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## Locked, Loaded, and Registered: The Feasibility and Constitutionality of a Federal Firearms Registration System

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LOCKED, LOADED, AND REGISTERED:  
THE FEASIBILITY AND CONSTITUTIONALITY  
OF A FEDERAL FIREARMS  
REGISTRATION SYSTEM

*Dylan J. McDonough\**

INTRODUCTION

The federal government has long been hostile to the very notion of a gun registration policy. Aside from a spattering of narrow twentieth-century statutes,<sup>1</sup> Congress has had nothing to say about such a policy—or at least nothing nice to say. One law specifically barred agencies from implementing “any system of registration of firearms, firearms owners, or firearms transactions or dispositions,”<sup>2</sup> and another forbade any “department, agency, officer, or employee of the United States” from using the National Instant Criminal Background Check System (“NICS”) to establish “any system for the registration of firearms, firearm owners, or firearm transactions or dispositions.”<sup>3</sup> For good measure, the regulation creating NICS reiterated the sentiment in identical language.<sup>4</sup> In each significant piece of firearm legislation, Congress included provisions that specifically reject a system of gun registration. This seems at first blush an inauspicious foundation for a federal gun registration system.

As Justice Louis Brandeis once reminded us, however, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

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1 See, e.g., National Firearms Act, ch. 757, 48 Stat. 1236 (1934); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

2 18 U.S.C. § 926(a) (2018).

3 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i), 107 Stat. 1536, 1542 (1993).

4 Department of Justice Information Systems, 28 C.F.R. § 25.9(b)(3) (2019).

experiments without risk to the rest of the country.”<sup>5</sup> Heeding this sentiment, a number of jurisdictions adopted their own systems of gun registration. The District of Columbia, for example, passed into law the Firearms Control Regulations Act of 1975, part of which created a registration system for all firearms.<sup>6</sup> Hawaii’s gun registration requirement rivals the comprehensive scope of Washington, D.C.’s law.<sup>7</sup> California and a handful of other states also have robust systems of gun registration.<sup>8</sup>

Legislation instituting a national gun registration program must be able to withstand a Second Amendment constitutional challenge. The Supreme Court has not yet ruled on the issue, but its Second Amendment jurisprudence indicates the legal framework it would likely employ in such an analysis. Fortunately, the U.S. Court of Appeals for the D.C. Circuit—working within the strictures of the Supreme Court’s Second Amendment pronouncements—already addressed the very question of gun registration in *Heller v. District of Columbia*, first in *Heller I*<sup>9</sup> and again in *Heller III*.<sup>10</sup> The court found some more onerous requirements of the law violated the Second Amendment, but the core of Washington, D.C.’s gun registration system passed constitutional muster.<sup>11</sup> The constitutionality of a federal system of gun registration is therefore not a question of first impression.

The need for an effective gun policy is an urgent one. In 2019, 39,523 people died and 30,141 were injured from gun violence.<sup>12</sup> Taken together, gun violence directly harmed about 69,664 people in the United States in 2019 alone,<sup>13</sup> and the extent of the damage inflicted in that year is no outlier.<sup>14</sup> Considering as well the toll taken on the families and friends of those victims, violence inflicted with guns has had, and continues to have, a profound impact on the country at large.<sup>15</sup> The bare numbers illuminate a

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5 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

6 D.C. CODE § 7-2502.01 (2020).

7 HAW. REV. STAT. § 134-2(a) (2019).

8 *See Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://www.giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/registration/> (last visited Oct. 7, 2020) (describing the gun registration systems of Washington, D.C., Hawaii, California, New York, Maryland, Connecticut, and New Jersey).

9 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

10 *Heller v. District of Columbia (Heller III)*, 801 F.3d 264 (D.C. Cir. 2015).

11 *See Heller II*, 670 F.3d at 1254 (finding that requiring handgun registration is “long-standing in American law” and thus “does not impinge upon the right protected by the Second Amendment”); *Heller III*, 801 F.3d at 280–81 (affirming the constitutional finding of *Heller II* and extending it to registration of long guns and other registration requirements).

12 *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> (last visited Dec. 6, 2020). Those numbers include suicides, which typically total about 22,000 per year in the United States alone. *Id.*

13 *Id.*

14 In 2018, gun violence killed or injured about 65,058 people; in 2017, about 68,961 people; and in 2016, about 67,782 people. *Id.*

15 AMNESTY INT’L, *IN THE LINE OF FIRE: HUMAN RIGHTS AND THE US GUN VIOLENCE CRISIS 9* (2018) (explaining how “[t]he impact of firearm violence extends far beyond the

simple fact: there is a crisis of gun violence in the United States that Congress has yet to adequately address.

As vital as it is to our federal system of government to allow states to tinker with innovative policies, eventually those experiments must end and any successful findings should be implemented in jurisdictions beyond the original state “laboratory.” And on the issue of gun safety legislation, the results are in. In states with more rigorous firearm regulations, fewer people die from guns, while in states with less rigorous firearm regulations, more people die from guns.<sup>16</sup> The correlation is incontrovertible and worth repeating: states with strong gun laws have the lowest gun death rates, and states with weak gun laws have the highest gun death rates.<sup>17</sup>

Despite the success of states in demonstrating the efficacy of tighter gun legislation, interstate gun trafficking stymies the ability of states to stem gun violence within their borders. The current patchwork of state laws is wanting for a system of federal regulation. The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) collects data that traces the origins of guns used or suspected to have been used in crimes, and the numbers underscore that “most crime guns confiscated in states with relatively restrictive laws governing gun ownership and sales tend to have been first purchased . . . in a state that has more lax laws.”<sup>18</sup> Even a brief analysis of ATF crime-gun trace data comparing the proportion of out-of-state crime guns to the stringency of that state’s gun policies illustrates this pattern.<sup>19</sup> No matter how comprehen-

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numbers of those injured and killed” by causing “long-lasting trauma . . . on victims, survivors, families and communities”).

