

**ENSURING ONLY “GOOD GUYS” CAN GET GUNS<sup>1</sup>: HOW IMPLEMENTATION OF A FEDERAL BACKGROUND CHECK REQUIREMENT ON ALL FIREARM TRANSFERS CAN IMPACT GUN VIOLENCE**

*Brendan P. Barry\**

*“With the right to bear arms comes a great responsibility to use caution and common sense . . . and it’s just plain common sense that there be a waiting period to allow local law-enforcement officials to conduct background checks on those who wish to purchase handguns.”<sup>2</sup>*

*-President Ronald Reagan*

I. INTRODUCTION. .... 560

II. HOW LEGISLATION AND JURISPRUDENCE SHAPED MODERN FEDERAL FIREARM REGULATIONS. .... 563

    A. Legislative History of Federal Regulation on Firearm Transfers. .... 563

---

<sup>1</sup> This title references the long-held rationale of gun rights lobbyists, “The only way to stop a bad guy with a gun is with a good guy with a gun,” which NRA Chief Wayne Lapiere emphatically stated at a press conference in 2012 following the Sandy Hook massacre. See Meghan Keneally, *Breaking Down The NRA-Backed Theory That a Good Guy With a Gun Stops a Bad Guy With a Gun*, ABC NEWS (Oct. 29 2018), <https://abcnews.go.com/US/breaking-nra-backed-theory-good-guy-gun-stops/story?id=53360480>. Meanwhile, the NRA has continually fought legislation regulating firearm sales and ownership making it easier for “Bad Guys” to get guns. See generally Jose Pagliery, “NRA Slams Gun-Background System Flaws It Helped Create,” CNN (Feb. 14, 2018), <https://www.cnn.com/2018/02/23/us/nra-criticizes-gaps-it-created-in-gun-background-system-invs/index.html>.

\* J.D. Candidate, 2020, Seton Hall University School of Law; B.A., 2012, Providence College. I would like to thank the *Seton Hall Legislative Journal* for the care and detail that went into publishing this comment. A special thank you to my faculty advisor, Professor Margaret Lewis, for her guidance and support throughout the writing process. Finally, I would like to thank my wife, Emily, and my family for their patience, inspiration, and unwavering support throughout this journey.

<sup>2</sup> Steven A. Holmes, *Gun Control Bill Backed by Reagan in Appeal to Bush*, THE NEW YORK TIMES, Mar. 29, 1991 at A1. In an address at George Washington University marking the 10th anniversary of John Hinckley’s unsuccessful assassination attempt that left former Reagan Press secretary James Brady severely disabled, former President Reagan – a card carrying member of the NRA – endorsed the Brady Handgun Violence Prevention Act and background checks for those seeking to purchase a firearm.

- B. How Jurisprudence Has Simultaneously Strengthened and Limited Congressional Authority to Regulate Firearms. 567
  - 1. Limits on Congressional Power to Enact Gun Control Regulations after *Lopez* and *Printz*. . . . . 567
  - 2. How Individual Rights and Federal Gun Control apply Post-*Heller/McDonald*. . . . . 571
- III. CURRENT BACKGROUND CHECK GAPS AND LEGISLATIVE, EXECUTIVE, AND STATE-BASED ATTEMPTS TO ADDRESS THEM. . . . . 573
  - A. Statutory Gaps and Recent Legislative Attempts to Fix Them. . . . . 574
  - B. Executive Approaches to Gun Control. . . . . 576
  - C. Comparative Analysis of State Based Approaches to Background Checks. . . . . 577
    - 1. Missouri. . . . . 577
    - 2. Connecticut. . . . . 578
    - 3. California. . . . . 579
- IV. PROPOSAL TO ADOPT A FEDERAL MINIMUM UNIVERSAL BACKGROUND CHECK REQUIREMENT. . . . . 580
- V. CONCLUSION. . . . . 582

I. INTRODUCTION.

On October 21, 2012, Zina Houghton was enjoying an uneventful Sunday morning, chatting and taking care of her regular clients at a day spa in suburban Milwaukee.<sup>3</sup> Houghton, according to others in the salon at the time, seemed remarkably calm and collected when without warning her estranged husband entered the salon waving a revolver in the air, screaming for everyone to get on the floor.<sup>4</sup> This was not the first time, but it would be the last time, that Ms. Houghton would fall victim to her husband’s abuse.<sup>5</sup> Radcliffe Houghton, who Zina had previously told a court “terrorize[d] [her] every waking moment,” proceeded to murder her as well as two others in the spa that morning. What is arguably worse than Zina’s tragic death, is the fact that Mr. Houghton should not have been able to purchase the firearm he used to murder her in the first place.<sup>6</sup> Federal regulations make it unlawful

---

<sup>3</sup> Carlos Sadovi, *Witness to Salon Attack Says Zina Houghton Tried to Calm Armed Man*, CHICAGO TRIBUNE (Oct. 23, 2012), <https://www.chicagotribune.com/news/ct-xpm-2012-10-23-ct-met-milwaukee-salon-shooting-sidebar-20121023-story.html>.

<sup>4</sup> *Id.*

<sup>5</sup> Michael Cooper, Michael S. Schmidt, & Michael Luo, *Loopholes in Gun Laws Allow Buyers to Skirt Checks*, THE NEW YORK TIMES (Apr. 11, 2013), at A14.

<sup>6</sup> *Id.* (“When Zina Houghton, 42, got a restraining order against her husband. . .he became ineligible to buy a gun under federal law.”).

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 561

for persons with active restraining orders to purchase firearms.<sup>7</sup> Despite these restrictions, Mr. Haughton evaded the background checks that would have stopped him by exploiting a loophole in federal regulations and purchasing his weapon from a private seller.<sup>8</sup>

Tragedies like this and countless other untold stories amplify the need for lawmakers and the nation to re-evaluate the status of gun control legislation and, specifically, the requirement for background checks.<sup>9</sup> While the national gun violence epidemic has resulted in countless public pleas for heightened federal regulation, most gun control legislation has failed to garner sufficient congressional support.<sup>10</sup> Unfortunately, the political reality is that the gun control debate is consistently plagued by partisan politics and interest group opposition to any federal regulation. One area of the discussion that has seen bipartisan public support with regularity over the last ten years is the concept of universal background checks.<sup>11</sup> Polling has found that at least ninety percent of Americans are in favor of some type of universal background check.<sup>12</sup> The overwhelming support for universal background checks, met with federal inaction, highlights the failure of Congress to address this critical issue despite so many tragedies.

While Congress remains divided on federal gun control regulation, states have implemented the majority of impactful gun control legislation, where varying degrees of restrictions have led to similarly diverse results.<sup>13</sup>

---

<sup>7</sup> 18 U.S.C.S. §922 (d)(8) (“It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person. . .is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child. . .”).

<sup>8</sup> Cooper, *supra* note 5.

<sup>9</sup> See generally, Cooper, *supra* note 5.

<sup>10</sup> Melina Delkic, *Sandy Hook Anniversary: These Are the Gun Control Laws that Have Failed Since the Newtown Shooting*, NEWSWEEK (Dec. 14, 2017), <https://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415>.

<sup>11</sup> See Sheryl Gay Stolberg, *Deal to Bolster Gun Background Checks Is Reached by Senators*, THE NEW YORK TIMES, Nov. 17, 2017, at A13; Katie Rogers, *Trump Adds Cautious Support to Changes to Background Checks for Gun Buyers*, THE NEW YORK TIMES A13 (Feb. 20, 2018).

<sup>12</sup> Matthew Miller, Lisa Hepburn & Deborah Azrael, “Firearm Acquisition Without Background Check”, ANNALS OF INTERNAL MEDICINE 166, 233–239 (2017) (“Universal background checks are favored by more than 90% of all Americans.”); Tim Malloy, *U.S. Support for Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds; Let Dreamers Stay, 80 Percent of Voters Say*, QUINNIPIAC UNIVERSITY POLL 1, 1 (2018), [https://poll.qu.edu/images/polling/us/us02202018\\_ugbw51.pdf](https://poll.qu.edu/images/polling/us/us02202018_ugbw51.pdf) (“Support for universal background checks is itself almost universal, 97 – 2 percent, including 97 – 3 percent among gun owners.”).

