http://www.azcentral.com/community/phoenix/articles/2009/03/09/20090309guns0309.html> (“The case has drawn international attention as a landmark effort against gunrunning.”).

⁵⁷ McKinley, *supra* note 6.

and was accused of selling over 700 firearms with the knowledge that the weapons were bought on behalf of DTOs.⁵⁸ Iknadosian's clients purchased guns largely prohibited from private ownership in Mexico, including AK-47s, SKS rifles, and .50-caliber rifles.⁵⁹ X-Calibur Guns sold a large number of weapons implicated in illicit gun trafficking, so much so that ATF officials believed they had discovered a "direct pipeline from Iknadosian to the Sinaloa cartel."⁶⁰ In fact, U.S. officials traced rifles back to Iknadosian and X-Calibur after Mexican officials recovered them at the scene of a gunfight that left eight Mexican police officers dead.⁶¹ Similarly, Arizona prosecutors believed that a narcotics crime boss had on his person an Iknadosian pistol with a \$35,000 diamond-studded map of Sinaloa on the butt of the gun when he was arrested.⁶²

The ATF brought the case to Arizona attorney general Terry Goddard, who investigated Iknadosian for over a year with the Phoenix Police Department.⁶³ The department's evidence against Iknadosian was extensive, and included his advice on sneaking weapons across the border:⁶⁴ "When you guys buy them [guns], I run the paperwork, you're ok, you're gone. On my end, I don't give a crap."⁶⁵ Moreover, his nine co-defendants all pled guilty in return for reduced charges and sentences.⁶⁶ Judge Robert Gottsfield dismissed the case, finding that the charges against Iknadosian were too severe, and that many of the sales were legitimate.⁶⁷ Concerning the allegations that the guns were headed directly to Mexico after purchase, Judge Gottsfield stated, "It's a terrible problem. They have to do something about it."⁶⁸

Persons involved in arms trafficking to drug cartels have not been entirely outside the reach of U.S. law enforcement.⁶⁹ Yet the Iknadosian

⁵⁸ *Id.*

⁵⁹ See Wagner, *supra* note 56.

⁶⁰ McKinley, *supra* note 6 (quoting Thomas G. Mangan, spokesman for the federal ATF).

⁶¹ Michel Marizco, *Toxicity in Arms Trafficking*, LAW ENFORCEMENT TECH., Sept. 1, 2009, at 10, 14 (quoting ATF Agent William Newell) ("The officers 'ran out of ammunition in the fight' . . . 'They got overwhelmed.'").

⁶² *Id.*

⁶³ Grimaldi & Horwitz, *supra* note 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Wagner, *supra* note 56.

⁶⁷ Marizco, *supra* note 61, at 14; see Grimaldi & Horwitz, *supra* note 1 (quoting Arizona Judge Robert Gottsfield) ("There certainly was evidence that Iknadosian was selling to people who were not buying the guns for themselves, and that's a class one misdemeanor.").

⁶⁸ Grimaldi & Horwitz, *supra* note 1 (quoting Arizona Judge Robert Gottsfield).

⁶⁹ See, e.g., *United States v. Hernandez*, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a 97-month sentence for supplying the Zeta cartel with 103 firearms, 23 of which were military-

case highlights the problems associated with enforcing criminal sanctions within the context of Mexican gun trafficking.⁷⁰ Specifically, a lack of tailored legislation makes convictions difficult.⁷¹ Nevertheless, those opposed to gun control, including members of the powerful gun lobby, do not agree that more restrictions would curb drug violence in Mexico.⁷² Mexican residents, on the other hand, believe that restricting access to weapons in the United States would help reduce both the number and caliber of arms available to the DTOs.⁷³ As one Mexican resident observed, “If the United States had a system like ours, we wouldn’t have so many problems here in Mexico.”⁷⁴

II. DISCUSSION

The high level of drug trafficking and the increasing violence has resulted in heightened efforts by both the U.S. and Mexican governments to disarm and dismantle DTO operations at the border.⁷⁵ Although the United States and Mexico have engaged in a variety of initiatives to address the gun smuggling problem, many have been unsuccessful because of structural problems or insufficient funding.⁷⁶ Consequently, little headway has been made to reduce arms trafficking

style assault rifles); *United States v. Gutierrez*, 359 Fed. Appx. 540, 541–42 (5th Cir. 2010) (upholding sentence of 46 months for making materially false statements to a federally licensed firearms dealer).

⁷⁰ See Grimaldi & Horwitz, *supra* note 1; McKinley *supra* note 6.

⁷¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 38; Grimaldi & Horwitz, *supra* note 1.

⁷² See Chris Cox, *Mexico’s Drug Wars: Will Gun Owners Be the Scapegoats?*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Apr. 27, 2009), <http://www.nraila.org/Issues/Articles/Read.aspx?id=354&issue=014>; Chris Hawley, *Mexico Says Gun Controls Undermined by U.S. Laws*, USA TODAY, Apr. 1, 2009, at 5A.

⁷³ See Hawley, *supra* note 72.

⁷⁴ *Id.* (quoting Agustín Villordo, a Mexican resident of Puebla).

⁷⁵ See John Bailey, *Combating Organized Crime and Drug Trafficking in Mexico: What Are Mexican and U.S. Strategies? Are They Working?*, in SHARED RESPONSIBILITY, *supra* note 22, at 327–28, 340–41; Randal C. Archibold, *National Guard Will Be Deployed at Border*, N.Y. TIMES, May 25, 2010, at A1 (noting President Obama’s intention to seek increased spending on law enforcement to combat drug smuggling in response to bipartisan pressures).

⁷⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 57–58 (noting there has not even been a coordinated effort between U.S. agencies); Brewer, *supra* note 3, at 9 (“Yet an examination of the current Mexican and regional context leads to the conclusion that without a paradigm shift in design, the hundreds of millions of taxpayer dollars earmarked for the Mérida Initiative and other antidrug aid to Mexico will fuel a dysfunctional approach to public security.”); see also U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., EVALUATION & INSPECTIONS DIV., I-2009-006, INTERIM REVIEW OF ATF’S PROJECT GUN-RUNNER 34 (Sept. 2009) (noting that the ATF’s resources are not utilized efficiently and the strategies for reviewing success of the program are insufficient).

to Mexico.⁷⁷ The Mexican government under President Calderón employed the military to combat the DTOs.⁷⁸ The United States has initiated programs to aid Mexico's government, but there has not been consistent cooperation between U.S. and Mexican police and armed forces.⁷⁹ Despite the attempted alliance between the two governments, arms trafficking has proliferated under the existing framework.⁸⁰

A. Gun Control in the United States

The United States has a strong policy favoring limited regulation of firearm ownership.⁸¹ At the federal level, the Gun Control Act of 1968 permits a wide range of purchasing and sale rights to licensed dealers, including rights to interstate and foreign transfer of weapons.⁸² The Act also places limits on who may own and purchase firearms.⁸³ Additionally, it regulates the administration of federal permits to sell firearms, and in many instances, it allows licensed sellers to transport an unlimited number of weapons in interstate and foreign commerce without reporting those sales to federal authorities.⁸⁴ Particularly relevant to arms trafficking, the Act makes it illegal for a licensed dealer to knowingly transfer weapons to an unlicensed person who lives out of state, yet it permits the sale of weapons to an unlicensed person if the transaction is completed at the dealer's place of business.⁸⁵ Similarly, under the Act it is illegal for any seller to transfer a firearm to a prohibited person, although the enforcement mechanisms are limited to li-

⁷⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 59 (recommending greater intelligence sharing and cooperation between the U.S. and Mexican governments).

⁷⁸ Bailey, *supra* note 75, at 328 ("Its central logic was to employ the armed forces, principally the Army, to confront armed bands of criminals in selected locales in order to disrupt their activities and to buy time to implement a long menu of institutional reforms.").

⁷⁹ See *id.* at 340.

⁸⁰ See Wright, *supra* note 4, at 369 ("It is largely the demand from the United States for drugs that makes the drug business profitable, and the United States' commerce in firearms that makes the cartel business more deadly."); *U.S. Ambassador to Mexico Resigns*, *supra* note 9 (noting the alliance between the United States and Mexico has been damaged due to the failure of the United States to stop arms trafficking to Mexico).

⁸¹ See *McMann v. City of Tucson*, 47 P.3d 672, 674 (2002) (describing Arizona state legislation intended to prevent the enactment of municipal gun control legislation); Sari Horwitz & James V. Grimaldi, *Firearms Watchdog on Short Lease*, WASH. POST, Oct. 26, 2010, at A1 (quoting an NRA fact sheet) ("Those who wonder what motivates American gun owners should understand that perhaps only one word in the English language so boils their blood as 'registration,' and that word is 'confiscation.'").

⁸² 18 U.S.C. § 922(a)(1)–(5) (1968).