16 See, e.g., Eric W. Fleegler, Lois K. Lee, Michael C. Monuteaux, David Hemenway & Rebekah Mannix, *Firearm Legislation and Firearm-Related Fatalities in the United States*, 173 J. AM. MED. ASS’N INTERNAL MED. 732, 735 (2013); *Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> (last visited Oct. 24, 2020).

17 See *Annual Gun Law Scorecard*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/resources/scorecard/> (last visited Oct. 24, 2020).

18 Joseph A. Peters, Philip J. Cook & Jens Ludwig, *Gun Crime and Gun Control: The Hawaiian Experience*, 2005 U. CHI. LEGAL F. 55, 73.

19 Giffords Law Center to Prevent Gun Violence ranks each state based on the strength of its gun laws, with “A” rankings generally signifying strong gun legislation and “F” rankings signifying weak gun legislation. See *Annual Gun Law Scorecard*, *supra* note 17. In states with the strictest gun laws, ranging here from “A” to “A-” rankings, the following percentages of all crime guns traced by the ATF in 2017 originated from out of state: California, 58.11%; New Jersey, 88.31%; Connecticut, 68.06%; Maryland, 67.91%; Massachusetts, 78.90%; New York, 85.19%; Hawaii, 79.86%; and Illinois, 64.49%. See *id.*; *Firearms Trace Data—2017*, ATF (Aug. 26, 2019), <https://www.atf.gov/resource-center/firearms-trace-data-2017>. In states with the weakest gun laws, here all “F” rankings, the following percentages of all crime guns traced by the ATF in 2017 originated from out of state: Alaska, 35.72%; Kansas, 48.36%; Arizona, 41.29%; Missouri, 38.50%; Idaho, 51.03%; Wyoming, 58.48%; and Mississippi, 41.46%. See *Annual Gun Law Scorecard*, *supra* note 17; *Firearms Trace Data—2017*, *supra*. While out-of-state guns contribute to crime to some degree in every state, those states with stricter gun laws bear the brunt of interstate gun trafficking resulting in crime. States with weak gun laws, on the other hand, are less frequently on the receiving end of gun trafficking because criminals have easier access to in-state guns.

sive a state's gun regulations, its efforts are partially undercut by a neighbor state with a dearth of gun regulations. The federal system was designed precisely for matters such as this—when the policy of one state harms the citizens of another, and particularly when the aggrieved state is powerless to remediate that harm, Congress must legislate.<sup>20</sup>

The implementation of a national regulatory program is no easy task, but this Note offers a viable path forward. Inspired by Congress blanching at the possible use of NICS data to establish a federal gun registry, one starting point to establish a federal gun registry is the use of NICS data. Although posited more disapprovingly than here, the National Rifle Association (NRA) succinctly explained the role of NICS in establishing a national gun registration system:

NICS would become a registry of firearm transfers if all firearm transfers were subject to NICS checks, the FBI retained records of approved checks indefinitely, and such records included information currently maintained on federal Form 4473s, which document the identity of a person who acquires a firearm from a firearm dealer, along with the make, model and serial number of the firearm acquired. Over time, as people would sell or bequeath their firearms, a registry of firearm transfers would become a registry of firearms possessed.<sup>21</sup>

Transforming NICS into a national firearm registration system may overhaul the current system, but even so, it is better than building from scratch. The foundation and framework are sturdy; though extensive, the renovation need not raze the existing structure.

In advocating on behalf of the ingenuity of state policymaking, Justice Brandeis declared: “If we would guide by the light of reason, we must let our minds be bold.”<sup>22</sup> Today, it is not enough for the states alone to effect bold policy visions. Gun violence is a national affliction, and none other than the federal government is sufficiently equipped to treat it. A system of firearms registration is a good place to start.

This Note is organized as follows. Part I outlines the evolving history of federal firearm legislation and its relevance to registration. Part I also presents promising state-level (or equivalent) systems of gun registration that may inform a like federal policy. Part II establishes the Supreme Court's Second Amendment jurisprudence and its potential application to federal firearms registration. Part III then details a lower court's application of Supreme Court precedent to existing firearm registration laws. Finally, this

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20 See THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) (“The federal constitution forms a happy combination . . . the great and aggregate interests being referred to the national, the local and particular to the state legislatures.”). Surely, the danger and impact of gun violence felt to varying extents by all Americans qualifies as one of those “great and aggregate interests.” *Id.*

21 *Gun Registration — Gun Licensing*, NRA-ILA (Aug. 8, 2016), <https://www.nraila.org/get-the-facts/registration-licensing/>.

22 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Note concludes by articulating how Congress can and why it must institute a federal firearms registration system.

## I. BACKGROUND ON EXISTING FEDERAL AND STATE FIREARM LAWS

Before turning to specific systems of firearm registration, the history and current landscape of the policy is vital to understand. Part I will first examine the history of major federal gun legislation, then highlight examples of existing state-level firearm registration systems.

### A. *Historical Federal Laws Relating to Firearm Registration*

The modern national political landscape has proven intractably indisposed to passing any sort of gun safety legislation, even in the face of tragic and widely publicized mass shootings.<sup>23</sup> But Congress has not always been this impotent. The following subsections will highlight the most significant federal gun laws of the past century, the effects of which still reverberate today. Most importantly, the failures and successes of these laws inform future gun reform efforts.