<sup>13</sup> Ashley Welch, *What Impact do State Gun Laws Have on Shooting Deaths?*, CBS NEWS (Mar. 5, 2018), <https://www.cbsnews.com/news/gun-control-laws-state-impact-on-shooting-deaths-suicide-study/>.

Based on the lack of standardization among individual states, state-level firearm regulation cannot sufficiently address the nationwide issue of gun violence.<sup>14</sup> Without uniformity, one state's weak regulation of firearms can undermine the effectiveness of another state's more comprehensive regulation.<sup>15</sup> Despite this reality and the significant popular support for change, many states still do not require background checks to supplement the gaps left by the current construction of federal statutes.<sup>16</sup> While differences in state-based regulation of firearms transfer can provide valuable insight into the effects of various gun control measures without the larger risk of failure on a national stage, the priority should be establishing a national system of firearm regulations implementing minimum standards for universal background checks.<sup>17</sup>

This comment will analyze various approaches to background checks at the federal and state level and advocate for the adoption of a federal requirement for universal background checks on all firearm transfers. Part II will discuss how the history of gun control legislation has shaped the state of current firearm regulations. It will also discuss the significant judicial decisions that impact Congress' ability to regulate firearms, and how those decisions both limit and enable the institution of a universal background check requirement in the future.

Part III will analyze the current construction of federal firearm transfer regulations, address the background check gap that congress inadvertently created for private sales, and discuss congressional and executive actions taken to address the issue. It will then analyze supplementary state level firearm regulations from Missouri, Connecticut, and California. Missouri provides a unique example as a state which previously had supplemental requirements for background checks but repealed the requirement in 2007.<sup>18</sup>

---

<sup>14</sup> Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1587 (2014) ("Although states have also passed gun control measures, state laws can be ineffective because, unless there are uniform standards, weak gun controls in one state can undermine stronger gun control efforts in other states."). See Michael de Leeuw, *Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson*, 45 CONN. L. REV. 1637, 1642–43 (2013) (describing "the relative ease and anonymity with which people can purchase handguns in one state and then transport them elsewhere to sell on the street").

<sup>15</sup> *Id.*

<sup>16</sup> Miller, *supra* note 12, at 235 ("State laws regulating private sales as of July 1, 2013 include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, New York, North Carolina, Pennsylvania, Rhode Island, and Washington, D.C.").

<sup>17</sup> See Allen Rostron, *A New State Ice Age for Gun Policy*, 10 HARV. L. & POL'Y REV. 327, 360 (Summer 2016). The term "transfer" will be used generally throughout this note to represent the sale, purchase, gift, or other means of exchange of firearms between two parties.

<sup>18</sup> Niraj Chokshi, *Study: Repealing Missouri's Background Check Law Associated With a Murder Spike*, THE WASHINGTON POST (Feb. 18, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/18/study-repealing-missouris->

Both California and Connecticut have supplemental background check requirements, and the comparison of their different approaches will demonstrate each version’s strengths and weaknesses.

Part IV will use the state-based analysis to advocate for the federal implementation of a minimum universal background check requirement based on aspects of the different states’ approaches. This section will argue that small change in the form of background checks at the point of transfer will significantly impact the effectiveness of gun control efforts during firearm transfer.

## II. HOW LEGISLATION AND JURISPRUDENCE SHAPED MODERN FEDERAL FIREARM REGULATIONS.

Federal requirements for background checks during the transfer of a firearm have only been around since the mid-1990s, but the development of current regulatory gaps in background check requirements can be traced to the early 1900s.<sup>19</sup> While congressional authority to regulate firearms is now generally recognized, the series of seminal legislative initiatives and judicial opinions that follow helped pave the circuitous route that led to the current state of firearm regulation. First, this section will look at how Congress has shaped firearm legislation over the last century, laying the foundation for the current state of regulatory affairs. Second, this section will analyze the impact the courts have had on limiting those regulations as well as clarifying the role of Congress in regulating firearms transfer and ownership.

### *A. Legislative History of Federal Regulation on Firearm Transfers.*

The National Firearms Act of 1934 (“NFA”) was the first major piece of federal gun control legislation passed concerning the transfer of firearms.<sup>20</sup> Congress enacted the NFA to regulate the manufacture, import, and transfer of specific firearms as defined in the act.<sup>21</sup> The NFA “imposed a tax on the making and transfer of firearms defined by the Act, as well as a special (occupational) tax on persons and entities engaged in the business of importing, manufacturing, and dealing in NFA firearms.”<sup>22</sup> The Act also required the registration of all NFA classified weapons with the secretary of the treasury.<sup>23</sup> While enacted under Congress’ taxing powers, the NFA was

---

background-check-law-associated-with-a-murder-spike/?utm\_term=.67c039babc26.

<sup>19</sup> See Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME (Feb. 22, 2018), <http://time.com/5169210/us-gun-control-laws-history-timeline/>.

<sup>20</sup> *Id.*

<sup>21</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, “National Firearms Act”, (Last visited Apr. 10, 2020), <https://www.atf.gov/rules-and-regulations/national-firearms-act>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (“The law also required the registration of all NFA firearms with the Secretary of the Treasury. Firearms subject to the 1934 Act included shotguns and rifles having barrels

not intended for revenue collection and instead targeted an alternative goal, to deter the use and transfer of weapons that were often used in crimes and episodes of gang violence.<sup>24</sup> This Act imposed a duty not only on all transfers of the regulated weapons, but required persons possessing the weapons to retroactively register them.<sup>25</sup>

The Federal Firearms Act of 1938 (“FFA”) developed a regulatory framework for licensing firearms dealers that is the schematic for the modern system.<sup>26</sup> The FFA required persons “engaged in the business” of importing, manufacturing, or dealing firearms to acquire federal firearms licenses (“FFL”) from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).<sup>27</sup> The FFA also prohibited classes of people from purchasing or possessing firearms, most notably at this time convicted felons.<sup>28</sup> Not only was it a federal offense for convicted felons to purchase or possess a firearm, but it was also a federal offense for any firearms dealer to knowingly transfer a firearm to these prohibited purchasers.<sup>29</sup>

Significantly, in 1968 the Supreme Court held that the NFA provision requiring firearm owners to register their firearms was unconstitutional.<sup>30</sup> The *Haynes* decision left the NFA essentially unenforceable, forcing Congress to amend Title II of the NFA by enacting Title II of the Gun Control Act (“GCA”) of 1968.<sup>31</sup> The amendments cured constitutional defects present in the NFA and also repealed the FFA, adopting many of its

---

less than 18 inches in length, certain firearms described as “any other weapons,” machineguns, and firearm mufflers and silencers.”).

<sup>24</sup> *Id.* (“Congress found these firearms to pose a significant crime problem because of their frequent use in crime, particularly the gangland crimes of that era such as the St. Valentine’s Day Massacre. The \$200 making and transfer taxes on most NFA firearms were considered quite severe and adequate to carry out Congress’ purpose to discourage or eliminate transactions in these firearms. The \$200 tax has not changed since 1934.”).

<sup>25</sup> *Id.*

<sup>26</sup> James Jacobs & Zoe Fuhr, *The Potential and Limitations of Universal Background Checking for Gun Purchasers*, 7 WAKE FOREST J. L. & POL’Y 537, 539 (2017).

<sup>27</sup> *Id.* (citing Federal Firearms Act of 1938, Pub. L. No. 785, §3(b), 52 Stat. 1250, 1251 (1938)). Notably, the FFA failed to define “engaged in the business” which would leave the door open for interpretation in later statutes, leading to the private sales exception that plagues gun control regulation today.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Haynes v. United States*, 390 U.S. 85, 99–100 (1968) (holding that the provisions of the NFA were unconstitutional on their face, and that a requirement for a felon, who would become punishable as a prohibited owner of a firearm, to register the firearm would violate his Fifth Amendment right against self-incrimination).

<sup>31</sup> Gray, *supra* note 19; Bureau of Alcohol, Tobacco, Firearms and Explosives, “National Firearms Act”, (Last visited Apr. 10, 2020), <https://www.atf.gov/rules-and-regulations/national-firearms-act> (“In 1971, the Supreme Court reexamined the NFA in the *Freed* case and found that the 1968 amendments cured the constitutional defect in the original NFA.”).