⁸³ *Id.*

⁸⁴ *Id. passim.*

⁸⁵ *Id.* § 922(b)(3).

censed dealers.⁸⁶ As a result, the problem of illicit sales by unlicensed dealers falls outside the scope of the Act.⁸⁷

In addition to federal legislation, U.S. Second Amendment policy was recently redefined by the Supreme Court.⁸⁸ In *District of Columbia v. Heller*, Justice Scalia reasoned that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”⁸⁹ Only two years later, *Heller* was affirmed and the Second Amendment was incorporated against the states as an individual right in *McDonald v. City of Chicago*.⁹⁰

In *Heller*, the Court considered whether a District of Columbia prohibition on the possession of functional handguns in the home violated the Second Amendment.⁹¹ The ordinance also required that any lawfully owned firearms be kept unloaded and inoperable when not being used for recreational activities.⁹² The case arose after Dick Heller, a police officer in the District of Columbia, was denied a registration certificate for a handgun he desired to keep at home.⁹³ Heller filed suit in District Court, seeking to enjoin the city from enforcing the handgun restrictions on Second Amendment grounds.⁹⁴ After engaging in a lengthy analysis of the linguistics and history of the Second Amendment, the Court held that the District’s handgun ban amounted to a Second Amendment violation in that it forbids “use for protection of one’s home and family.”⁹⁵

Two years later, *McDonald v. City of Chicago* incorporated the individual right to keep and bear arms established in *Heller* to all fifty states.⁹⁶ *Heller* addressed the issue within the confines of a federal en-

⁸⁶ See *id.* § 922(s), (t).

⁸⁷ See *id.* § 922(s)(1)(A)(i)(II) (requiring only licensed sellers to perform background checks or verify the identity of buyer).

⁸⁸ *McDonald v. City of Chicago*, 130 S. Ct. 3020 *passim* (2010); *District of Columbia v. Heller*, 554 U.S. 570 *passim* (2008) (outlining the debate of Second Amendment interpretation as either a right to maintain a militia or an individual right to own firearms, and resolving the debate as a right for individuals); Mark Tushnet, *Permissible Gun Regulations After Heller: Speculation About Method and Outcomes*, 56 UCLA L. REV. 1425, 1432–33 (2009) (noting that the Court’s decisions have created a barrier to constitutional challenges of most federal gun regulations).

⁸⁹ 554 U.S. at 570.

⁹⁰ 130 S. Ct. at 3050–51.

⁹¹ 554 U.S. at 573.

⁹² *Id.*

⁹³ *Id.* at 574–75.

⁹⁴ *Id.* at 575–76.

⁹⁵ *Id.* at 628–29.

⁹⁶ *McDonald*, 130 S. Ct. at 3026–27.

clave, and therefore did not address state firearm regulations.⁹⁷ The case was filed against the city only hours after *Heller* came down, alleging that the Chicago ordinances were in violation of the Second and Fourteenth Amendments.⁹⁸ The Court rejected the petitioner's challenge under the privileges and immunities clause of the Fourteenth Amendment.⁹⁹ Instead, the Court engaged in a selective incorporation analysis, ultimately determining that the "right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."¹⁰⁰ The Court thus agreed with the petitioner's contention that the law essentially prevented citizens from defend themselves, leaving them more susceptible to injury and gun-related crime.¹⁰¹ In the end, the Court held that the Second Amendment as recognized in *Heller* would be incorporated through the Due Process clause of the Fourteenth Amendment.¹⁰²

While the individual right to keep and bear arms is not without limits, it is also without a clear category of exception.¹⁰³ Both *Heller* and *McDonald* recognize the necessity of governmental regulations in certain circumstances.¹⁰⁴ *Heller* stressed that the right would not extend to every manner and purpose, and included a list of exceptions where prohibitions on ownership would be reasonable.¹⁰⁵ The Court permits prohibitions for "presumptively lawful regulatory measures" without providing a standard for determining which regulations might fit into that category.¹⁰⁶ The Court did not elucidate a standard for evaluating gun regulations, instead reasoning that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if those exceptions come before us."¹⁰⁷

Overall, *Heller* addresses the individual right to carry arms for the purpose of self-defense.¹⁰⁸ Therefore, it is unlikely that *Heller* or *McDonald* would prohibit certain regulations aimed at reducing drug traffick-

⁹⁷ Eileen Kaufman, *The Second Amendment: An Analysis of District of Columbia v. Heller*, 25 *TOURO L. REV.* 703, 704 (2009).

⁹⁸ *McDonald*, 130 S. Ct. at 3027; Kaufman, *supra* note 97, at 723.

⁹⁹ *McDonald*, 130 S. Ct. at 3030–31.

¹⁰⁰ *Id.* at 3042–43.

¹⁰¹ *See id.* at 3043–44.

¹⁰² *Id.* at 3044–45.

¹⁰³ *See* Kaufman, *supra* note 97, at 711–12.

¹⁰⁴ *McDonald*, 130 S. Ct. at 3047–49; *Heller*, 554 U.S. at 626–27.

¹⁰⁵ *See Heller*, 554 U.S. at 626–27.

¹⁰⁶ *See id.* at 627 n.26.

¹⁰⁷ *Id.* at 635.

¹⁰⁸ *Id.* at 626–27, 629.

ing.¹⁰⁹ While the Court in *Heller* seemed to apply a strict-scrutiny analysis to regulations aimed at restricting law-abiding person's access to weapons, a regulation only peripherally related to the individual's access to weapons would probably receive only intermediate scrutiny.¹¹⁰ This would likely include laws aimed at gun-trafficking, which might include registration requirements, or increased efforts to funnel sales through regulated, licensed sellers.¹¹¹

One relevant issue to be addressed in the future will be the constitutionality of regulations requiring registration of guns by the federal government.¹¹² The federal government's inability to trace firearms has hampered policing of gun trafficking.¹¹³ Yet gun-rights advocates are wary of registration requirements and the "slippery slope" from registration to confiscation.¹¹⁴ *Heller* suggests that registration requirements will be constitutional so long as they do not amount to a complete ban.¹¹⁵

Firearms are further regulated at the state level.¹¹⁶ All states operate under federal gun control laws, but it is within their discretion to enhance those regulations with additional requirements for background checks and dealer inspections by state officials.¹¹⁷ Some states, including those along the southwestern border, have opted not to enact additional regulations, and therefore have relatively limited gun control laws.¹¹⁸

¹⁰⁹ See *id.* at 626–29 (noting that although a complete ban on handguns is unconstitutional, other regulations would likely withstand a Second Amendment challenge).

¹¹⁰ See *id.* at 626–27, 634–35 (noting that the Second Amendment right is not unlimited, but also that it is not to be subject to a "freestanding 'interest-balancing' approach"); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (finding that government regulations concerned with constitutional rights will be subjected to heightened scrutiny).

¹¹¹ See *McDonald*, 130 S. Ct. at 3047–49; *Heller*, 554 U.S. at 626–27 & n.26.

¹¹² See Tushnet, *supra* note 88, at 1436.

¹¹³ DEP'T OF JUSTICE, JOINT STAFF REPORT, THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: FUELING CARTEL VIOLENCE 30 (2011) available at <http://www.grassley.senate.gov/judiciary/upload/ATF-07-26-11-Report-on-Impact-on-Mexico-2.pdf>; Sari Horwitz, *A Gunrunning Sting Gone Fatally Wrong*, WASH. POST, July 26, 2011, at A6 (noting that some ATF officials believed the operation to be highly successful in infiltrating the Sinaloa cartel).

¹¹⁴ See Tushnet, *supra* note 88, at 1436 ("The slippery slope to gun confiscation is not quite as slippery after *Heller*; though gun-rights proponents can continue to argue that there is still some grease in the slope.").

¹¹⁵ See *id.*; *Heller*, 554 U.S. at 626–27.

¹¹⁶ See MAYORS AGAINST ILLEGAL GUNS, THE MOVEMENT OF ILLEGAL GUNS IN AMERICA REPORT 3 (2008) ("The key finding of this report is that states that supply crime guns at the highest rates have comparatively weak gun regulations.").

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*; see Fredrick Kunkle, *Gun Toting Soccer Moms a Scary Thought in D.C. Area, but Not out West*, WASH. POST, Aug. 18, 2010, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/08/17/AR2010081705427.html> (quoting Hildy Saizow, President of Arizonans for Gun Safety) ("Out here in the Southwest, it's really a Wild West mentality.