#### 1. The National Firearms Act of 1934

Congress has not always legislated in accord with its recent hostility to a system of gun registration. The National Firearms Act of 1934 (NFA) is the earliest federal law regulating firearms that, though subsequently amended, remains in effect today.<sup>24</sup> As originally enacted, the NFA regulated machine guns, shotguns and rifles with barrels less than eighteen inches long, guns except for pistols and revolvers “capable of being concealed on the person,”

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<sup>23</sup> See, e.g., Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN POL. (Apr. 18, 2013), <https://www.cnn.com/2013/04/17/politics/senate-guns-vote/index.html> (detailing how legislation to expand background checks was thwarted in the aftermath of the 2012 Sandy Hook elementary school shooting, which killed twenty elementary schoolchildren and six school staff members); Daniella Diaz, *A Month After Las Vegas Shooting, There’s Still No Bump Stock Regulation*, CNN POL. (Nov. 2, 2017), <https://www.cnn.com/2017/11/01/politics/bump-stock-gun-debate-congress/index.html> (reporting on how both legislation and regulations to ban bump stocks stalled despite purported bipartisan support in the aftermath of the 2017 Las Vegas concert shooting, the deadliest in modern American history); Sheryl Gay Stolberg, *Shooting Victims’ Families Watch as Gun Measures Stall Once Again*, N.Y. TIMES (June 20, 2016), <https://www.nytimes.com/2016/06/21/us/shooting-victims-families-watch-as-gun-measures-stall-once-again.html> (“[T]he Senate rejected four gun safety measures . . . one week after the Pulse nightclub massacre, which killed [forty-nine] and injured [fifty-three] . . .”).

<sup>24</sup> See Don J. Calvert, Tanarra James & John B. Ross, *Brief History of National Firearms Act and Gun Control Act*, in TXCLE FIREARMS LAW: WHAT EVERY TEXAS LAWYER NEEDS TO KNOW, STATE BAR OF TEXAS, Westlaw (2018); Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME (last updated Apr. 30, 2019), <https://time.com/5169210/us-gun-control-laws-history-timeline/>. See generally *National Firearms Act*, ATF, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (Apr. 7, 2020).

and any sort of muffler or silencer.<sup>25</sup> In addition to imposing various taxes, the law required all importers, manufacturers, dealers, and possessors to register these kinds of guns and gun accessories with the Secretary of the Treasury.<sup>26</sup> Failure to comply within the statutorily imposed time limits could result in criminal prosecution, with maximum penalties of a \$2000 fine or five years in prison, or both.<sup>27</sup> Decades later in *Haynes v. United States*, however, the Supreme Court defanged the firearm registration regulatory power of the NFA by finding that, because registration was mandatory, and because “a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution,” the law violated the Fifth Amendment’s privilege against self-incrimination.<sup>28</sup> Once the Court tore its longstanding gun regulations asunder, Congress promptly acted to reassemble the tattered remains.

## 2. The Gun Control Act of 1968

To remedy this newfound constitutional defect, Congress amended the NFA with Title II of the Gun Control Act of 1968 (GCA).<sup>29</sup> The GCA eliminated the mandatory registration of firearms for possessors of unregistered firearms; even further, it included “no mechanism for a possessor to register an unregistered NFA firearm already possessed by the person.”<sup>30</sup> Congress, in an abundance of constitutional caution, also specified that information obtained from the registration of a firearm shall not be used against that registrant in a criminal proceeding, unless the violation of law occurred after the registration.<sup>31</sup> In other words, the information supplied for the registration of firearms under the NFA could now only criminally implicate registrants for crimes committed after their registration, not for crimes committed before or concurrent with their registration. The Court found these GCA amendments satisfactorily resolved the NFA’s prior self-incrimination flaw.<sup>32</sup>

By shoring up the constitutionality of the NFA registration system, and by introducing some novel policy features, the GCA ensured that its firearm registration requirements had legal teeth. It codified an official National Firearms Registration and Transfer Record to be maintained by the Secretary of the Treasury, subjecting manufacturers, importers, and makers of NFA

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25 National Firearms Act, ch. 757, § 1(a), 48 Stat. 1236, 1236 (1934).

26 *Id.* § 9, 48 Stat. at 1239.

27 *Id.* § 14, 48 Stat. at 1240.

28 390 U.S. 85, 97, 100 (1968); see U.S. CONST. amend. V.

29 Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1213, 1227 (1968); BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUST., NATIONAL FIREARMS ACT HANDBOOK § 1.1.2, at 1 (2009) [hereinafter NATIONAL FIREARMS ACT HANDBOOK].

30 NATIONAL FIREARMS ACT HANDBOOK, *supra* note 29, § 1.1.2, at 1.

31 Gun Control Act of 1968 § 210, 82 Stat. at 1232; NATIONAL FIREARMS ACT HANDBOOK, *supra* note 29, § 3.4.1, at 25.

32 *United States v. Freed*, 401 U.S. 601, 606 (1971).

firearms to a strict registration requirement.<sup>33</sup> Though mere possessors can no longer be criminally liable for failing to register, the GCA applies to all *transfers* of NFA firearms, mandating that transferors register the gun to the transferee.<sup>34</sup> Notwithstanding the “mere possessor” loophole, the GCA imposes rigorous registration requirements on the weapons within its purview. NFA firearms can only be transferred once the transferor files a written application to the Secretary of the Treasury and pays the tax; the transferee is identified, by photograph and fingerprints if a natural person; the transferor is identified; the firearm is properly identified; and the Secretary approves the transfer.<sup>35</sup> Failure to comply with any provision of the GCA could result in criminal penalties up to a \$5000 fine or five years in prison, or both.<sup>36</sup>