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 565

provisions under the new legislation.<sup>32</sup> The GCA “regulated interstate and foreign commerce in firearms, including importation, ‘prohibited persons’, and licensing provisions.”<sup>33</sup> In the wake of significant acts of gun violence during the civil rights movement, specifically the assassinations of Dr. Martin Luther King, Jr. and Attorney General Robert Kennedy, the GCA implemented strict regulations establishing new firearms offenses, as well as expanding the classes of prohibited purchasers to include felons, the mentally ill, and unlawful users of narcotics, among others.<sup>34</sup> The primary effect of the initial GCA language on the future of background checks was to incorporate the former FFA requirement for “persons engaged in the business” of manufacturing, distributing, and dealing firearms to obtain FFLs.<sup>35</sup>

In 1983, Congress passed the Firearms Owners Protection Act (“FOPA”), a significant indicator of the country’s conservative ideological shift and the growing influence of the National Rifle Association (“NRA”).<sup>36</sup> In dramatic shift from how the legislation had been interpreted in the past, FOPA re-defined the “engaged in the business” provision as only applying to,

“a person who devotes time, attention, and labor to dealing [manufacturing, or distributing] in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but *such term shall not include* a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>37</sup>

The bill also enacted other limitations on gun control initiatives by prohibiting a requirement for national registration of dealer’s firearm sale

---

<sup>32</sup> Gray, *supra* note 19; Bureau of Alcohol, Tobacco, Firearms and Explosives, “National Firearms Act”, (Last visited Apr. 10, 2020), <https://www.atf.gov/rules-and-regulations/national-firearms-act> (“In 1971, the Supreme Court reexamined the NFA in the *Freed* case and found that the 1968 amendments cured the constitutional defect in the original NFA.”).

<sup>33</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, “Gun Control Act of 1968”, (Last visited Apr. 10, 2020), <https://www.atf.gov/rules-and-regulations/gun-control-act>.

<sup>34</sup> Jacobs & Fuhr, *supra* note 26, at 539–40.

<sup>35</sup> 18 U.S.C. § 923(a) (West 2018) (“No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.”).

<sup>36</sup> Luff, *supra* note 14, at 1588–89.

<sup>37</sup> 18 U.S.C § 921(a) (21) (emphasis added); Luff, *supra* note 14, at 1588–89.

records, and by allowing licensed dealers to participate in gun shows.<sup>38</sup>

Following the attempted assassination of President Ronald Reagan in 1981, which left White House Press Secretary James Brady permanently disabled, a movement back towards liberal application of gun control emerged, culminating in the passage of the Brady Handgun Violence Prevention Act of 1993 (“Brady Act”).<sup>39</sup> The Brady Act significantly modified the GCA by requiring that all FFL dealers conduct background checks on purchasers to ensure they were not prohibited from purchasing a firearm.<sup>40</sup> Viewed in light of current amendments and other proposed changes, opinions on effectiveness of the initial Brady Act have been mixed.<sup>41</sup>

The Brady Act was seen as important because it established the requirement that all federally licensed firearm dealers, manufacturers, and distributors institute a waiting period between purchase of the firearm and transfer to the purchaser, which Congress viewed as a strategy to prevent heat of passion firearm purchases intended for violence.<sup>42</sup> The waiting period required chief local law enforcement officers (“CLEO”) to process the purchaser’s application, conduct a background check, and within five business days inform the FFL whether or not the sale could proceed.<sup>43</sup> If the CLEO did not inform the FFL within five business days that the purchaser was a prohibited person, the FFL had the discretion to proceed with the sale.<sup>44</sup>

After five years, the Act required that the waiting period would be replaced by a national background checking system, which led to the creation of the National Instant Criminal Background Check System (NICS).<sup>45</sup> The initial Brady Act only applied to handguns but eventually the requirement for FFLs to conduct NICS background checks would also apply to “long-guns” such as rifles and shotguns.<sup>46</sup> The Brady Act’s requirement for background checks left significant gaps in the regulation of firearms transfers based on its interaction with previous federal statutes and is a major reason why universal background checks are not a federal requirement to this

---

<sup>38</sup> Gray, *supra* note 19.

<sup>39</sup> Gray, *supra* note 19.

<sup>40</sup> Jacobs & Fuhr, *supra* note 26, at 541–42.

<sup>41</sup> Luff, *supra* note 14, at 1589 (“According to one scholar, it was ‘this generation’s most important federal gun control law . . . and, at the moment of its passage, [was] praised . . . as a major turning point in the politics of gun control and crime control.’ Another scholar observed, however, that the limitations of the Brady Act were actually modest. . .”).

<sup>42</sup> Luff, *supra* note 14, at 1589.

<sup>43</sup> Jacobs & Fuhr, *supra* note 26, at 542.

<sup>44</sup> Jacobs & Fuhr, *supra* note 26, at 542.

<sup>45</sup> Luff, *supra* note 14, at 1589.

<sup>46</sup> Jacobs & Fuhr, *supra* note 26, at 542.

day.<sup>47</sup>

Gun rights advocates recognized that 20th century legislation had laid a foundation for more powerful firearm regulation in the future and turned their focus to the courts to challenge the power of the federal government to implement this legislation.

*B. How Jurisprudence Has Simultaneously Strengthened and Limited Congressional Authority to Regulate Firearms.*

Traditionally, Congress relies on its broad regulatory powers under the Commerce Clause of the U.S. Constitution to regulate the transfer and possession of firearms.<sup>48</sup> In some instances Congress has also regulated manufacturing, importing, and dealing of firearms under their tax powers, as demonstrated by the NFA, but generally modern statutes fall under the power to regulate interstate commerce.<sup>49</sup> Gun rights advocates primarily challenge the authority of Congress to regulate the transfer and possession of firearms on three grounds: (1) that Congress is exceeding the authority granted by the Commerce Clause,<sup>50</sup> (2) that Congress is regulating activity reserved to the States in violation of the Tenth Amendment,<sup>51</sup> or (3) that Congress’ regulations violate the protections of the Second Amendment and the people’s right to bear arms.<sup>52</sup> The following cases demonstrate how the Court’s rulings on these challenges have both limited and solidified congressional authority to regulate firearms possession and transfer.

1. Limits on Congressional Power to Enact Gun Control  
Regulations after *Lopez* and *Printz*.

Prior to 1995 congressional authority to regulate firearms under the Commerce Clause had been essentially unchallenged.<sup>53</sup> In 1990, Congress

---

<sup>47</sup> See discussion *infra* Section III.A.

<sup>48</sup> VIVIAN CHU, CONG. RESEARCH SERV., R43033, CONGRESSIONAL AUTHORITY TO REGULATE FIREARMS: A LEGAL OVERVIEW 1 (2013) (“The Congress shall have Power . . . To Regulate Commerce with foreign Nationals, and among the several states, and with Indian Tribes.”) (citing U.S. Const., art. I, § 8, cl. 1).

<sup>49</sup> *Id.* at 1 n.8 (“The National Firearms Act of 1934 levies taxes regarding the manufacture and transfer of certain firearms and other weapons. Therefore, it could be argued that Congress is also relying on its authority under the Taxing Clause to enact this statute. U.S. Const., art. I, §8, cl. 1.”).

<sup>50</sup> *Id.* at 4. See also *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>51</sup> Chu, *supra* note 48, at 5. See also *Printz v. United States*, 521 U.S. 898 (1997).