This is perhaps not surprising, as many residents in those states place special emphasis on a broad reading of the Second Amendment, and prefer relaxed restrictions on firearms.¹¹⁹ In fact, an individual right to keep firearms was recognized in state constitutions in Arizona and Texas, long before the Court's decision in *Heller*.¹²⁰

In general, states implicated in arms trafficking to DTOs, including Arizona and Texas, have done little to augment federal regulations on selling weapons.¹²¹ Moreover, state regulations in Arizona and Texas do not include provisions on registration, or bans on assault weapons.¹²² For example, Arizona permits the sale of high-caliber assault rifles to American citizens who present identification without requiring dealers to report those sales to the government.¹²³ Similarly, Texas law makes sales of handguns illegal only if the seller "knowingly" transfers the weapon to a person who intends to use that weapon unlawfully.¹²⁴ Gun regulations in the border states ensure that citizens can own weapons with very few restrictions.¹²⁵

B. Gun Control in Mexico

In contrast, Mexico has adopted particularly strict gun control laws.¹²⁶ Currently, there is only one firearm store in the entire country; it is located in Mexico City, and operated by the military.¹²⁷ In order to obtain a permit to own a firearm, a person must apply at a military base, and demonstrate that he: (1) lives an honest life; (2) has com-

People are willing to accept the fact that people are walking around with guns on their hips.").

¹¹⁹ See McKinley, *supra* note 6 (noting an alleged arms dealer engaged in illegal trafficking moved to Arizona to take advantage of the more lenient laws); Vick, *supra* note 15.

¹²⁰ Volokh, *supra* note 11, at 193, 203.

¹²¹ See Kunkle, *supra* note 118 (comparing the strict handgun restrictions in the D.C. to those in Arizona, which require only a computerized background check to obtain a handgun).

¹²² See ARIZ. REV. STAT. ANN. § 13-31 *passim* (2010) (containing no explicit ban on assault rifles or requirements for registration); 16 TEX. ADMIN. CODE § 36 *passim* (1997) (no requirements for registration or bans on assault weapons); Vick, *supra* note 15 (quoting Jacob Allerd, a private collector and firearms dealer in Arizona) ("No paperwork, nothing . . . Just an Arizona license. And proof you're over 21.").

¹²³ ARIZ. REV. STAT. ANN. § 13-3108(B), (C) (2010).

¹²⁴ TEX. PENAL CODE ANN. § 46.06(a)(1) (West 1997).

¹²⁵ See Kunkle, *supra* note 118 ("But their bill reflects a philosophy that seems part of the American West's genome. Even Arizona's flag, based on a design created by the team captain of the former territory's rifle team during a national rifle match almost a hundred years ago, symbolizes the way guns are woven into the state's politics and culture.").

¹²⁶ See Hawley, *supra* note 72; Kopel, *supra* note 18, at 6-7.

¹²⁷ Kopel, *supra* note 18, at 6.

pleted any required military service; (3) has not been convicted of any crimes involving weapons; and (4) does not use any drugs.¹²⁸ To receive a permit, a person must also show that he has a justifiable reason for owning a weapon.¹²⁹ Unless the person obtains a permit for use as a governmental employee, he must have his permit reissued every two years.¹³⁰ Additionally, private ownership is limited to low-power firearms, primarily those smaller than .22 caliber.¹³¹ Anyone who uses or sells a weapon of a higher caliber, specifically those restricted for military use, may face a prison sentence of up to thirty years.¹³² In contrast to U.S. regulations, Mexico has established a national registry for firearms, and requires that all weapons be reported to the government for inclusion in a database.¹³³

In an effort to enhance its own laws and reduce arms imported from the United States, the Mexican government has attempted to increase its involvement with U.S. security officials along the border.¹³⁴ To control the influx of weapons, the Mexican government has focused on seizing illegal weapons, engaging in raids of property associated with drug traffickers and inspecting incoming vehicles.¹³⁵ Additionally, in 2009, the Mexican government aided U.S. tracing efforts by submitting an extensive list of firearms to the ATF's U.S. database for use in discerning trafficking patterns.¹³⁶ Even in light of the strict Mexican regulations and international cooperation, ATF officials and Mexican authorities predict that the DTOs will continue to import weapons from U.S. dealers along the border.¹³⁷ One ATF special agent observed that the relative ease of acquiring guns in the United States as compared to Mexico will encourage DTO members to continue to travel north across the border to purchase firearms.¹³⁸

¹²⁸ Ley Federal de Armas de Fuego y Explosivos [Federal Law of Firearms and Explosives], art. 26, Diario Oficial de la Federación [DO], 23 de Enero de 2004 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/102.pdf>.

¹²⁹ *Id.*

¹³⁰ *Id.* art. 25.

¹³¹ See Kopel, *supra* note 18, at 6.

¹³² Ley Federal de Armas de Fuego y Explosivos, art. 84.

¹³³ ASTORGA, *supra* note 44, at 2.

¹³⁴ Goodman & Marizco, *supra* note 22, at 177–79.

¹³⁵ *Id.*

¹³⁶ *Id.* at 169.

¹³⁷ Grimaldi & Horwitz, *supra* note 1.

¹³⁸ *Id.*

C. Effect of the Conflicting Policies

Despite strict Mexican regulations, buyers are nevertheless able to acquire and import the weapons they desire from U.S. arms dealers.¹³⁹ Although the Mexican government granted only 4300 licenses that allow persons to carry firearms outside of their homes, between 2004 and 2008 over 20,000 guns were seized and traced to the United States.¹⁴⁰ In fact, it is estimated that 2000 weapons are brought into Mexico each day from the United States.¹⁴¹ Likely, the individuals Mexico aims to exclude from permitted gun ownership—those involved in drugs and crime—are those most likely to obtain a weapon illegally from the United States.¹⁴² For these reasons, Mexican officials have described the illicit arms market as the most important domestic crime problem, and the primary threat to Mexican national security.¹⁴³

Certain U.S. regulations directly facilitate sales to individual DTO members, and thus operate in direct conflict to Mexican attempts to reduce DTO access to firearms.¹⁴⁴ For example, ATF officials are only permitted to inspect individual gun stores once a year without a warrant.¹⁴⁵ Because there are nearly 7000 gun dealers along the border, few stores are inspected even annually.¹⁴⁶ Although licensed dealers are required to inform state or local law enforcement if a non-licensed person purchases more than one handgun within a five day period, there is no similar requirement for assault rifles.¹⁴⁷ Moreover, sales by unlicensed dealers are in large part unregulated.¹⁴⁸ Lastly, ammunition

¹³⁹ See Hawley, *supra* note 72 (quoting Lt. Col. Raúl Manzano Vélez, Director of Civilian Gun Sales in Mexico) (“I would dare say that Mexico has some of the strictest regulations about gun ownership in all the world, and we’re right next to a country . . . that has some of the easiest ones. . . . That creates a huge vacuum between the countries and feeds weapons trafficking.”).

¹⁴⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 15.

¹⁴¹ Hendrix, *supra* note 7, at 108.

¹⁴² See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 23–24 (noting that most arms trafficked into Mexico end up in the hands of the cartels).

¹⁴³ *Id.* at 10.

¹⁴⁴ See Goodman & Marizco, *supra* note 22, at 195–98 (summarizing certain U.S. regulations that present a contrast to Mexican regulations within the arms trafficking context).

¹⁴⁵ *Id.*

¹⁴⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 20 (noting that there are over 6700 gun stores along the border); Astorga & Shirk, *supra* note 27, at 47–48.

¹⁴⁷ See Goodman & Marizco, *supra* note 22, at 198 (noting that these measures are generally unenforceable without a registration system that would provide an enforcement mechanism).

¹⁴⁸ *Id.*

sales, which occur far more frequently than sales of weapons, are also generally unmonitored.¹⁴⁹

Mexican officials have appealed to U.S. officials for reinstatement of the assault weapons ban¹⁵⁰ that expired in 2004.¹⁵¹ Mexican President Felipe Calderón suggested that increased violence in Mexico can be correlated with greater access to high-power assault weapons.¹⁵² In fact, one state along the border, Chihuahua, has seen a 1800 percent increase in murders between 2007 and 2010.¹⁵³ The availability of these weapons has also negatively impacted Mexican law enforcement, as many officers are not equipped to combat the high-caliber guns employed by the cartels.¹⁵⁴ Much of the Mexican police force is armed with older, low caliber weaponry and lacks body armor; it is thus unable to control the virtually militarized DTOs.¹⁵⁵ The severe imbalance in firepower has necessitated the use of the Mexican military, as the police force has been rendered inoperable.¹⁵⁶

Although buyers can legally obtain firearms in the United States, many weapons are also available from illegal, unregulated sources.¹⁵⁷ In actuality, it appears that few federally-licensed dealers engage in firearm trafficking, suggesting that many “crime guns,” or those suspected to have been used in a crime, come from other, illicit sources.¹⁵⁸ Policing these weapons is generally done through a system known as “e-Trace,” that permits authorities to follow the movement of a weapon from a manufacturer or importer to a first purchaser.¹⁵⁹ Serial numbers or

¹⁴⁹ *Id.*

¹⁵⁰ Brian Knowlton, *Calderón Calls for Restoring Assault Weapons Ban*, N.Y. TIMES CAUCUS BLOG (May 20, 2010 12:43 PM), <http://thecaucus.blogs.nytimes.com/2010/05/20/calderon-callsforrestoringassaultweaponsban/>.