The GCA additionally expanded the NFA definition of “firearm” by clarifying what constitutes a machine gun and adding “destructive device[s],” which include weapons like missiles and bombs.<sup>37</sup> It is not too fanciful a proposition that the registration requirements on the manufacture, importation, and transfer of NFA weapons play a role in explaining the absence of civilian casualties from such regulated weapons as umbrella guns, sub-machine guns, grenades, RPG launchers, mortars, and automatic cannons.<sup>38</sup>

### 3. The Firearms Owners’ Protection Act

Congress has made numerous changes to the federal firearm registration system in the years since these NFA and GCA developments. The Firearms Owners’ Protection Act, for instance, banned the transfer or possession of machine guns, except those that were lawfully possessed and registered before the law went into effect in 1986.<sup>39</sup> This in effect set a hard maximum on the number of machine guns available in the United States, which, according to the ATF, was 630,019 in April of 2017.<sup>40</sup> Registration and other regulations of NFA firearms have proven effective in preventing the infliction of violence with these weapons, but the number of NFA firearms subject to such requirements is negligible when compared to the total number of guns in the United States today. While the exact number of U.S. firearms is elusive, at least partially because of the lack of a national system of gun registra-

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33 26 U.S.C. § 5841 (2018); Gun Control Act of 1968 § 201, 82 Stat. at 1229.

34 Gun Control Act of 1968 § 201, 82 Stat. at 1229.

35 26 U.S.C. § 5812 (2018).

36 Gun Control Act of 1968 § 102, 82 Stat. at 1223–24.

37 *Id.* § 102, 82 Stat. at 1230–31.

38 NATIONAL FIREARMS ACT HANDBOOK, *supra* note 29, § 2.1, at 5–20; see Heath Druzin, *Automatic Weapons Are Legal, But It Takes a Lot to Get One of the 630,000 in the U.S.*, BOISE STATE PUB. RADIO (Dec. 21, 2018), <https://www.boisestatepublicradio.org/post/automatic-weapons-are-legal-it-takes-lot-get-one-630000-us#stream/0> (“Machine guns covered by the 1934 National Firearms Act have never been used in a mass shooting in America.”).

39 Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 102, 100 Stat. 449, 453 (1986); NATIONAL FIREARMS ACT HANDBOOK, *supra* note 29, § 1.1.3, at 2.

40 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUST., FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE 2017, at 15 (2017).



tion, a recent study estimated the United States had over 393 million civilian-held firearms in 2017.<sup>41</sup>

Certainly the NFA and its progeny serve as useful data points when considering future policy solutions to gun violence, but a registration system applicable to all types of guns, for which this Note advocates, would necessarily operate at a scale magnitudes larger than any national firearm regulation currently in existence.

#### 4. The Brady Handgun Violence Prevention Act of 1993

The Brady Handgun Violence Prevention Act of 1993 (“Brady Law”) has become the most consequential gun law in modern U.S. history because it permitted the formation of NICS, the first federal regulatory system intended to provide a check on most every gun sale. After years of troublesome interim provisions that faced constitutional challenges for commandeering states into conducting background checks on handgun purchases,<sup>42</sup> NICS finally became operational in 1998 and thenceforth mandated background checks on the purchasers of any type of firearm from a Federal Firearm Licensee (FFL).<sup>43</sup>

The Brady Law mandates that any person “engage[d] in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition” obtain a Federal Firearm License.<sup>44</sup> Obtaining a Federal Firearm License involves submitting an application with one’s photograph and fingerprints to the Attorney General, as well as paying a yearly licensing fee.<sup>45</sup> An unlicensed person seeking to buy a firearm from an FFL is required to complete a firearms transaction record, ATF Form 4473.<sup>46</sup> The form’s requested information includes the transferee’s name, sex, residence address, date and place of birth, height, weight, race, country of citizenship, State of residence, “and certification by the transferee” that his or her possession or transportation of the gun is not prohibited by federal law.<sup>47</sup> It also asks the transferee to identify, as applicable, the firearm’s manufacturer, importer, type, model, caliber, gauge, and serial number.<sup>48</sup> For transferees who successfully receive a firearm following a NICS check, FFLs

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41 AARON KARP, SMALL ARMS SURV., ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4, tbl.1 (2018).

42 See e.g., *Printz v. United States*, 521 U.S. 898, 925 (1997).

43 *About NICS*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Oct. 11, 2020); see also *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Oct. 11, 2020).

44 18 U.S.C. § 923(a) (2018).

45 *Id.*

46 27 C.F.R. § 478.124(a) (2020); see BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUST., OMB No. 1140-0020, ATF FORM 4473: FIREARMS TRANSACTION RECORD (2020) [hereinafter FIREARMS TRANSACTION RECORD], <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

47 27 C.F.R. § 478.124(c)(1); see FIREARMS TRANSACTION RECORD, *supra* note 46.

48 27 C.F.R. § 478.124(c)(4); see FIREARMS TRANSACTION RECORD, *supra* note 46.

must retain their ATF Form 4473s for a minimum of ten years after the date of sale; for transferees who fail to receive a firearm after a NICS check, FFLs need only retain their ATF Form 4473s for a minimum of five years after the date of the NICS inquiry.<sup>49</sup> FFLs must organize their retained firearms transaction records in alphabetical, chronological, or numerical order.<sup>50</sup>