<sup>52</sup> Chu, *supra* note 48, at 5. See also *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>53</sup> Kathleen M. Sullivan & Noah Feldman, *Constitutional Law* 142 (Robert C. Clark et al. eds., 19th ed. 2016) (“For Nearly 60 years after the New Deal, the Court did not strike down a single federal statute as exceeding Congress’s power under the Commerce Clause. . . In 1995, a decision invalidating a congressional gun control law broke that longstanding record.”).

passed legislation making it a “federal offense ‘for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.’”<sup>54</sup> Following the arrest of a San Antonio high school student under this provision, a challenge to the law made its way to the Supreme Court in 1995.<sup>55</sup> Chief Justice Rehnquist delivered the opinion of the Court holding that Congress had exceeded its authority by enacting the Gun Free School Zones Act of 1990 (“Gun Control Act”).<sup>56</sup> Justice Rehnquist began by describing three categories of activity which the Court has interpreted congressional authority to regulate in accordance with the commerce power.<sup>57</sup> The Court stated that Congress has the authority to regulate “the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and “those activities having substantial relation to interstate commerce.”<sup>58</sup> With the framework for testing the Gun Control Act established, the Court quickly determined that to pass muster, the Act would have to regulate activity which “substantially affects” interstate commerce in accordance with the third category.<sup>59</sup> Ultimately, the Court held that the mere possession of a firearm within a school zone, could not be said to substantially affect interstate commerce without an attenuated chain of events too far removed to justify upholding the statute.<sup>60</sup> Some saw this case as a significant limitation of Congress’ ability to regulate the firearms in intrastate activities

---

<sup>54</sup> *Id.* (quoting 18 U.S.C. § 922(q) (1994)).

<sup>55</sup> *See* *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>56</sup> *Chu*, *supra* note 48, at 2.

<sup>57</sup> *Lopez*, 514 U.S. at 558–59.

<sup>58</sup> *Id.* at 559. (The Court went on to discuss the third kind of activity at length asking, “whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause.” Ultimately the Court held that based on the weight of precedent, the proper test is to determine whether the activity in question “substantially affects” interstate commerce).

<sup>59</sup> *Id.* at 559; *Chu*, *supra* note 48, at 2-3 (“Under the first two categories, Lopez endorses Congress’s ‘power to regulate all activities, persons or products that cross state boundaries. So long as a federal regulation relates to interstate transactions or interstate transportation, the federal regulation would be justified under the first two branches. However, in examining the School Zones Act, the Court concluded that possession of a gun in a school zone was neither a regulation of the channels nor the instrumentalities of interstate commerce.”). Notably, the Court did discuss that the analysis might be different if there was a jurisdictional element to the law, stating that a jurisdictional element might “limit [the statute’s] reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.” *Chu*, *supra* note 48 at 3 n.24 (quoting *Lopez*, 514 U.S. at 562).

<sup>60</sup> *Lopez*, 514 U.S. at 567 (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

as a whole. Nonetheless, significantly for the future of firearm regulation, while the Court found that Congress had exceeded their authority in *Lopez*, a subsequent case has clarified the requirements of the “substantially affects” doctrine.<sup>61</sup>

In *Gonzales v. Raich*, the Court held that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>62</sup> This language supports upholding a congressional regulation of firearms transfers without requiring actual evidence that the activities substantially affect interstate commerce or undercut a larger regulatory scheme, so long as there is a rational basis for Congress to make such conclusions.<sup>63</sup> Subsequent challenges to firearm regulation under the Commerce Clause have attempted to undermine the ruling in *Gonzales v. Raich* as it applies to intrastate firearm manufacturing and transfer under state law.<sup>64</sup> Ultimately, the holding in *Gonzales v. Raich* has withstood such challenges on the basis that congressional regulations of intrastate manufacture and sale of firearms is necessary to enable the successful implementation of any federal scheme of firearm regulation.<sup>65</sup> Similarly, in cases of intrastate “non-commercial” transfer of firearms federal courts have held that, similar to the marijuana in *Raich*, failure to regulate this “non-commercial” activity would interfere with the larger regulatory framework.<sup>66</sup>

---

<sup>61</sup> Chu, *supra* note 48, at 4 n.28 (“[T]he Court in *Gonzales v. Raich* subsequently clarified that Congress still has considerable authority under the ‘substantially affects’ doctrine to regulate activity that is ‘quintessentially economic’ on the intrastate level, even though the activity itself is not a part of interstate commerce.”) (quoting *Gonzales v. Raich*, 545 U.S. 1, 18 (2005)).

<sup>62</sup> Chu, *supra* note 48, at 4.

<sup>63</sup> Chu, *supra* note 48, at 4.

<sup>64</sup> See *Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 978 (2013) (“[Plaintiff] wants to manufacture firearms under the Montana Firearms Freedom Act, state legislation that declares that the manufacture and sale of certain firearms within the state is beyond the scope of Congress’s commerce power.”).

<sup>65</sup> Chu, *supra* note 48, at 9 (“In upholding the validity of the National Firearms Act and Gun Control Act as applied to the intrastate manufacture and sale of firearms and firearms accessories, the district court stated that Congress had a rational basis, without the need to have particularized findings, to conclude that failure to regulate intrastate manufacture and sale of firearms would leave a ‘gaping hole’ in the federal scheme regulating firearms.”) (quoting *Montana Shooting Sports Ass’n v. Holder*, 2010 U.S. Dist. LEXIS 104301, at \*1 (D. Mont. Aug. 31, 2010)).

<sup>66</sup> Chu, *supra* note 48, at 13 (“The Sixth Circuit stated that guns, similar to marijuana, are a ‘fungible commodity’ for which there is an established interstate market and that the provision at issue is a part of the larger regulatory framework. The court concluded that the relevant ‘legislative history supports the logical connection between the intrastate sale and disposition of firearms and interstate market in firearms.’”) (quoting *United States v. Rose*, 522 F.3d 710, 718–19 (6th Cir. 2008)).

Another limitation on congressional ability to regulate firearms transaction comes from the Tenth Amendment, and the anti-commandeering principle announced in *New York v. United States*.<sup>67</sup> As previously discussed, the interim provisions of the Brady Act required CLEOs to conduct background checks on persons wishing to purchase a firearm from an FFL to determine if that person was a prohibited purchaser.<sup>68</sup> In *Printz v. United States*, a Montana CLEO challenged the constitutionality of the Brady Act's requirement, arguing that the provision was unconstitutional under the Tenth Amendment.<sup>69</sup> Justice Scalia, writing for the Court, agreed with the petitioners and held that the requirement for CLEOs to enforce the provisions of the Brady Act was clearly a violation of the rule set forth in *New York*, and that the provisions of the Brady Act were therefore unconstitutional.<sup>70</sup> While *Printz* invalidated the interim provision, the ruling significantly did not address any issues with the congressional regulation of firearms under the Commerce Clause.<sup>71</sup> Justice O'Connor went beyond this, specifically distinguishing in her concurrence that "[t]he Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers. Our holding, of course, does not spell the end of the objectives of the Brady Act."<sup>72</sup> Justice O'Connor's concurrence seems to indicate that a federally enforced regulatory system in which state and local governments can voluntarily participate would be

---

<sup>67</sup> Sullivan & Feldman, *supra* note 53 at 182 (discussing the extension of the anti-commandeering principle, preventing the federal government from forcing states to enact legislation, to apply to federal laws directing state and local executive officials to enforce federal legislation).

<sup>68</sup> Jacobs & Fuhr, *supra* note 26 at 542; See discussion, *supra* Section II.A.3.

<sup>69</sup> *Printz v. United States*, 521 U.S. 898, 904 (1997).

<sup>70</sup> *Id.* at 933 ("We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.' The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.") (quoting *United States v. New York*, 505 U.S. 144, 188 (1992)).

<sup>71</sup> See generally *id.*

<sup>72</sup> *Printz*, 521 U.S. at 935–36 (O'Connor, J., concurring) (emphasis added) (citation omitted). *But c.f.* *Printz*, 521 U.S. at 937 (Thomas, J., concurring) ("In my 'revisionist' view, the Federal Government's authority under the Commerce Clause . . . does not extend to the regulation of wholly *intrastate*, point-of-sale transactions. Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations. Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must 'temper our Commerce Clause jurisprudence' and return to an interpretation better rooted in the Clause's original understanding. Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that 'substantially affect' interstate commerce, I question whether Congress can regulate the particular transactions at issue here.") (internal citations omitted).

constitutional under the Commerce Clause.<sup>73</sup>

Ultimately, while both *Lopez* and *Printz* were seen as wins for the pro-gun rights lobby, limiting federal power to regulate firearms possession and transfer, the holding in each case did very little to prevent congressional power to regulate under the authority of the Commerce Clause.