¹⁵¹ See Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, § 110102(a)(v)(1) (codified as amended at 18 U.S.C. § 922) (expired 2004).

¹⁵² Knowlton, *supra* note 150.

¹⁵³ Miglierini, *supra* note 34.

¹⁵⁴ See Goodman & Marizco, *supra* note 22, at 185–87.

¹⁵⁵ See *id.*

¹⁵⁶ See Bailey, *supra* note 75, at 327; Grimaldi & Horwitz, *supra* note 1 (quoting Mexican Ambassador to the United States, Arturo Sarukhan) (“We need to defang drug trafficking organizations of these highcaliber and semiautomatic and automatic weapons and we need to do it now.”).

¹⁵⁷ See Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1179–80 (2005).

¹⁵⁸ See Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1247 (2009) (noting that the ATF discovered low rates of misconduct among federally licensed arms dealers).

¹⁵⁹ See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ETRACE INTERNET-BASED FIREARMS TRACING AND ANALYSIS (Aug. 2005), available at www.atf.gov/publications/download/p/atf-p-3312-9.pdf.

other information about the weapon is submitted to the ATF's National Tracing Center to determine the original source of the weapon.¹⁶⁰ Mexico has submitted weapons to the United States for tracing—between 2004 and 2008, the ATF was able to determine the original source of the weapon for only 52 percent of tracing requests.¹⁶¹

Tracing the number and type of weapons used by the Mexican DTOs has proved difficult under current U.S. regulations.¹⁶² Although the ATF has increased its use of traces on crime guns, the data remains incomplete because it does not account for all weapons used in Mexico; it instead accounts only for weapons both seized by authorities *and* submitted for trace.¹⁶³ This has proven to be an obstacle to policing those involved in arms smuggling because officials are unable to discern clear trafficking patterns that might be useful for making arrests and seizing weapons.¹⁶⁴ It is likely, however, that the ATF will be forced to continue to operate with limited tracing data, as the gun lobby has expressed strong opposition to the creation of a national database.¹⁶⁵

Moreover, the firearm purchases are generally made by “straw purchasers,” individuals with clean background records who are paid by representatives of various DTOs to purchase firearms.¹⁶⁶ The use of straw purchasers insulates the actual owner from the transaction by concealing his identity.¹⁶⁷ Thus, the problems presented by a limited ability to trace a weapon are compounded by an inability to identify the ultimate owner in many firearm sales.¹⁶⁸

Project Gunrunner is the ATF initiative targeted specifically at reducing firearms trafficking to Mexico, yet it has been hampered by its reliance on incomplete tracing data.¹⁶⁹ In implementing this project, the ATF analyzes data from crime guns supplied by the Mexican government.¹⁷⁰ One operation under Project Gunrunner, known as “Fast and Furious,” attempted to use e-Trace to establish links between

¹⁶⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 14 n.10.

¹⁶¹ See *id.*

¹⁶² McKinley, *supra* note 19.

¹⁶³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 16; Goodman & Marizco, *supra* note 22, at 177–78.

¹⁶⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 25–27.

¹⁶⁵ See Horwitz & Grimaldi, *supra* note 77.

¹⁶⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 21.

¹⁶⁷ See U.S. DEP'T. OF JUSTICE, *supra* note 27, at 16.

¹⁶⁸ See *id.*

¹⁶⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 25–26 (noting that ATF does not always have access to trace data within a timeframe that would be most helpful); U.S. DEP'T OF JUSTICE, *supra* note 76, at 2–3.

¹⁷⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 25–26.

weapon purchases and high ranking members of the cartels.¹⁷¹ ATF officials in Phoenix spent nearly \$650,000 on just over 1000 weapons and permitted “gunwalking,” or allowing known straw purchasers to make the firearm sales.¹⁷² Tracing after the sale proved difficult, however, as ATF officials in Mexico were only able to learn of weapons seizures through public sources like newspapers, and could only access weapons for a few days following seizure before the Mexican military locked the guns in a vault.¹⁷³ The operation ended after an ATF agent was killed by one of the weapons associated with the program.¹⁷⁴

In order to bolster individual domestic initiatives, the United States and Mexico agreed on a support package largely focused on providing military assistance and financial aid for Mexican security forces.¹⁷⁵ The Mérida Initiative signed in 2007 by Mexican President Felipe Calderón and President George W. Bush, promised \$400 million in aid in the first year, with an estimated total payment of over \$1 billion over three years.¹⁷⁶ The initiative represents an international complement to U.S. domestic efforts to reduce demand for illegal drugs, halt the trafficking of firearms and weapons, and prosecute criminals engaged in drug trafficking.¹⁷⁷ Additionally, the initiative aims to support law enforcement to improve public security, and to strengthen the Mexican judicial structure and rule of law.¹⁷⁸ One objective of this program is to reduce the U.S. demand for drugs in an effort to curtail the growth of some of these organizations.¹⁷⁹ The ultimate success of the Mérida Initiative is questionable, however, as drug related killings have dramatically increased in the years since its signing.¹⁸⁰ In March 2010, the initiative was revised to address this violence by increasing funding for civilian police training and reducing military technical assistance.¹⁸¹

¹⁷¹ Horwitz, *supra* note 113.

¹⁷² U.S. DEP'T OF JUSTICE, *supra* note 113, at 25–26; Horwitz, *supra* note 113.

¹⁷³ U.S. DEP'T OF JUSTICE, *supra* note 113, at 16, 22; Horwitz, *supra* note 113.

¹⁷⁴ U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: ACCOUNTS OF ATF AGENTS 43–44 (2011); Horwitz, *supra* note 113.

¹⁷⁵ Brewer, *supra* note 3, at 9.

¹⁷⁶ *Id.*; *The Mérida Initiative: Fact Sheet*, *supra* note 7.

¹⁷⁷ *The Mérida Initiative: Fact Sheet*, *supra* note 7.

¹⁷⁸ *See* Hendrix, *supra* note 7, at 112.

¹⁷⁹ *See id.*

¹⁸⁰ *See* Brewer, *supra* note 3, at 10. *But see* Hendrix, *supra* note 7, at 110 (“With the Mérida Initiative, the old ‘name and blame’ game has receded to the past, and has been replaced with a new security partnership based on collaboration and mutual respect.”).

¹⁸¹ *See* Ginger Thompson & Marc Lacey, *U.S. and Mexico Revise Joint Antidrug Strategy*, N.Y. TIMES, Mar. 23, 2009, at A4.

III. ANALYSIS

The violence associated with drug trafficking now threatens every aspect of Mexico's national security.¹⁸² DTOs have infiltrated Mexican government and law enforcement using threats and bribery,¹⁸³ and have maintained economic growth in the face of a financial downturn.¹⁸⁴ The "politically savvy" DTOs have forced the Mexican government to engage military forces to battle the heavily armed cartels, as traditional forms of law enforcement have been ineffective.¹⁸⁵ These organizations have risen to a level of power never before seen in the Mexican criminal context, and are expanding to create a threat to the international community.¹⁸⁶ Despite the fact that criminal law is traditionally a domestic matter,¹⁸⁷ such a limitation in this context has inhibited the ability of the Mexican government to reduce the levels of violence, and has contributed to a staggering death toll.¹⁸⁸ As such, the failure of the United States and Mexico to create an international solution virtually guarantees that the arms trafficking problem and the associated violence will continue.¹⁸⁹

¹⁸² See Bailey, *supra* note 75, at 327 ("What in the past had been a chronic but tolerable problem of public security has passed the tipping point to become a genuine threat to national security and democratic governance.").

¹⁸³ Cf. *id.* at 331 (noting that part of President Calderón's strategic plan to address the DTOs is to purge corrupt people from the Mexican police force).

¹⁸⁴ See *id.* at 327; Kopel, *supra* note 18, at 12 (noting that Mexican cartels earn approximately twenty-five billion dollars in revenue a year, which amounts to two percent of the gross domestic product of Mexico).

¹⁸⁵ See Bailey, *supra* note 75, at 327; Wright, *supra* note 4, at 368 ("The government's plan . . . led some to predict a prolonged violence in the country with little or no gains in public order.").

¹⁸⁶ Bailey, *supra* note 75, at 327.

¹⁸⁷ See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 986 (2007) ("[I]nternational criminal law has largely been enforced at either the purely domestic or the international level.").

¹⁸⁸ See Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 102-03 ("The key insight is that government inaction is just as likely to limit freedom as government action."); Turner, *supra* note 187, at 989 ("While international crimes often do not create externalities for powerful states, the argument that the international community must act to prevent and punish international crimes has deep moral resonance."); Miglierini, *supra* note 34 (suggesting that the death toll associated with Mexican drug violence is now over 34,000).