Once the FFL has received the potential firearm transferee's ATF Form 4473, the FFL will contact the FBI, or a state point of contact (POC) if the state has opted to liaise with the federal government on NICS, and relay the transferee's information.<sup>51</sup> NICS checks available records to determine whether the transfer of a firearm would violate any federal or state laws.<sup>52</sup> A person is effectively prohibited by federal law from possessing a firearm if she: (1) has been convicted of or is under indictment for a crime punishable by imprisonment for a term exceeding one year; (2) "is a fugitive from justice"; (3) "is an unlawful user of or addicted to any controlled substance"; (4) "has been adjudicated as a mental defective or . . . has been committed to a mental institution"; (5) is an "illegal[ ]" or "unlawful[ ]" alien present in the United States, or, in some cases, is "admitted to the United States under a nonimmigrant visa"; (6) "has been discharged from the Armed Forces under dishonorable conditions"; (7) has renounced her United States citizenship; (8) is subject to a court restraining order to prevent contact with an intimate partner or a child of an intimate partner; or (9) "has been convicted in any court of a misdemeanor crime of domestic violence."<sup>53</sup>

Whether the FFL conducts the NICS check by phone or internet, the procedure is nearly identical. If the initial database check finds no matching records of concern, then the transaction can proceed unimpeded; if it finds matching records, the case is transferred to a NICS Legal Instruments Examiner ("NICS Examiner") to make a final determination.<sup>54</sup> Most NICS checks take only a few short minutes from start to finish,<sup>55</sup> and perhaps to preempt the possibility that background checks unduly hinder access to firearms, a NICS delay lasting longer than three business days permits the FFL to transfer the gun to the transferee.<sup>56</sup> A NICS Examiner has up to ninety days to make a final decision on a case, so if she discovers the transferee is legally prohibited from gun ownership *after* the FFL already sold the weapon, the FBI will task the ATF with a retrieval order to recover the gun.<sup>57</sup> Predictably,

49 27 C.F.R. § 478.129(b).

50 *Id.* § 478.124(b).

51 *About NICS*, *supra* note 43; 27 C.F.R. § 478.102(b).

52 *About NICS*, *supra* note 43; 27 C.F.R. § 478.102(a)(2)(i).

53 18 U.S.C. § 922(g), (n) (2018).

54 *See About NICS*, *supra* note 43; *NICS & Reporting Procedures*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/nics-reporting-procedures/> (last visited Oct. 13, 2020).

55 *See About NICS*, *supra* note 43; *NICS & Reporting Procedures*, *supra* note 54.

56 27 C.F.R. § 478.102(a)(2)(ii).

57 Jennifer Mascia, *Everything You Need to Know About Federal Background Checks*, THE TRACE (Nov. 30, 2020), <https://www.thetrace.org/2015/07/gun-background-check-nics-guide>.

this eighty-seven-day period in which someone ineligible to possess a gun may do just that after purchasing it lawfully can, and has, resulted in tragedy.<sup>58</sup>

When NICS denies a transfer because that potential transferee's possession of a firearm would violate federal or state law, NICS retains the records pertinent to that attempted transaction "indefinitely."<sup>59</sup> Conversely, when NICS approves a transfer, it destroys all substantive records of that transfer "within 24 hours."<sup>60</sup> Such compulsory record destruction of successful firearm transfers comports with the statutory and regulatory mandate that "[n]o department, agency, officer, or employee of the United States may . . . use [NICS] to establish any system for the registration of firearms, firearm owners, or firearm transactions."<sup>61</sup>

Were Congress to change course and pursue a federal policy to register all firearms, ATF Form 4473s already provide ample information on both gun and gun buyer—information foundational to any system of registration. NICS showcases how the technical aspects of a massive federal system of licensing, information-gathering, and policing of gun transfers can be effected. Since the inception of NICS in 1998, the FBI has processed more than 320 million NICS background checks, and only about two percent have been rejected because of the transferee's ineligibility.<sup>62</sup> That is not to suggest NICS has been an unmitigated success story. Loopholes and missing records have resulted in notorious oversights.<sup>63</sup> The NICS database relies on "local police, sheriff's offices, the military, federal and state courts, Indian tribes and in some places, hospitals and treatment providers, to send criminal or mental health records" in order to establish a reliable system for background checks.<sup>64</sup> The sources of information comprising the database are diffuse, resulting in a jumbled records reporting process: "Some agencies don't know what to send; states often lack funds needed to ensure someone handles the data; no system of audits exists to find out who's not reporting; and some states lack the political will to set up a functioning and efficient reporting process."<sup>65</sup> Creating a federal firearm registration system thus

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58 The attacker in the April 2015 shooting of nine church parishioners in Charleston, South Carolina, used a firearm that he bought lawfully, though his record made him ineligible to own a firearm. *Id.* He only obtained the weapon because the NICS check delayed the process beyond the three-day maximum. *See id.*

59 28 C.F.R. § 25.9(a) (2020).

60 28 C.F.R. § 25.9(b)(1)(iii).

61 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i), 107 Stat. 1536, 1542 (1993); *see* 28 C.F.R. § 25.9(b)(3).

62 Mascia, *supra* note 57.

63 The high-profile mass shootings at Virginia Tech in 2007, Charleston, South Carolina, in 2015, Sutherland Springs, Texas, in 2017, and Aurora, Illinois, in 2019 all involved gunmen not eligible to own a gun, but due to missing records or other human error, NICS permitted the gun transfer to proceed. *Id.*

64 Martha Bellisle, *Gun Background Check System Riddled with Flaws*, PBS NEWSHOUR (Mar. 10, 2018), <https://www.pbs.org/newshour/nation/gun-background-check-system-riddled-with-flaws>.

65 *Id.*

necessitates political and administrative ingenuity beyond mere superimposition of the NICS processes onto a policy template for gun registration. Despite its many flaws, it would be wise for Congress to consider and incorporate the successful features of NICS into what would become a new behest of a regulatory scheme: national gun registration.