## 2. How Individual Rights and Federal Gun Control apply Post-*Heller/McDonald*.

The other primary challenge to any federal regulation of firearms typically manifests as a challenge based on individual right to bear arms as protected by the Second Amendment.<sup>74</sup> Traditionally, this right to bear arms was understood to bear relation to some association or affiliation with contributing to the common defense in a militia.<sup>75</sup> In 2008, the Supreme Court essentially reversed seventy years of precedent in deciding *District of Columbia v. Heller*.<sup>76</sup>

The petitioners in *Heller* challenged a thirty-two year-old handgun ban in Washington, D.C. on the basis that the statute violated the Second Amendment.<sup>77</sup> The statute in *Heller* banned, among other things, the possession, registration, and carry of handguns as well as requiring all handguns to be locked and unloaded even when in a private citizen's home.<sup>78</sup> The *Heller* Court, analyzed the language of the Second Amendment based

---

<sup>73</sup> *Id.* at 936 (O'Connor, J., concurring) (“States and chief law enforcement officers may voluntarily continue to participate in the federal program.”); See Chu, *supra* note 48 at 5.

<sup>74</sup> U.S. CONST., amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

<sup>75</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”) (citation omitted). In *Miller*, the Court evaluated a claim that the defendants were entitled to carry sawed-off shotguns under the protection of the Second Amendment. After evaluating the text of the Second Amendment the Court determined that this type of weapon was not protected as it served no real militia function, and its possession was not attributable to supporting the common defense.

<sup>76</sup> Gray, *supra* note 19.

<sup>77</sup> *District of Columbia v. Heller*, 554 U.S. 570, 574 (2008).

<sup>78</sup> *Id.* at 574–75 (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, ‘unloaded and disassembled or bound by a trigger lock or similar device’ unless they are located in a place of business or are being used for lawful recreational activities.”) (internal citations omitted).

on its two clauses, ultimately finding that the text of the Amendment coupled with the historical context guarantees an individual right to possess arms.<sup>79</sup> The majority, written by Justice Scalia, argued that the statute at issue would fail any level of scrutiny.<sup>80</sup> Despite not naming any specific level of scrutiny with which the Court or lower courts should use regarding Second Amendment challenges in the future, the opinion seems to suggest that a heightened level of scrutiny is most appropriate.<sup>81</sup> Justice Breyer, in his dissent, contended exactly the opposite, arguing that even if the Second Amendment applies—which he expresses doubts that it does—the District of Columbia’s ordinance would survive the proper degree of scrutiny based on a balancing of competing interests.<sup>82</sup>

While the decision in *Heller* was widely heralded as a major victory for gun rights advocates, it does not severely limit the federal government’s ability to regulate the transfer of firearms.<sup>83</sup> Justice Scalia acknowledged that the Second Amendment, similar to other rights, is not unlimited.<sup>84</sup> He then discussed a non-exhaustive list of current constitutionally valid prohibitions and restrictions regarding the possession and transfer of firearms, specifically identifying laws “imposing conditions and qualifications on the commercial sale of arms.”<sup>85</sup>

In 2010, the protections of *Heller* were extended to the states, incorporated under the concept of due process.<sup>86</sup> Since *Heller* was decided in Washington, D.C. the Second Amendment was applied under federal law, but the petitioners in *McDonald v. City of Chicago* argued that the ruling was

---

<sup>79</sup> Sullivan, *supra* note 53 at 471.

<sup>80</sup> LEGAL COMMUNITY AGAINST VIOLENCE, *Summary and Analysis of District of Columbia v. Heller*, 2 (July 2008), [https://lawcenter.giffords.org/wp-content/uploads/2012/05/dc\\_v\\_heller\\_analysis.pdf](https://lawcenter.giffords.org/wp-content/uploads/2012/05/dc_v_heller_analysis.pdf).

<sup>81</sup> *Id.* at 2 (“The majority opinion states that the handgun ban would fail any standard of scrutiny . . . but does not articulate a standard that should be applied in evaluating other laws under the Second Amendment.”) (citation omitted).

<sup>82</sup> Sullivan, *supra* note 53, at 472 (“Under an appropriate balancing of interests, ‘which focuses upon the presence of handguns in high-crime urban areas . . . [the D.C. ordinance] represents a permissible legislative response to a serious, indeed life-threatening problem,’ and is ‘tailored to’ that problem . . .”).

<sup>83</sup> Sullivan, *supra* note 53, at 471.

<sup>84</sup> Sullivan, *supra* note 53, at 471 (“[R]easonable restrictions on firearm ownership could still be constitutional: ‘Like most rights, the right secured by the Second Amendment is not unlimited.’”).

<sup>85</sup> Sullivan & Feldman, *supra* note 53, at 471 (“Although we not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”) (emphasis added).

<sup>86</sup> *McDonald v. Chicago*, 561 U.S. 742, 767 (2010).

not applicable as the Second Amendment has no application to the states.<sup>87</sup> Similar to the D.C. law, a Chicago ordinance effectively banned possession of handguns by private citizens who resided in the city.<sup>88</sup> In the majority opinion, Justice Alito confirmed the holding in *Heller*, and held that based on the fundamental nature of the Second Amendment and its deep roots in the “nation’s history and tradition,” the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment protections announced in *Heller* to the States.<sup>89</sup> The city relied on arguments Justice Breyer had made in his *Heller* dissent, but the Court held that an interest balancing test was not appropriate despite failing to identify a specific level of judicial scrutiny for Second Amendment cases.<sup>90</sup> More importantly for the development of future gun control regulation, the opinion also reaffirmed the constitutionality of longstanding prohibitions on possession of firearms by felons and the mentally ill, as well as laws conditioning or qualifying commercial sales of arms.<sup>91</sup>

Ultimately, while *Heller* and *McDonald* were seen as overwhelming victories for the pro-gun-rights lobby, placing restrictions on state and federal authority to prohibit firearm possession and transfer, these cases also solidified Congress’ constitutional authority to regulate the commercial transfer of firearms. While challenges to firearms regulation will undoubtedly continue, the holdings in *Lopez*, *Printz*, *Heller*, and *McDonald* have certainly not prevented future development and implementation of a federal system to regulate the transfer of firearms.

### III. CURRENT BACKGROUND CHECK GAPS AND LEGISLATIVE, EXECUTIVE, AND STATE-BASED ATTEMPTS TO ADDRESS THEM.

As is evident from the historical construction of gun control in the United States, the current system regulating the commercial and non-commercial transfer of firearms was not created with a single comprehensive vision, but rather, has been pieced together over time. These incremental changes and patchwork attempts at regulation are what have led to the current gaps that plague federal legislation today. Recent attempts by the

---

<sup>87</sup> *Id.* at 750.

<sup>88</sup> *Id.*

<sup>89</sup> Sullivan & Feldman, *supra* note 53, at 473-75.

<sup>90</sup> *McDonald*, 561 U.S. at 785–86.

<sup>91</sup> *Id.* (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’ We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”) (internal citations omitted).

Legislative and Executive branches to remedy these gaps have been unsuccessful, as the country remains divided on how to approach these issues.<sup>92</sup> In the face of federal failure, states have chosen how to regulate firearms in varied ways with similarly varied results.<sup>93</sup> Some scholars argue that national remedies may be unattainable until state level regulation determines approaches capable of obtaining nationwide support.<sup>94</sup> It is therefore appropriate to compare federal and state based attempts to regulate the implementation of background checks in the transfer of firearms to get an idea of what may be successful in the future. First, this section will look at the current gap in background check requirements created by statutory and regulatory language. After identifying the critical gap, the analysis will turn to legislative, executive, and finally state-based attempts to address the hole in background check requirements.

*A. Statutory Gaps and Recent Legislative Attempts to Fix Them.*

As was evident in *Heller*, some longstanding prohibitions on possession and transfer of firearms are widely accepted as fundamental to regulation of gun control.<sup>95</sup> The GCA identifies nine classes of persons prohibited from purchasing or possessing a firearm.<sup>96</sup> The central mechanism to implement those prohibitions, and what gives the law teeth, is the concept of universal background checks.<sup>97</sup> Unfortunately, based on the current construction of federal laws, background checks are not required in all firearm transactions or transfers.<sup>98</sup> As previously discussed, the GCA requires that all persons engaging in the business of manufacturing, distributing or dealing firearms to obtain an FFL.<sup>99</sup> Additionally, the Brady Act requires all FFLs to conduct a background check through NICS on the recipient when transferring a firearm.<sup>100</sup> FOIA limited the definition of “engaged in the business” to exclude those sellers who merely transfer firearms occasionally or as a

---

<sup>92</sup> Rostron, *supra* note 17, at 328.