¹⁸⁹ See William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 995, 1004 (1996) ("By developing a relationship that recognizes the importance of dynamic responses to change, the parties can establish a mutually reinforcing relationship that can resolve disputes as well as new issues."); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) ("[T]he modern transformation of sovereignty has remade interna-

A. *The Importance of International Cooperation: A Brief Digression into the Cross Border Pharmaceutical Trade*

In a global economy, domestic regulatory schemes are subject to influence and arbitrage from competing policies abroad.¹⁹⁰ The consequences of this modern dilemma are evident in the illegal pharmaceutical trade between the United States and Mexico.¹⁹¹ U.S. citizens are able to purchase pharmaceuticals in Mexico, or online from Mexican distributors, at a much lower cost than in the United States, and are not required to report those purchases under U.S. law.¹⁹² The pharmaceutical market has evolved in a remarkably parallel fashion to the illegal arms market, as Mexican cities near the border host nearly ten times as many pharmacies as exist in comparably sized cities across the border.¹⁹³ The importation of pharmaceuticals through unregulated channels has grown enormously, and threatens to compete with drugs available in the legal prescription market.¹⁹⁴ The Food and Drug Administration (FDA) has extensive regulations designed to protect people and markets from illegal or counterfeit drugs, yet those rules only apply to those who willingly subject themselves to the intended regulatory system.¹⁹⁵ In other words, the regulatory scheme is not equipped to address the growing market for drugs imported across the border.¹⁹⁶ The wide availability of drugs in Mexico suggests that the “grey market” of pharmaceutical drugs will continue to proliferate, undermining the efforts of the FDA.¹⁹⁷ The extensive regulatory scheme prohibiting the importation of pharmaceuticals is thus likely to become extraneous as consumers are able to purchase drugs at a lower cost abroad.¹⁹⁸

The pharmaceutical trade affects more than just the ability of U.S. citizens to access drugs.¹⁹⁹ Pricing mechanisms in individual countries

tional law, so that international law norms now help construct national identities and interests through a process of justificatory discourse.”).

¹⁹⁰ Cf. deKieffer, *supra* note 25, at 322 (“The volume of undocumented prescription drug imports from Mexico . . . [has] severely damaged the regulatory regime of the Food and Drug Administration.”).

¹⁹¹ *See id.*

¹⁹² *Id.* at 321–22.

¹⁹³ *Id.* at 322–23.

¹⁹⁴ *Id.* at 325.

¹⁹⁵ *Id.* at 327–28.

¹⁹⁶ *See deKieffer, supra* note 25, at 328.

¹⁹⁷ *See id.* at 327–29.

¹⁹⁸ *See id.* at 329.

¹⁹⁹ *See* Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 YALE J. HEALTH POL’Y L. & ETHICS 193, 195–96

reflect an internal regulatory attitude: some systems impose higher prices to facilitate research, while others offer drugs at lower prices to improve access.²⁰⁰ The concern is that a divergence from the intended policy may undermine high-price regulatory systems and reduce financial support for research and development, which may in turn threaten the ability to provide low cost drugs to benefit low income countries in the future.²⁰¹ Although current patients may thus benefit from lower priced drugs, the quality of future medicine may be sacrificed due to the reduced revenue available for research.²⁰² As such, the deliberate attempt to create a regulatory structure to promote domestic interests may be rendered irrelevant by the flowering grey market of pharmaceutical drugs.²⁰³

In the present instance, Mexican attempts to restrict access to weapons will be similarly undermined.²⁰⁴ Drug and arms traffickers will continue to take advantage of the disparities in legal systems, trading illegal narcotics for guns across the border between the United States and Mexico.²⁰⁵ To prevent Mexican gun control laws from meeting the same fate as FDA regulations in the prescription drug context, the United States ought to consider the international implications of its domestic gun policy.²⁰⁶

Where issues with international implications are presented, combining international and domestic considerations is difficult because of the inherent self-interest employed by nation-states in the international

(2005) (noting that pharmaceutical pricing is part of an overall scheme that addresses intellectual property rights, as well as research and development costs).

²⁰⁰ *Id.* at 195.

²⁰¹ *Id.* at 195–96.

²⁰² *Id.* at 219.

²⁰³ *See id.* at 196 (“So long as R&D costs continue to be partially funded by sales revenues, the conventional wisdom holds that pharmaceutical arbitrage is a major threat to both differential pricing and innovation. Preventing pharmaceutical arbitrage from low income markets to high income markets is generally viewed as the linchpin of this analysis.”).

²⁰⁴ *See* ASTORGA, *supra* note 44 (“Mexico and the United States must reinforce, without fail, cooperation among institutions that deal with weapons trafficking . . . given that the disappearance of weapons is not a realistic scenario and the weapons manufacturers and vendors, as well as the traffickers, are not about to impose self-regulations.”); deKieffer, *supra* note 25, at 329 (noting that the FDA regulations have been rendered irrelevant).

²⁰⁵ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 58; Zagaris, *supra* note 24, at 511 (“Either [nation-states] will be able to adapt their conception of international organizational theory to account for and counter new international criminal actors, or they will eventually find themselves unable to effectively counter corrupt practices.”).

²⁰⁶ *Cf.* Koh, *supra* note 189, at 2602; Morais, *supra* note 23, at 626 (“[T]he disparities in the legal provisions of national laws between different jurisdictions pose serious practical problems for law enforcement. . . . One unfortunate consequence of such disparity in laws is that it provides an opportunity for criminals to engage in regulatory arbitrage.”).

sphere.²⁰⁷ State governments are charged with protecting the interests of those within their borders, so any conflicting interests have the potential to impede international cooperation.²⁰⁸ Within issues of domestic significance, contemplation of international obligations is often avoided by the United States due to a fear that such considerations would result in damage to U.S. sovereignty.²⁰⁹ Additionally, courts fear that application of international law threatens the separation of powers by encouraging the judiciary to enter into foreign affairs or other areas traditionally vested in the other two branches.²¹⁰

The use of foreign law in areas of constitutional interpretation has been severely criticized.²¹¹ Justice Scalia discouraged the Court's consideration of international practices, noting that "views of other nations . . . cannot be imposed upon Americans through the Constitution."²¹² Even in cases related to U.S. treaties, the Court has been reluctant to consider the foreign court's interpretation of treaty provisions.²¹³ Thus, in the present case, it is extremely unlikely that the courts or the legislature would consider the Mexican gun problem when defining Second Amendment policy or ownership rights.²¹⁴

Yet the importance of considering the potential international implications of domestic regulations and policy should not be understated.²¹⁵ The modern world is experiencing a trend toward globaliza-

²⁰⁷ See Aceves, *supra* note 189, at 1000 ("Studies of international cooperation examine the problem of developing cooperative behavior among egoistic actors and maintaining such collaboration under conditions of anarchy.")

²⁰⁸ See *id.* at 1017 (suggesting that transaction costs present in international agreements may impede the development and operation of cooperative structures).

²⁰⁹ See *id.*; Austen L. Parrish, *Reclaiming International Law*, 93 MINN. L. REV. 815, 815–16 (2009) ("[I]nternational law poses a threat to democratic sovereignty, and in turn to American culture and uniqueness."); Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 222 (2008) ("Historically, jurisdiction was conceived as the sovereign's power within a defined territory to impose and enforce its laws on its subjects and in its judicial organs. Today, however, jurisdiction in international law is mostly extra-territorial.")

²¹⁰ See Donald Earl Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 15 (2010).

²¹¹ See Parrish, *supra* note 209, at 825 ("Plenty of scholarship questions whether international law and institutions are consistent with the U.S. constitution and principles of democratic sovereignty.")

²¹² *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).

²¹³ See *Olympic Airways v. Husain*, 540 U.S. 644, 655 n.9 (2004); Jenny S. Martinez, *Toward an International Judicial System*, 56 STAN. L. REV. 429, 512–13 (2003) (noting inconsistent application of international law among U.S. courts).

²¹⁴ See *Atkins*, 536 U.S. at 348 (Scalia, J. dissenting); Parrish, *supra* note 209, at 825.

²¹⁵ See Turner, *supra* note 187, at 987–88 ("Transgovernmental networks could offer an effective response to the 'globalization paradox' in international criminal law.")

tion and away from explicit national sovereignty.²¹⁶ Such globalization entails inter-reliance in business, economy, policy and crime.²¹⁷ The international economy permits regulations to be subject to arbitrage and exploitation, suggesting that nations ought to consider the global effect of domestic regulations.²¹⁸ In the present instance, Mexican gun control regulations have been ineffective because of conflicting restrictions in the United States in the same way U.S. FDA regulations were undermined by the availability of pharmaceutical drugs in Mexico.²¹⁹

B. *War in the War on Drugs*

In 2009, President George W. Bush spoke with Guatemalan President Oscar Berger concerning the relationship between the U.S. demand for drugs and the Central American source of drugs.²²⁰ President Bush stated, “Our countries are working together to fight transnational gangs. . . . You’ve got to understand that these gangs are able to move throughout Central America and up through Mexico into our own country, and therefore, we’ve got to think regionally and act regionally.”²²¹

Within the United States, however, the debate over gun control reform has been internally focused—simultaneously highly polarized and muddled with conflicting interpretations of existing authorities.²²² Nevertheless, nearly all states with a constitutional provision for firearms

²¹⁶ See Koh, *supra* note 189, at 2631.