### B. *State Systems of Firearm Registration*

Going beyond the limited scope of the federal gun laws, a number of states have enacted systems of gun registration, or at least have employed policies roughly akin to one. States (or like jurisdictions) with systems of firearm registration or other similar policies include: the District of Columbia, Hawaii, California, New York, New Jersey, Connecticut, and Maryland.<sup>66</sup> In what is perhaps becoming a familiar pattern, other states explicitly forbid the registration of firearms: Delaware, Florida, Georgia, Idaho, Pennsylvania, Rhode Island, South Dakota, and Vermont.<sup>67</sup> What follows is a brief delve into the particulars of some gun registration systems already in effect on the state level, and what Congress ought to learn from these examples.

#### 1. The District of Columbia's Firearm Registry

Washington, D.C., passed into law the Firearms Control Regulations Act of 1975, part of which established a compulsory gun registration system; this feature alone placed the law “among the strictest [gun laws] of any jurisdiction in the nation.”<sup>68</sup> As codified today, the law mandates that “no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm.”<sup>69</sup> And the application process is not perfunctory; the applicant must present ample personal information and complete various screening requirements.

A person seeking to purchase or in some other way receive a gun must first apply for, and the D.C. Metropolitan Police Department must first issue, a gun registration certificate.<sup>70</sup> A person who moves into Washington, D.C., in possession of a gun must “immediately” apply to register that weapon.<sup>71</sup> In applying for a firearms registration certificate, the applicant must at minimum provide to the D.C. police chief the following information: (1) full name; (2) “present address and each home address where the applicant has resided” for the past five years; (3) “present business or occupation,” as well as “the address and phone number of the employer”; (4) “date and place of

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66 See *Registration*, *supra* note 8.

67 *Id.*

68 *Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?*, CONGRESSMAN TOM DAVIS (June 28, 2005), <https://web.archive.org/web/20070228194658/http://tomdavis.house.gov/cgi-data/news/files/191.shtml>.

69 D.C. CODE § 7-2502.01 (2020).

70 *Id.* § 7-2502.06.

71 *Id.*

birth”; (5) sex; (6) if applicable, the reasons why any government authority “denied or revoked the applicant’s license, registration certificate, or permit pertaining to any firearm”; (7) a detailed description of any past “mishap” involving a firearm; (8) “[t]he caliber, make, model, manufacturer’s identification number, serial number, and any other identifying marks on the firearm”; (9) the name, address, and, if applicable, dealer’s license number of the firearm’s most recent transferor; and (10) the primary location the gun will be kept.<sup>72</sup> D.C. police are required to take and maintain each applicant’s fingerprints and a “full-face photograph.”<sup>73</sup> Each applicant must also “sign an oath or affirmation,” under the penalty of perjury, attesting to the information provided in the application process,<sup>74</sup> pay a fee,<sup>75</sup> and “complete a firearms training and safety class provided by the Chief.”<sup>76</sup>

If applying “for a registration certificate for a pistol to be used for the purpose of self-defense within [the applicant’s] home,” the applicant must, in addition to all the procedures laid out above, present to the police “[a] valid driver’s license or a letter from a physician attesting that the applicant has vision at least as good as that required for a driver’s license,” and some sort of D.C. residency verification.<sup>77</sup>

Barring a certain class of firearms from registration effectively outlaws that gun because only registered firearms can be lawfully possessed in Washington, D.C. Under D.C. law, “registration certificate[s] shall not be issued for”: (1) sawed-off shotguns; (2) machine guns; (3) short-barreled rifles; (4) pistols not validly registered to the current registrant prior to September, 24, 1976, though this particular ban has numerous exceptions and qualifications; (5) “unsafe firearm[s],” specifically defined elsewhere; (6) assault weapons; or (7) .50 BMG rifles.<sup>78</sup> Such listed firearms are thus effectually prohibited in the District, minus rather narrow exceptions unimportant here.

The laws and rules governing firearm registration in Washington, D.C., amount to the strictest registration requirements in the United States, and, more broadly, place D.C. in the upper echelons of jurisdictions with all-around robust gun laws. Likely for this reason, constitutional challenges have long bombarded D.C.’s gun registry; the ensuing cases and doctrine will be discussed in Parts II and III.

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72 *Id.* § 7-2502.03(b). Note that the numbers listed may not align with those in the statute because of a repealed section and omissions of irrelevant information. See APPLICATION FOR FIREARMS REGISTRATION CERTIFICATE, WASHINGTON, D.C., METROPOLITAN POLICE DEPARTMENT (2013), [https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/service\\_content/attachments/PD-219%20Firearms%20Registration%20Application%28Rev0613%29\\_fillable.pdf](https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/service_content/attachments/PD-219%20Firearms%20Registration%20Application%28Rev0613%29_fillable.pdf).

73 D.C. CODE § 7-2502.04(a)–(b) (2020).

74 *Id.* § 7-2502.05(a), (c).

75 *Id.* § 7-2502.05(b); APPLICATION FOR FIREARMS REGISTRATION CERTIFICATE, *supra* note 72 (application fee of thirteen dollars).

76 D.C. MUN. REGS. tit. 24, § 2311.9 (2020).

77 *Id.* tit. 24, §§ 2320.1, 2320.3(c)(1)(B)–(C).

78 D.C. CODE § 7-2502.02(a) (2020).

## 2. Hawaii's Firearm Registry

Before a resident can possess a firearm, Hawaii requires her to “procure[ ] from the chief of police . . . a permit to acquire the ownership of a firearm.”<sup>79</sup> Permit application forms collect the applicant’s “name, address, sex, height, weight, date of birth, place of birth, country of citizenship, social security number, alien or admission number, . . . mental health history and . . . fingerprint[s] and photograph[s].”<sup>80</sup> Only persons twenty-one years of age or older can purchase a gun in Hawaii.<sup>81</sup> A person seeking to purchase a gun must wait a minimum of fourteen days from the date of applying for a permit, and no more than twenty days before hearing a final determination on the issuance of the permit.<sup>82</sup> Once the prospective gun buyer receives a permit, she can acquire the gun.