<sup>93</sup> Rostron, *supra* note 17, at 328 (“While the gun issue has been stalled at the federal level, some state legislatures have been more active. False [T]he nation continues to become more fractures on [gun issues], with variation in state approaches to guns becoming even more prominent than in the past.”). See discussion *infra* Part III(B).

<sup>94</sup> Rostron, *supra* note 17, at 329.

<sup>95</sup> *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

<sup>96</sup> 18 U.S.C.S. § 922(g). See Rostron, *supra* note 17, at 341 (“Federal laws disqualify some people from having guns, such as convicted felons, fugitives, drug addicts, illegal aliens, people with misdemeanor convictions for domestic violence or subject to domestic violence restraining orders, and people who have been committed to a mental institution or determined through court adjudication to have serious mental impairments.”).

<sup>97</sup> Rostron, *supra* note 17, at 340–41.

<sup>98</sup> Rostron *supra* note 17, at 341.

<sup>99</sup> 18 U.S.C.S. § 923(a).

<sup>100</sup> 18 U.S.C.S. § 922(t).

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 575

hobby.<sup>101</sup> This limitation allows for a person who is legally prohibited from purchasing or owning a firearm to obtain one by purchasing from a seller who is not obligated to conduct a background check.<sup>102</sup> While it is still illegal for the seller to transfer a weapon to a prohibited person, the statute requires that the seller “knowingly” transfers the firearm to a prohibited party, incentivizing private sellers to not ask questions or conduct background checks when making a transfer.<sup>103</sup> However, when background checks are conducted, research shows that they prevent a significant number of prohibited persons from purchasing and possessing firearms.<sup>104</sup>

Based on research and studies indicating the benefits of background checks, the federal government has attempted through legislative and executive powers to address the regulatory gap. In 1994, gun control advocates looked to build upon the gains made by the Brady Act and introduced the Gun Violence Protection Act of 1994 (“Brady II”).<sup>105</sup> Brady II attempted to close the gap by making it illegal for any individual to transfer a handgun to an individual that is not an FFL, or does not have a state issued handgun license.<sup>106</sup> Similarly in 1999, the Gun Show Accountability Act attempted to extend the background check requirement to transactions where any part of the transaction occurs at a gun show or is initiated at a gun show and occurs at a different time and location.<sup>107</sup> In 2013, Congress once again sought to reduce the “gun show loophole” through the creation of the Manchin-Toomey Amendment.<sup>108</sup> Even if the bill had passed and become law, the Manchin-Toomey Amendment alterations were detrimentally under-inclusive and would not have sufficiently closed the gap for all private sales as they merely restricted the transfer of firearms at gun shows.<sup>109</sup> All three of these legislative efforts failed to garner sufficient support in Congress to be submitted to the President and therefore none ever became

---

<sup>101</sup> 18 U.S.C. § 921(a) (21); Luff, *supra* note 14, at 1588–89.

<sup>102</sup> Rostron *supra* note 17, at 341.

<sup>103</sup> 18 U.S.C. § 922(t).

<sup>104</sup> Andrew McClurg, *In Search of the Golden Mean in the Gun Debate*, 58 *How. L.J.* 779, 790–91 (2015) (Stating that despite regulatory gaps, and system imperfections, background checks can still be effective, “A Justice Department report estimated that between 1994 (when background checks went into effect) and 2010, background checks prevented more than 2.1 million prohibited purchasers from obtaining guns from licensed dealers.”) (emphasis added).

<sup>105</sup> Jacobs & Fuhr, *supra* note 26, at 545.

<sup>106</sup> Jacobs & Fuhr, *supra* note 26, at 545 (citing Gun Violence Prevention Act of 1994, S. 1878, 103d Cong. (1994); Gun Violence Prevention Act of 1994, H. 3932, 103d Cong. (1994)).

<sup>107</sup> Jacobs & Fuhr, *supra* note 26, at 546 (citing Gun Show Accountability Act, S. 443, 106th Cong. § 931(c)(1) (1999)).

<sup>108</sup> Jacobs & Fuhr, *supra* note 26, at 546.

<sup>109</sup> Jacobs & Fuhr, *supra* note 26, at 546–548.

law.<sup>110</sup>

*B. Executive Approaches to Gun Control.*

Following the San Bernardino Massacre in 2015, President Barack Obama grew tired of Congress' inaction on gun control initiatives and attempted to implement some of his own through a series of executive orders.<sup>111</sup> While there was significant opposition from gun rights activists and lobbying organizations like the NRA, the executive actions really did little to affect the way regulation of firearm transfers occurred.<sup>112</sup> The executive orders essentially reiterated enforcement guidance for the ATF to employ when determining whether someone is engaged in the business of selling firearms.<sup>113</sup> The agency guidance did not alter enforcement of the existing law, it did not require more firearm sellers to obtain FFLs, and really only served to clarify what quantity and frequency of sales indicate whether or not someone is engaged in the business of selling firearms.<sup>114</sup> Prior to leaving office, President Obama also attempted to strengthen existing background check systems through an executive order requiring the Social Security Administration to send NICS records of mentally disabled people for use in the background check database.<sup>115</sup>

When President Trump took office in 2017, he made good on campaign promises to roll back the gun control efforts of the Obama Administration.<sup>116</sup> President Trump not only blocked the Social Security Administration order, weakened the NICS system, but also had the Justice Department narrow its definition of fugitives who are prohibited from purchasing weapons.<sup>117</sup> After the Parkland School Shooting in 2018, President Trump surprised many by showing support for initiatives to strengthen background checks.<sup>118</sup> Since

---

<sup>110</sup> Jacobs & Fuhr, *supra* note 26, at 546–51.

<sup>111</sup> Jacobs & Fuhr, *supra* note 26, at 555 (citing Press Release, White House Office of the Press Sec'y, Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer (Jan. 4, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>).

<sup>112</sup> Rostron, *supra* note 17, at 336–37.

<sup>113</sup> Rostron, *supra* note 17, at 336–37.

<sup>114</sup> Jacobs & Fuhr, *supra* note 26, at 556–57.

<sup>115</sup> Gregory Korte, “Trump Signs Bill Reversing Obama Rule to Ban Gun Purchases by Mentally Ill,” USA TODAY, Feb. 28, 2017, <https://www.usatoday.com/story/news/politics/2017/02/28/trump-sign-bill-blocking-obama-gun-rule/98484106/>.

<sup>116</sup> Beth Reinhard & Sari Horwitz, “The Trump Administration Has Already Been Rolling Back Gun Regulations,” THE WASHINGTON POST, Oct. 4, 2017, [https://www.washingtonpost.com/investigations/the-trump-administration-has-already-been-rolling-back-gun-regulations/2017/10/04/5caad7d6-a86b-11e7-8ed2-c7114e6ac460\\_story.html?utm\\_term=.5e8fa398f186](https://www.washingtonpost.com/investigations/the-trump-administration-has-already-been-rolling-back-gun-regulations/2017/10/04/5caad7d6-a86b-11e7-8ed2-c7114e6ac460_story.html?utm_term=.5e8fa398f186).

<sup>117</sup> *Id.*

<sup>118</sup> Tessa Berenson, “Here’s Where President Trump Stands on 5 Gun Control Ideas”

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 577

that time President Trump has retreated on this position, taking stances that mirror those of the Republican Party and the NRA on the issue of background checks, most recently promising to veto the Bipartisan Background Checks Act of 2019 should it pass in both houses of Congress.<sup>119</sup> Ultimately, the actions of the executive branch in recent history has done little to improve the effectiveness of gun control through background checks.