²¹⁷ See Morais, *supra* note 23, at 584 (“It is a sorry testament to the state of affairs in the world today that the term [international crime] now encompasses a much wider range of international crimes such as drug trafficking, money laundering, terrorism, the financing of terrorism, corruption, trafficking in women and children, tax evasion and cyber crime.”).

²¹⁸ See Morais, *supra* note 23, at 626.

²¹⁹ See deKieffer, *supra* note 25, at 329; Sheridan, *supra* note 55.

²²⁰ See Hendrix, *supra* note 7, at 110 (quoting President George W. Bush).

²²¹ *Id.*

²²² See Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477, 481 (2004) (“Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment.”); Robert A. Creamer, Note, *History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 *B.C. L. REV.* 905, 906 (2004) (“To a startling degree, both sides cite the same case law, history, and other authorities to support their views.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 45–46 (noting that cooperative efforts between U.S. and Mexican agencies has been limited); cf. Parrish, *supra* note 209, at 818 (“In the last two decades, the United States has disengaged from the traditional sources of international law, declining to enter into multilateral conventions or undertake new international legal obligations.”).

have explicitly allowed for an individual right of ownership.²²³ This suggests that the individual right to own guns is closely held—perhaps particularly so by citizens residing near the Mexican border—and thus regulation will not be enacted without opposition.²²⁴

Arms trafficking to DTOs will likely continue without a foundational change in U.S. or international drug and firearm policy.²²⁵ In 2007, over 24,000 people died in the United States as a result of drugs.²²⁶ Mexico's homicide rate is currently more than three times the world average.²²⁷ Moreover, despite qualms about revising constitutional rights based on foreign impact²²⁸ the violence is no longer simply contained within Mexico.²²⁹ In addition to many domestic murders and kidnappings, the U.S. government has cited the DTOs as a potential threat to national security.²³⁰ Practically, then, it appears that the United States may be providing the framework to arm the most prolific criminal organizations in history.²³¹

Regulations targeted at reducing trafficking or sales to known DTO members would likely withstand challenge under *Heller* or *McDonald*.²³² Each case reserves discretion for police and national security issues by permitting certain types of regulations to stand despite potential infringement on Second Amendment rights.²³³ Regulations

²²³ See Chemerinsky, *supra* note 222, at 478 (outlining the debate between liberals and conservatives over the interpretation of the scope of the Second Amendment); Volokh, *supra* note 11, at 192.

²²⁴ See Tufte, *supra* note 14, at 342 (“Both men and women, young and old, can and do carry handguns concealed on their person . . . [and] feel that is a right guaranteed to them by the Arizona Constitution that ‘shall not be impaired.’”).

²²⁵ See *id.*; See Zagaris, *supra* note 24, at 465 (“While states can act on collective interests without institutions or formal organizations, institutionalization can strengthen collaboration that is more sustainable and dependable than under *ad hoc* measures, with a view towards consistent cooperation and collaboration.”).

²²⁶ Hendrix, *supra* note 7, at, 107.

²²⁷ *Id.* at 111–12.

²²⁸ See Cox, *supra* note 72 (noting that the blame of violence ought to be placed on the Mexican government or the cartels themselves, and should not amount to a restriction on gun ownership in the United States).

²²⁹ See Arabit & McMahon Testimony, *supra* note 50; Archibold, *supra* note 51.

²³⁰ Archibold, *supra* note 51.

²³¹ Calderon: *Mexico Drug Gangs Seek to Replace State*, BBC News (Aug. 5, 2010), <http://www.bbc.co.uk/news/worldlatinamerica10877156>.

²³² See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047–48 (2010) (noting that not all state gun control laws are presumptively unconstitutional); *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (reasoning that many gun regulations are presumptively lawful).

²³³ See *McDonald*, 130 S. Ct. at 3047–49; *Heller*, 554 U.S. at 626–27; see also *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (outlining different levels of scrutiny to be applied by the Court when addressing regulations concerning fundamental or constitutional rights).

that do not amount to a total ban on access to usable weapons, or those that are tangentially related to ownership by U.S. citizens are thus likely to withstand constitutional challenge.²³⁴ Still, any U.S. regulation aimed at decreasing arms trafficking to Mexico would have to be sufficiently tailored to fit within the social context of the strong preference for permitting ownership of firearms.²³⁵

The originalist analysis in both *Heller* and *McDonald* of the Second Amendment lend little support to an argument against passing regulations restricting access to weapons by those involved in DTOs because such a restriction would not be related to a U.S. citizen's ability to own a gun.²³⁶ Practically, it is the current regulations, permitting access to weapons, that defines the scope of the Second Amendment right.²³⁷ After *Heller*, it is understood to mean an individual right to carry a weapon for self-defense; and most gun control regulations are primarily concerned with uses for other reasons.²³⁸ In some regard, this ought to lessen concerns about too much government oversight of gun-owners by conceding that ownership is no longer related to the creation of an anti-government militia.²³⁹ Registration requirements need not be instinctively distrusted, or thought to be prelude to confiscation.²⁴⁰

Regulations prohibiting a foreign citizen from bypassing his own country's laws are neither prohibited nor informed by the Second

²³⁴ See *McDonald*, 130 S. Ct. at 3047–49; *Heller*, 554 U.S. at 626–27; Tushnet, *supra* note 88, at 1436.

²³⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 24 (“[R]elevant law enforcement officials we met with noted certain provisions of some federal firearms laws present challenges to their efforts to address arms trafficking.”).

²³⁶ See *McDonald*, 130 S. Ct. at 3042–43; *Heller*, 553 U.S. at 628.

²³⁷ See ASTORGA, *supra* note 44, at 2 (“The importance of the U.S. weapons industry . . . make[s] the United States the ideal market to obtain weapons of war”); Chemerinsky, *supra* note 222, at 481 (“The point is that the meaning of the Second Amendment is not determined by the application of constitutional theory or interpretive methodologies. It is the product entirely of the values and politics of the individual”); Cox, *supra* note 72 (“That’s right Mexico. Anti-gun activists and politicians are already planning to make gun bans, gun sales restrictions and even licensing and registration a part of their ‘solution’ to Mexico’s problems.”).

²³⁸ See *Heller*, 553 U.S. at 626–27.

²³⁹ See *id.*; Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1350 (noting that, had the *Heller* Court determined the Second Amendment right related to a militia, it would have been forced to strike down the regulations for being inconsistent with that goal, and concluding that such a holding would have been very difficult); Tushnet, *supra* note 88, at 1436 (noting that registration requirements are likely constitutional).

²⁴⁰ See *Heller*, 553 U.S. at 626–27; Tushnet, *supra* note 88, at 1436.

Amendment.²⁴¹ Moreover, a person has no Second Amendment right to sell illegal guns, or to sell to prohibited persons.²⁴² A right of access to high-power weapons by straw purchasers, and an ability to sell illegal weapons without risk of prosecution is therefore not defined by the Second Amendment, but merely by a lack of enforcement mechanisms.²⁴³ The problem of DTO access to weapons is thus not permitted by the Second Amendment, rather, it often carries on in spite of it.²⁴⁴

One operation aimed at reducing arms trafficking highlights the inability of law enforcement to effectively trace or halt the trafficking of weapons.²⁴⁵ Operation Fast and Furious involved an attempt to trace weapons to cartel members who purchased guns from undercover ATF agents.²⁴⁶ Poor execution, an inadequate statutory framework, and ineffective enforcement mechanisms ensured that the operation ended in tragic failure.²⁴⁷ Despite the fact that Congress has been unwilling to strengthen gun-control laws, it has expressed outrage at the idea that the government was supplying DTO members with weapons.²⁴⁸ Yet with

²⁴¹ See U.S. Const. amend. II; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1513–15 (2009) (outlining possible interpretations of a “right of the people” in the Second Amendment to determine whether bans on gun ownership by noncitizens are constitutionally valid); cf. *McDonald*, 130 S. Ct. at 3047–49; *Heller*, 554 U.S. at 626–27; Hawley, *supra* note 72 (quoting Lt. Col. Raúl Manzano Vélez, Director of Civilian Gun Sales in Mexico) (“I would dare say that Mexico has some of the strictest regulations about gun ownership in all the world, and we’re right next to a country . . . that has some of the easiest ones . . .”).