Once the person acquires the firearm, she must register that weapon “within five days of acquisition.”<sup>83</sup> In addition, even a person who brings a firearm into Hawaii from out of state must “register [it] within five days after arrival . . . with the chief of police.”<sup>84</sup> Registration forms are “uniform throughout the State,” and include the “name of the manufacturer and importer; model; type of action; caliber or gauge; serial number; and source from which receipt was obtained, including the name and address of the prior registrant.”<sup>85</sup> Registration, unless already procured through the permitting process or some other means, requires each registrant “be fingerprinted and photographed by the police department” conducting the registration.<sup>86</sup> Hawaii keeps confidential that personal information the firearm registry collects; it can be disclosed, however, for general administrative purposes, “lawful performance” of law enforcement agency duties, or if so ordered by a court.<sup>87</sup> Registrants must also pay a registration fee to the county.<sup>88</sup>

Though the permitting process and other minute procedures distinguish the firearm registration systems of Washington, D.C., and Hawaii, in essence both jurisdictions impose near-universal registration requirements on those residents seeking to possess guns. Both collect and maintain considerable and detailed information about the gun possessed and its possessor. Such a policy is beautiful for its simplicity: no unregistered gun can lawfully be possessed. And simplicity is ever a virtue in public policy, particularly when contemplating the expansion of a state registration system to the national scale. No matter how conceptually pleasing, however, an actual

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79 HAW. REV. STAT. § 134-2(a) (2019).

80 *Id.* § 134-2(b).

81 *Id.* § 134-2(d).

82 *Id.* § 134-2(e).

83 *Id.* § 134-3(b).

84 *Id.* § 134-3(a).

85 *Id.* § 134-3(b).

86 *Id.* § 134-3(a).

87 *Id.* § 134-3(b).

88 *See id.* § 134-3(e).

transition from the absence of a firearm registration mandate to universal compliance with one demands some policy ingenuity—particularly when occurring in a nation with over 330 million inhabitants. Rather than wishing for all U.S. gun owners to willingly report their firearm ownership information, a better transition policy might place the registration onus at the time of gun sale or transfer. Fortunately, some states have already experimented with this precise policy suggestion.

### 3. California's Firearm Registry

While Hawaii and the District of Columbia offer glimpses of an ideal registration policy—attractive for its simplicity—California demonstrates how a jurisdiction with a large population can realistically implement a system of firearm registration. Comprehension of California's gun registry, however, first requires a primer on the state's overall firearm legislation.

California serves as a model for comprehensive gun violence prevention policy.<sup>89</sup> It both maintains a firearm registration system and employs a diverse slate of gun safety measures: barring firearm access to those convicted of certain crimes or in other narrow circumstances;<sup>90</sup> restricting long gun purchases to California residents eighteen years of age and older and handgun purchases to those twenty-one years of age and older;<sup>91</sup> licensing firearms dealers and conducting background checks through the state Department of Justice;<sup>92</sup> imposing a mandatory ten-day waiting period before the buyer can receive the gun;<sup>93</sup> requiring proof of residency;<sup>94</sup> administering a written firearm safety exam to receive a certificate needed to buy a gun;<sup>95</sup> instructing the gun buyer precisely how to safely handle the purchased weapon, guided by the firearms dealer;<sup>96</sup> mandating the sale of lock boxes or safes along with every gun sold;<sup>97</sup> limiting the makes and models of guns that may be sold to those who “passed required safety and functionality tests”;<sup>98</sup> and restricting the frequency of handgun sales to one for every thirty days.<sup>99</sup> New California residents must report their firearms to the state Department of Justice or otherwise transfer ownership of the weapons within sixty days of arriving.<sup>100</sup>

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89 See *Annual Gun Law Scorecard*, *supra* note 17 (ranking California with the top score of “A” for strength of gun safety policies).

90 See CAL. PENAL CODE § 29800–25 (West 2020); CAL. WELF. & INST. CODE §§ 8100, 8103 (West 2020).

91 KAMALA D. HARRIS, CAL. DEP'T OF JUST., CALIFORNIA FIREARMS LAWS SUMMARY 3 (2016).

92 *Id.*

93 *Id.*

94 CAL. PENAL CODE § 26845 (West 2020).

95 *Id.* §§ 31610–70.

96 *Id.* § 26850.

97 *Id.* §§ 23635–90.

98 HARRIS, *supra* note 91, at 4; see CAL. PENAL CODE § 32000 (West 2020).

99 CAL. PENAL CODE § 27535 (West 2020).

100 HARRIS, *supra* note 91, at 6.

For every firearm sale in California, the parties to the transfer must create a painstakingly detailed electronic transfer record that includes forty items of information related to the gun, the seller, and the buyer.<sup>101</sup> For information about the gun, for example, they must note the firearm's type,<sup>102</sup> make,<sup>103</sup> caliber,<sup>104</sup> barrel length,<sup>105</sup> color,<sup>106</sup> manufacturer's name,<sup>107</sup> model name or number,<sup>108</sup> serial number,<sup>109</sup> status as new or used,<sup>110</sup> and other useful identifying information.<sup>111</sup> Information about the seller must include the seller's name and business address,<sup>112</sup> business phone number,<sup>113</sup> signature,<sup>114</sup> California Firearms Dealer number,<sup>115</sup> and certificate of eligibility number.<sup>116</sup> For the firearm buyer, the electronic transfer record requires the buyer's full name,<sup>117</sup> gender,<sup>118</sup> date and place of birth,<sup>119</sup> local address,<sup>120</sup> telephone number,<sup>121</sup> occupation,<sup>122</sup> signature,<sup>123</sup> identification card,<sup>124</sup> physical description,<sup>125</sup> complete list of past legal names and aliases,<sup>126</sup> answers to questions that could disqualify the buyer from acquiring a firearm,<sup>127</sup> and firearm safety certificate number.<sup>128</sup> The parties must lastly respond to a few other miscellaneous questions.<sup>129</sup> California evidently seeks to attain the most amount of information possible about all gun transfers occurring within its borders.