*C. Comparative Analysis of State Based Approaches to Background Checks.*

As federal attempts to strengthen background check requirements for firearm transfers have come up short, many states have decided to supplement the baseline federal requirements. States have employed a variety of methods to help strengthen regulation of firearm purchase and possession with similarly varied results.<sup>120</sup> Below is a comparison of three states with different approaches to regulation: (1) Missouri, (2) Connecticut, and (3) California. Missouri does not supplement federal regulation, while the latter two states have supplemented federal background check requirements in different ways with different levels of effectiveness.

1. Missouri.

Missouri is rated forty-sixth in terms of state gun law strength.<sup>121</sup> Missouri is an interesting case study because the state is a prime example of why permit to purchase, or universal background checks, are so effective. Permit to Purchase (“PTP”) regulations require firearm purchasers to obtain a license confirming they have already passed necessary background check procedures under federal and state requirements before they are able to finalize a firearm transaction.<sup>122</sup> In 2007 Missouri repealed their permit to purchase requirement, and since that time have seen the number of firearms-related homicides increased approximately twenty-five percent.<sup>123</sup> Following the repeal of the almost ninety-year-old law, Missouri also saw a

---

TIME (Mar. 12, 2018), <http://time.com/5195469/donald-trump-gun-control-white-house/>.

<sup>119</sup> Jacob Pramuk, *House Passes Another Bill to Strengthen Gun Background Checks as Trump Pledges to Veto*, CNBC (Feb. 28, 2019), <https://www.cnbc.com/2019/02/28/house-passes-gun-control-background-check-bill-trump-pledges-to-veto.html>.

<sup>120</sup> See McClurg, *supra* note 104, at 790–93; Rostron, *supra* note 17, at 341–43; Jacobs & Fuhr, *supra* note 26, at 564–66.

<sup>121</sup> Gifford’s Law Center, *Annual Gun Law Scorecard 50 State Rankings 2018*, <http://lawcenter.giffords.org/scorecard/#rankings> (last visited Mar. 23, 2020).

<sup>122</sup> Daniel Webster, et. al., *Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides*, 91 J. OF URBAN HEALTH 293, 294 (2014).

<sup>123</sup> *Id.* at 296 (In 2008, at the first full year after the permit-to-purchase licensing law was repealed, the firearm homicide rate in Missouri increased sharply to 6.23 per 100,000, a 34 % increase from the baseline mean. For the post-repeal period of 2008–2010, the mean annual firearm homicide rate was 5.82, 24.9 % higher than the pre-repeal mean. . .”).

sharp increase in the number of crime guns that originated from in-state retailers.<sup>124</sup> Following the repeal of the PTP laws, Missouri also saw its firearm suicide rates raise by sixteen percent.<sup>125</sup> Missouri now has the third highest gun death rate per one hundred thousand people in the country at 21.3 deaths per one hundred thousand people.<sup>126</sup> Following the repeal, the state does not require background checks prior to the transfer of firearms between private unlicensed parties.<sup>127</sup> This has led to Missouri being in the top half of states in crime gun exports, meaning that guns purchased in Missouri were used and recovered following crimes in other states.<sup>128</sup> The researchers felt confident that “the study provides compelling confirmation that weakness in firearm laws lead to death from gun violence.”<sup>129</sup> While Missouri provides a compelling study into the effects removing background checks can have on gun violence, Connecticut makes a similarly compelling display of the positive effects more restrictive requirements can have.

## 2. Connecticut.

In 1995, Connecticut enacted a law supplementing federal requirements for background checks by requiring all handgun purchasers to obtain a permit from local police and mandating a minimum of eight hours safety training.<sup>130</sup> Conducting a statistical analysis to estimate the effect of the PTP laws on Connecticut’s homicide and suicide rates, researchers found a reduction in both the state’s homicide and suicide rates.<sup>131</sup> Multiple studies showed that the PTP laws reduced the overall level of lethal gun violence as the firearm related homicide rate dropped by nearly forty percent,<sup>132</sup> and the firearm related suicide rate dropped nearly fifteen percent.

Following the tragedy at Sandy Hook, the Connecticut legislature continued to bolster the regulations on firearms in 2013, making background

---

<sup>124</sup> *Id.* at 294 (“Webster and colleagues reported that immediately following the repeal of Missouri’s PTP handgun law, there was a twofold increase in the percentage of guns that had unusually short intervals between the retail sale and the recovery by police, an indicator of firearm diversion or trafficking. The repeal also coincided with a sharp increase in the percentage of crime guns recovered by police in Missouri that had been originally sold by in-state retailers, from 56.4 % in 2006 to 71.8 % in 2012.”).

<sup>125</sup> Cassandra Crifasi, et. al., *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTATIVE MEDICINE 43, 47 (2015).

<sup>126</sup> Gifford’s Law Center, *Annual Gun Law Scorecard 50 State Rankings 2018*, <http://lawcenter.giffords.org/scorecard/#rankings> (last visited Mar. 23, 2020).

<sup>127</sup> Gifford’s Law Center, *Missouri State Gun Laws*, <http://lawcenter.giffords.org/gun-laws/state-law/Missouri/> (last visited Mar. 23, 2020).

<sup>128</sup> *Id.*

<sup>129</sup> Chokshi, *supra* note 18.

<sup>130</sup> Rostron, *supra* note 17 at 347.

<sup>131</sup> Kara Rudolph, et. al., *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. OF PUB. HEALTH e49, e51-53 (2015).

<sup>132</sup> *See id.*; *see also* Crifasi, *supra* note 125, at 47.

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 579

checks necessary for all types of firearms, not only handguns, as well as ammunition.<sup>133</sup> The Executive Director of Connecticut Against Gun Violence cites these changes as leading to one of the lowest years of gun violence in the state’s history.<sup>134</sup> He reported that gun-related homicides in the state had reduced significantly following implementation of the additional background checks, referencing that the state previously had, on average, about ninety-two gun-related homicides per year compared to only fifty-three in 2016.<sup>135</sup>

### 3. California.

California has supplemented federal gun control legislation by requiring a background check for all gun sales at the point of transfer.<sup>136</sup> Since 1991, California has required all persons not in the business of selling firearms to transfer through an intermediary when conducting a transaction with an un-licensed individual.<sup>137</sup> Gifford’s Law Center to Prevent Gun Violence rates California as the number one state in terms of gun law strength.<sup>138</sup> They possess one of the lowest gun-related death rate per one hundred thousand people at 7.45, the seventh lowest gun related death rate in the country, placing behind only other states who also supplement federal background check requirements.<sup>139</sup> California also has the fifth lowest rate of guns exported to other states which are used to commit crimes.<sup>140</sup> Despite California’s efforts to reduce gun violence through supplemental laws, its efforts may be undercut if prohibited persons unable to acquire firearms in California can access firearms in Nevada or Arizona where laws are not as

---

<sup>133</sup> Lori Mack, *What’s Been the Impact of Connecticut’s Gun Laws After Sandy Hook?*, WNPR NEWS (Dec. 8, 2017), <http://www.wnpr.org/post/whats-been-impact-connecticuts-gun-laws-after-sandy-hook>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Rostron, *supra* note 17, at 341–42.

<sup>137</sup> Rostron, *supra* note 17, at 341 (“The process essentially involves using a licensed gun dealer as an intermediary between the owner of the gun and the person seeking to buy it. The owner takes the gun to a licensed dealer, and the dealer runs a background check on the prospective purchaser. If the purchaser passes the background check, the purchaser gets the gun. If not, the dealer returns the gun to the owner.”).

<sup>138</sup> Gifford’s Law Center, *Annual Gun Law Scorecard 50 State Rankings 2017*, <http://lawcenter.giffords.org/scorecard/#rankings> (last visited Apr. 10, 2020).

<sup>139</sup> *Id.*; Centers for Disease Control and Prevention, *Firearm Mortality by State*, [https://www.cdc.gov/nchs/pressroom/sosmap/firearm\\_mortality/firearm.htm](https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm) (last visited Apr. 10, 2020).