²⁴² See U.S. Const. amend. II; *Heller* 554 U.S. at 626–27; cf. Grimaldi & Horwitz, *supra* note 1 (quoting Arizona Judge Robert Gottsfeld) (“There certainly was evidence that [arms dealer] Iknadosian was selling to people who were not buying the guns for themselves, and that’s a [only a] class one misdemeanor.”).

²⁴³ See Grimaldi & Horwitz, *supra* note 1; James V. Grimaldi, *ATF Faces Federal Review over Tactics to Foil Gunrunning Rings*, WASH. POST, Mar. 10, 2011, at A4 (noting that the investigation of a suspected assault rifle dealer was dropped after the House voted against permitting the ATF to engage in tracing assault rifles after purchase).

²⁴⁴ See McKinley, *supra* note 19; see also *United States v. Hernandez*, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a sentence imposed against an arms dealer convicted of supplying Mexican drug cartels).

²⁴⁵ See U.S. DEP’T OF JUSTICE, *supra* note 113, at 6.

²⁴⁶ *Id.*

²⁴⁷ See Holder, Statement Before the S. Comm. on the Judiciary, *supra* note 9, at 5 (“One critical first step should be for Congressional leaders to work with us to provide ATF with the resources and statutory tools it needs to be effective.”); U.S. DEP’T OF JUSTICE, *supra* note 174, at 9 (“Avila purchased three AK-47 style rifles, two of which ended up being found at the murder scene of U.S. Border Patrol Agent Brian Terry.”).

²⁴⁸ See Holder, Statement Before the S. Comm. on the Judiciary, *supra* note 9, at 5 (“Unfortunately, earlier this year the House of Representatives actually voted to keep law enforcement in the dark when individuals purchase multiple semi-automatic rifles and shotguns in southwest border shops.”); see also Tim Mak, *Issa: Holder ‘Owns’ Fast & Furious*,

the current legal framework in place, is the mere provision of access to weapons sufficiently distinct from actually supplying weapons to DTOs?

The Mexican arms trafficking dilemma demonstrates that an inappropriate convergence of laws has occurred where U.S. regulations are dominant.²⁴⁹ Conflicting goals, as well as problems in coordination, have created gaps²⁵⁰ that permit trafficking to continue.²⁵¹ Mexican restrictions on access to weapons have not prevented DTO members from acquiring high-power weapons because those guns are widely available in the United States.²⁵² Thus, the central problem in arms trafficking is the ease with which purchasers can obtain weapons, legally and illegally, in the United States.²⁵³ As evidence, numerous Mexican and U.S. officials have cited U.S. gun regulations as the source of the problem, and proposed U.S. legal reform as the solution.²⁵⁴ Although reform of U.S. policies in the way of restricting access to high-caliber weapons may encourage a reduction of violence in Mexico, it is unlikely that the United States would undergo domestic reform in that area.²⁵⁵

Without a foundational reform in international gun control, efforts focused on policing along the border will continue to be inefficient and inadequate.²⁵⁶ Moreover, the U.S. government has admitted

POLITICO (Oct. 10, 2011 1:21 PM), www.politico.com/news/stories/1011/65556.htm (noting that members of Congress have aggressively attacked Holder over his involvement in *Fast and Furious*, and may initiate a congressional investigation into whether he lied or misled Congress in hearings on the subject).

²⁴⁹ See Parrish, *supra* note 209, at 849.

²⁵⁰ See Bailey, *supra* note 75, at 343.

²⁵¹ See Grimaldi, *supra* note 243.

²⁵² See Parrish, *supra* note 209, at 849 (“In some contexts, domestic law as an instrument of international governance is beginning to replace international law.”); see also Cox, *supra* note 72 (suggesting that Mexican regulations are inefficient because they are largely disregarded).

²⁵³ See Jimmy Carter, Op-Ed., *What Happened to the Ban on Assault Weapons?*, N.Y. TIMES, Apr. 27, 2009, at A23 (“Across our border, Mexican drug cartels are being armed with advanced weaponry imported from the United States—a reality only the NRA seems to dispute.”).

²⁵⁴ See, e.g., Grimaldi, *supra* note 243 (quoting retired ATF supervisor James Cavanaugh) (“There is no guntrafficking statute. . . . We’ve been yelling for years that we need a guntrafficking statute, because these cases are so difficult to prove.”); Sheridan, *supra* note 55 (noting Mexican authorities have requested that the United States modify its policies to reduce access to high powered rifles).

²⁵⁵ See Knowlton, *supra* note 150 (“After Mr. Calderón’s speech, Senator Richard J. Durbin, the majority whip from Illinois, lamented the violence—especially along the northern border of Mexico—that has spilled into both countries. But he, too, noted the lack of a receptive climate in Congress toward restoring the assault weapons ban.”).

²⁵⁶ See McKinley, *supra* note 19 (quoting Assistant Director of the Federal Firearms Agency, William J. Hoover) (“Guns are legal to possess in this country If you stop me between the dealer and the border, I am still legal, because I can possess those guns.”).

that its own policing agencies are unable to effectively address the gun trafficking problem in the face of current gun control regulations.²⁵⁷ Yet so far, U.S. efforts have generally been limited to targeted police initiatives along the border, and have not included directives aimed at comprehensive reform of drug and gun use.²⁵⁸ In 2009, the U.S. government implemented a \$95 million outbound inspection program.²⁵⁹ Nevertheless, the port director in El Paso Texas noted that while his team had recovered nearly \$400,000 in cash, they had recovered only one handgun during the first six weeks of searches at four border crossing points.²⁶⁰ In 2010, the Obama administration pledged 1200 troops to the Mexican border to aid in the fight against drug smuggling.²⁶¹ The decision was applauded by those who interpreted it as a timely solution to violence and immigration issues.²⁶² Even so, in 2010 approximately 9000 persons were killed in Mexico in associated drug violence.²⁶³ Accordingly, a continuation of current unilateral policing efforts will be insufficient to reduce the number of firearms crossing the border.²⁶⁴

In the same vein, the success of unilateral efforts to monitor the black market for small weapons rests on reform of U.S. law and policy.²⁶⁵ The United States has implemented many programs intended to address the issue of gun smuggling, but admits that there has been little success in reducing the number of weapons transported across the border.²⁶⁶ The United States has spent over \$1 billion on programs for the ATF and Immigration and Customs Enforcement (ICE) to combat arms trafficking, but acknowledged that these efforts have been unsuccessful

²⁵⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 24.

²⁵⁸ See Grimaldi, *supra* note 1.

²⁵⁹ See Marizco, *supra* note 61, at 14; *Checking Up on Drug War Border*, CBS NEWS (May 15, 2009), <http://www.cbsnews.com/stories/2009/05/15/national/main5017125.shtml>.

²⁶⁰ *Checking Up on Drug War Border*, *supra* note 259.

²⁶¹ Archibold, *supra* note 75.

²⁶² *Id.*

²⁶³ See Holder, Statement Before the S. Comm. on the Judiciary, *supra* note 9, at 5; ANGELICA DURAN-MARTINEZ ET AL., 2010 MID-YEAR REPORT ON DRUG VIOLENCE IN MEXICO 4 (Trans-Border Inst. ed., 2010).

²⁶⁴ See Brewer, *supra* note 3, at 10 (noting that U.S. emphasis on policing and narcotics both overlooks and exacerbates the underlying issues related to the drug war).

²⁶⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 58 ("U.S. and Mexican officials in locations we visited told us that, while they have undertaken some efforts to combat illicit arms trafficking, they are concerned that without a targeted, comprehensive, and coordinated U.S. governmental effort, their efforts could fall short."); Zagaris, *supra* note 24, at 464 (suggesting that the United States "discontinue 'cowboy politics'" to bolster OAS efforts and improve relations with Latin America).

²⁶⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 58.

in light of legal constraints and lack of coordination.²⁶⁷ The ATF program, Project Gunrunner, has inherent flaws based on the overriding legal restrictions, including an inability to meet its own goals or to analyze the success, if any, of the program overall.²⁶⁸ The problem remains that the focus of both of these programs is policing: merely increasing law enforcement efforts without facilitating needed legal reform.²⁶⁹

Other organizations devoted to international crime have been similarly ineffective in addressing the problem of arms trafficking, due in part to a lack of true cooperation by the United States.²⁷⁰ Across the globe, many regulatory and policy-based efforts are enacted by inter-governmental organizations.²⁷¹ The Organization of American States (OAS) operates as the primary regional organization with regard to international criminal issues.²⁷² The OAS has exerted significant effort in combating drug smuggling from Latin America, but its attempts to create regional harmonization have been largely undermined by the United States' internal focus on gun policy and general rejection of multilateralism.²⁷³ For example, in its report concerning the arms trafficking dilemma, the U.S. Government Accountability Office made no mention of OAS collaborative efforts, instead focusing entirely on ATF and ICE measures.²⁷⁴ It is unlikely that any initiative spearheaded by an inter-governmental organization would be effective due to the United States' reluctance, for political reasons, to enter into or cooperate with these types of organizations.²⁷⁵ Thus, current initiatives, both bilateral and unilateral, have proven ineffective in reducing the number of arms transported to Mexico from the United States.²⁷⁶

²⁶⁷ *Id.*; Thompson & Lacey, *supra* note 53 (noting that the United States and Mexico revised the strategy against drug trafficking because prior efforts were showing little effect).