<sup>140</sup> Gifford’s Law Center, *California State Gun Laws*, <http://lawcenter.giffords.org/gun-laws/state-law/California/> (last visited Mar. 23, 2020); Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Firearms Trace Data Report, <https://www.atf.gov/firearms/docs/undefined/2016tracestatscaliforniapdf/download> (last visited Mar. 23, 2020).

strict.<sup>141</sup>

The success of California's current gun control measures has enabled the state to continue developing the regulations that they hope will reduce gun violence in the future.<sup>142</sup> Some of these measures include expanded bans on purchase, possession, and ownership of firearms by those afflicted with mental disorders or those with previous domestic violence convictions.<sup>143</sup> While gun rights advocates have contested the effect of these proposals on violence in the Golden State, the Brady Center to Prevent Gun Violence maintains that these laws continue to save lives.<sup>144</sup>

It is evident from the state-based analysis that supplemental requirements for background checks have a significant impact on lethal violence inflicted with firearms.<sup>145</sup> While current federal laws struggle to address the ability of prohibited purchasers from acquiring firearms, examples provided by states continue to demonstrate the effectiveness of minimum background check standards. In his *New State Ice* dissent, Justice Brandeis opined that variation in state laws provide a valuable opportunity for experimentation in policy, effectively serving as a source of trial and error to determine both successful and unsuccessful policies.<sup>146</sup> While states can serve as an effective laboratory for testing the validity of various gun control measures, this analysis would suggest that universal background checks have already passed the initial viability test and should be implemented at the federal level. Even though the impact of states making poor choices regarding policy may be better than a national implementation of faulty regulation, the impact will nevertheless be harmful to those affected.<sup>147</sup> In the area of gun control the harm to those affected is significant, and therefore it is time to move past state testing and implement a federal requirement that all firearms transfers require background checks.

#### IV. PROPOSAL TO ADOPT A FEDERAL MINIMUM UNIVERSAL BACKGROUND CHECK REQUIREMENT.

Perfect is the enemy of good when it comes to gun control legislation, and a small change in background check requirements that can be implemented now should be the short-term goal. Making a small, measured

---

<sup>141</sup> Rostron, *supra* note 17, at 357–58.

<sup>142</sup> Jeff Daniels, “Stricter Gun Laws in 2019 — Including California Lifetime Firearms Ownership Ban on Some Domestic Abusers”, CNBC (Dec. 7, 2018), <https://www.cnbc.com/2018/12/26/tougher-gun-laws-to-take-effect-in-2019-in-ca-several-other-states.html>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See supra* Section III(c).

<sup>146</sup> Rostron, *supra* note 17, at 357–58.

<sup>147</sup> Rostron, *supra* note 17, at 356.

change to federal regulation of firearms will not prevent more state-based analysis to continue on what subsequent measures should be taken to reduce gun violence. But rather than wait while the damage continues to amass, the best approach is to enact a minimum federal requirement for universal background checks at the point of any firearm transfer similar to the California approach. As previously mentioned, government and the public widely support universal background checks.<sup>148</sup> The impacts of requiring background checks in various forms is evident based on the disparity in firearm-based violence amongst states with and without supplemental procedures.<sup>149</sup> In Missouri, a House Resolution imposed numerous restrictions and measures intended to deter would-be purchasers of firearms.<sup>150</sup> The failure of this bill shows how an over-inclusive approach to gun control legislation limits the possibility that an effective law will actually pass. While many of these provisions may be worth considering, it is better to utilize the state laboratory approach to evaluate more controversial requirements once universal background checks are already in effect at the federal level.

Another pitfall to avoid in creating a minimum standard is being under-inclusive. Similar to the Manchin-Toomey Amendment, legislators must be wary of closing small gaps such as the “gun show loophole” while leaving all other private transactions unregulated.<sup>151</sup> The recent proposal of House Resolution 8 (H.R. 8), or the Bipartisan Background Checks Act of 2019, is the closest legislation has come to achieving the kind of change that this analysis believes will create a small but significant first step towards future change.<sup>152</sup> H.R. 8 requires all unlicensed firearms dealers to transfer firearms through an FFL holder implementing the current background check requirements for FFLs to be enforced on all transfers.<sup>153</sup> By keeping this bill limited to background checks, gun control advocates are hopeful that the bill will pass through Congress, despite facing an uphill battle in the Republican controlled Senate.<sup>154</sup> While opposition from conservative gun rights lobbyists is significant, this kind of change can initiate a movement for larger

---

<sup>148</sup> Miller, *supra* note 12.

<sup>149</sup> See Discussion, *supra* Section III.C.

<sup>150</sup> H.B. 366, 99th Gen. Assemb., First Reg. Sess. (Mo. 2017). In addition to background checks, the bill would have required purchasers to watch a thirty-minute video on firearm injuries, tour an emergency trauma center when gun violence victims are present, meet with families of gun violence victims, and other deterrent based measures all prior to receiving a firearm.

<sup>151</sup> Jacobs & Fuhr, *supra* note 26, at 546-548.

<sup>152</sup> Sheryl Stolberg, “Background Check Bill Marks Gun Control as a Priority for House Democrats”, N.Y. TIMES (Jan. 8, 2019) (<https://www.nytimes.com/2019/01/08/us/politics/house-democrats-gun-control.html>).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

overhaul in gun control.<sup>155</sup> In February 2019, H.R. 8 passed through the House of Representative and was co-sponsored by 5 Republican members. While a positive step, the vote was primarily along party lines and President Trump already indicated he would veto the bill if it eventually passes through the Senate.<sup>156</sup>

While this “solution” will not solve all of the gun violence issues in the United States, it will be the first step to addressing other significant challenges. Having mandatory background checks in place will enable legislators to examine how those systems can be further improved through methods such as enhancing the accuracy and speed of NICS,<sup>157</sup> implementing waiting periods,<sup>158</sup> and assessing other holes in the background check system like the “Charleston Loophole”.<sup>159</sup> Universal background checks are not the cure; instead, a minimally invasive, marginally controversial remedy is needed to begin tackling one of the nation’s most critical issues.

#### V. CONCLUSION.

The requirement for universal background checks will by no means solve all of the problems in the weapons transfer universe. As evidenced by history, gun control legislation will slowly be pieced together over time but implementing this kind of federal uniformity can at least begin refurbishing a broken system. Critics of this kind of minimum universal background check requirement will continue to argue that many of the mass shootings and murders in recent memory would not have been prevented by a background check.<sup>160</sup> The only argument that needs furnishing in return is: what about the one that could have prevented. President Obama passionately championed this message in the days after the Sandy Hook shooting, pleading with the nation and the government for even incremental change by stating the complexity of the problem is no longer tolerable as an excuse for

---

<sup>155</sup> *See Id.*

<sup>156</sup> Brakkton Booker, “House Passes Sweeping Gun Bill,” NPR (Feb. 27, 2019, 3:46 PM), <https://www.npr.org/2019/02/27/698512397/house-passes-most-significant-gun-bill-in-2-decades>.

<sup>157</sup> Devlin Barrett, et. al., *FBI’s Gun Background-Check Database is Missing Records of Millions of Cases*, WASHINGTON POST (Nov. 10, 2017, 10:41 PM), <https://www.chicagotribune.com/news/nationworld/ct-fbi-gun-background-check-system-missing-records-20171110-story.html>.

<sup>158</sup> *Id.*

<sup>159</sup> David Johnson, *The Gun Loophole Congress Isn’t Talking About Put 4,170 Guns in Wrong Hands in 2016*, TIME (Feb. 27, 2018), <http://time.com/5170667/charleston-loophole-fix-nics/>.

<sup>160</sup> Marion Hammer, *Universal Background Checks – Absolutely Not*, NRA-ILA (Jan. 25, 2013), <https://www.nraila.org/articles/20130125/universal-background-checks-absolutely-not-1>.

2020] *ENSURING ONLY “GOOD GUYS” CAN GET GUNS* 583

doing nothing.<sup>161</sup> He implored the nation to recognize that while there are no individual regulations or combination of laws that will prevent every senseless act of violence, “We know such violence has terrible consequences for our society. And if there is even one thing that we can do to prevent any of these events, we have a deep obligation—all of us—to try.”<sup>162</sup>

---

<sup>161</sup> See President Barack Obama, Remarks by the President in a Press Conference, (Dec. 19, 2012, 12:02 PM) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/12/19/remarks-president-press-conference>).

<sup>162</sup> *Id.*