²⁶⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 58; U.S. DEP'T OF JUSTICE, *supra* note 76, at 31 (noting that the ATF did not establish reasonable goals for gun-running teams to respond to arms trafficking data).

²⁶⁹ Kleck & Wang, *supra* note 158, at 1240–41 (describing the gaps between policing models and actual gun trafficking patterns); Grimaldi & Horwitz, *supra* note 1.

²⁷⁰ See Zagaris, *supra* note 24, at 454.

²⁷¹ Turner, *supra* note 187, at 991 (describing the trend to utilize intergovernmental agencies in the European Union).

²⁷² See Zagaris, *supra* note 24, at 454.

²⁷³ See *id.* at 463–65.

²⁷⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, *passim*.

²⁷⁵ See Parrish, *supra* note 209, at 818.

²⁷⁶ See Brewer, *supra* note 3, at 11 (“A change in the design of this high profile initiative, coupled with a decisive shift away from directing other foreign aid to Mexico’s military, would thus ensure that the administration’s recent statements regarding shared U.S. responsibility for drug trafficking truly signify a new level of commitment by the United States to address efficiently the particular ways in which it perpetuates the drug trade.”).

Moving forward, one option may be a directed bilateral initiative targeted at drug and arms trafficking.²⁷⁷ Mexican efforts have been rendered effectively irrelevant in the current circumstances.²⁷⁸ A unilateral U.S. initiative aimed at international arms trafficking, while constitutionally viable, would likely be met with opposition from the powerful gun lobby that refutes the connection between U.S. arms dealers and Mexican violence.²⁷⁹ Similarly, state action is unlikely in this area due to prevailing attitudes toward lenient restrictions on ownership and sales.²⁸⁰ In contrast to unilateral efforts, a coherent strategy would simultaneously embrace the growing trend toward globalization while encouraging both parties to clearly assert their national interests as they move forward.²⁸¹ Further, the United States' general aversion to multilateral treaties suggests that an agreement with a more regional focus may appropriately address U.S. concerns in the drug war without raising political concerns related to extensive international obligations.²⁸²

A bilateral initiative focusing on international crime is not a new idea.²⁸³ The growth of international crime alongside globalization and regional integration has encouraged governments worldwide to adopt international criminal procedures.²⁸⁴ Recent efforts to create international criminal standards in the areas of terrorism and money launder-

²⁷⁷ See Zagaris, *supra* note 24, at 511 (“Until national governments establish effective regional organizations, the mandate and resources to intensively and regularly work on criminal justice planning at the international level, individual states will react in a disorganized and inefficient manner to crime.”).

²⁷⁸ See Hawley, *supra* note 72; Grimaldi & Horwitz, *supra* note 1 (“Drug cartels have aggressively turned toward the United States because Mexico severely restricts gun ownership.”).

²⁷⁹ See *Heller*, 554 U.S. at 626–27 (reasoning that many gun regulations are presumptively lawful); Cox, *supra* note 72 (“American gun owners and American gun laws are not to blame for the violence in Mexico. Blaming American gun owners will not stop a single murder, nor will it stem the flow of drugs, money or firearms to the cartels.”).

²⁸⁰ See *McDonald*, 130 S. Ct. at 3048–49 (noting that not all state gun control laws are presumptively unconstitutional); Kunkle, *supra* note 118 (quoting Arizonan citizen Jeff Smith) (“Hell, if you’re going to believe in free love and drugs and all that stuff from the 1960s, you’ve got to believe in guns.”).

²⁸¹ See Hendrix, *supra* note 7, at 120 (describing the benefits of international cooperation).

²⁸² See Parrish, *supra* note 209, at 818 (“In the last two decades, the United States has disengaged from the traditional sources of international law, declining to enter into multilateral conventions or undertake new international legal obligations.”).

²⁸³ See Turner, *supra* note 187, at 986 (noting that international networks have been adapted to address a variety of international issues, and have only recently been created in the criminal capacity).

²⁸⁴ See Morais, *supra* note 23, at 586.

ing have been well received.²⁸⁵ In contrast, as the international community trends toward globalization, the United States' persistent disregard of international law and cooperation threatens the reputation of the U.S. legal system, and may undermine future efforts to obtain assistance on U.S. initiatives.²⁸⁶

Although there has been no final agreement to date, several factors suggest that a concerted effort in the future is not unlikely.²⁸⁷ The United States has initiated several programs related to the war on drugs, many of which contemplate cooperation with Mexico.²⁸⁸ One is the Mérida Initiative, a \$1 billion program aimed at improving Mexico's law enforcement capacity and bolstering shared interests including intelligence, prosecution, and extradition.²⁸⁹ This agreement has been criticized, however, for merely increasing funds for ineffective programs and for promoting a U.S. focus on militarization.²⁹⁰ The plan underwent revision in 2010 after acknowledgement that the war against DTOs had made little headway,²⁹¹ suggesting that the United States recognizes the importance of its role moving forward. Unfortunately, this recognition has translated into increased funds for policing the border, and other measures that have proven unsuccessful in addressing the problem.²⁹²

²⁸⁵ See *id.* at 643 (“The international legal framework to combat international crime, especially money laundering, the financing of terrorism and corruption, is now well established.”).

²⁸⁶ See Parrish, *supra* note 209, at 831 (“When a U.S. court fails to vindicate an international right or to enforce an international obligation, the court’s failure is attributed to the nation as a whole, and the nation is held responsible.”); Zagaris, *supra* note 24, at 425 (describing the European trend toward harmonization of criminal justice systems).

²⁸⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 3–4 (noting that U.S. law enforcement has assisted its Mexican counterparts, but does not suggest the efforts are part of an overall prohibitive scheme); see also Brewer, *supra* note 3, at 9 (outlining the Mérida Initiative, a cooperative effort between the United States and Mexico to combat drug trafficking); Morais, *supra* note 23, at 586 (suggesting that new international criminal concerns have encouraged governments to adopt international criminal law despite the fact that it is traditionally within national regulation).

²⁸⁸ See Zagaris, *supra* note 24, at 440–43.

²⁸⁹ Arabit & McMahon Testimony, *supra* note 50.

²⁹⁰ See Brewer, *supra* note 3, at 10–11 (suggesting that the Mérida Initiative “has led to a tripling of drug related homicides” and ought to consider a shift away from an emphasis on “law enforcement battles”); see also Morais, *supra* note 23, at 588 (“[T]he use of military strategies to fight international crime is inappropriate and likely to fail.”).

²⁹¹ Thompson & Lacey, *supra* note 53.

²⁹² See U.S. DEP’T OF JUSTICE, *supra* note 76, at 10 (noting that ATF policing measures are inefficient and insufficient in many instances); Press Release, White House, Administration Officials Announce U.S.–Mexico Border Security Policy: A Comprehensive Response & Commitment (Mar. 24, 2009), available at http://www.whitehouse.gov/the_press_office/

CONCLUSION

It is true of course, that the rights explicit within the Constitution deserve our utmost protection and reverence both in society at large and as members of the legal community. The Second Amendment granting the right to own guns has been closely held by U.S. citizens since the country's founding. Yet, since then, it has become a polarized, nearly untouchable, debate based more on politics than substance. The alarming number and rate of deaths in Mexico may present an opportunity for a new understanding of the impact of U.S. gun policy.

Mexican DTOs present a threat to Mexican and U.S. citizens alike. It is unlikely that any person would interpret the Second Amendment as guaranteeing criminals access to any weapons at all, much less military-grade assault rifles, tanks and grenades. Rather than merely ensuring that citizens can protect themselves against each other or the government, U.S. policy has created a paramilitary criminal organization in Mexico—paying them for drugs, and allowing weapons to be purchased with the profits.

As the world trends toward globalization, there ought to be extensive consideration of international implications within domestic policy. The strictly internal focus of the United States in the enactment of rules and regulations has facilitated tragic consequences for Mexican citizens across the border. Although the U.S. government is rightly charged with protecting the interests of its own citizens, social circumstances within the national and international community indicate that this may no longer be the only valid consideration. Describing the problems ahead, Attorney General Holder summed up the issue thusly: “We have serious problems to address—and sacred responsibilities to fulfill. We must not lose sight of what’s really at stake here: lives, futures, families, and communities.”²⁹³

AdministrationOfficialsAnnounceUSMexicoBorderSecurityPolicyAComprehensiveResponseandCommitment/.

²⁹³ Holder Statement Before the Comm. on the Judiciary, *supra* note 9 at 5.