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101 See CAL. PENAL CODE § 28160 (West 2020).

102 *Id.* § 28160(a) (14).

103 *Id.* § 28160(a) (2).

104 *Id.* § 28160(a) (13).

105 *Id.* § 28160(a) (16).

106 *Id.* § 28160(a) (17).

107 *Id.* § 28160(a) (7).

108 *Id.* § 28160(a) (8).

109 *Id.* § 28160(a) (9).

110 *Id.* § 28160(a) (15).

111 *Id.* § 28160(a) (10)–(12).

112 *Id.* § 28160(a) (33).

113 *Id.* § 28160(a) (35).

114 *Id.* § 28160(a) (31).

115 *Id.* § 28160(a) (5).

116 *Id.* § 28160(a) (32).

117 *Id.* § 28160(a) (18).

118 *Id.* § 28160(a) (26).

119 *Id.* § 28160(a) (19), (23).

120 *Id.* § 28160(a) (20).

121 *Id.* § 28160(a) (24).

122 *Id.* § 28160(a) (25).

123 *Id.* § 28160(a) (30).

124 *Id.* § 28160(a) (22).

125 *Id.* § 28160(a) (27).

126 *Id.* § 28160(a) (28).

127 *Id.* § 28160(a) (29).

128 *Id.* § 28160(a) (40).

129 *Id.* § 28160(a) (1), (3), (4), (6), (34), (36)–(39).



California statutes direct the state attorney general to collect, “permanently keep,” file, and maintain these electronic transfer records.<sup>130</sup> Beyond simply storing files, the California Attorney General must develop a registry of firearms and their owners to aid in prosecution of crimes, civil actions, and other property disputes concerning firearms.<sup>131</sup> The firearm registry incorporates all the information required by the electronic transfer records, meaning that information about the buyer, the seller, and the firearm itself are all kept accessible for use by state government officials of all stripes and even some agencies and organizations outside the government.<sup>132</sup> California’s wider array of gun safety policies take on even greater import as the gun registry enables proper monitoring and enforcement of those laws’ manifold directives.

The most pressing difference between California’s gun registration system and those of Washington, D.C., and Hawaii is not the end result of a fairly comprehensive gun registry used primarily for law enforcement purposes—all firearm registration systems share that goal. Rather, the lesson that can be gleaned from California that may be missed by focusing only on the experiences of the District of Columbia and Hawaii is that emphasis on data collection at the transfer stage reduces the burden on the gun buyers and sellers and thus boosts compliance. California, a state with a large population of gun owners, crafted a gun registry from scratch by tamping its regulations into the firearm sales process. California thus brought into reality the NRA’s dreaded NICS premonition: “Over time, as people would sell or bequeath their firearms, a registry of firearm transfers would become a registry of firearms possessed.”<sup>133</sup> These jurisdictions provide useful visions of how an implemented firearm registry might function; before any such vision can be realized, however, Congress must earnestly address whether the legislation complies with the Second Amendment.

## II. THE SUPREME COURT’S SECOND AMENDMENT JURISPRUDENCE

Part II provides a general overview of Supreme Court precedent on the Second Amendment. The Constitution offers a succinct proclamation: “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>134</sup> The cases discussed below work to define the precise meaning of this right.

The scope of the Second Amendment, “such a significant matter[,] has been for so long judicially unresolved” because, “[f]or most of our history, . . . the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.”<sup>135</sup> Here, as we conceive of a universal

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130 *Id.* § 11106(b)(1) (amended 2020).

131 *See id.* § 11106(a)(1), (b)(1), (2).

132 *See id.* at § 11106(b)(2)(A)–(D), (3); *id.* § 11105.

133 *Gun Registration—Gun Licensing*, *supra* note 21.

134 U.S. CONST. amend. II.

135 *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

federal firearms registration system, judicial interpretation of the Second Amendment has the single-handed potential to either doom or sustain the whole enterprise. Where the Supreme Court has been and where it is liable to go on this matter is therefore worthy of an in-depth examination.

A. *The Right to Bear Arms: A General or Militia-Bound Right?*

Central in determining the scope of the right granted by the Second Amendment is the issue of whether that right applies to all individuals irrespective of their relation to any militia or only to those engaged in militia service. The Supreme Court has gone about settling the matter in a mere handful of cases, but, because of the 5–4 splits and the recency of the decisions, current Second Amendment jurisprudence remains an uneasy one.

1. *United States v. Miller*

*United States v. Miller* involved an indictment of two men for transporting a shotgun with a barrel less than eighteen inches long in interstate commerce, a violation of the National Firearms Act of 1934 (NFA).<sup>136</sup> As may be recalled from subsection I.A.1, this kind of weapon was, and remains, subject to registration requirements<sup>137</sup> with which the appellees allegedly failed to comply.<sup>138</sup> The District Court found that then-section eleven of the NFA, which pronounced that “[i]t shall be unlawful for any person who is required to register . . . and who shall not have so registered, . . . to ship, carry, or deliver any firearm in interstate commerce,”<sup>139</sup> violated the Second Amendment.<sup>140</sup> The lower court thereby quashed the indictment, and the United States appealed directly to the Supreme Court.<sup>141</sup>

In a unanimous decision, the Court reversed the lower court and concluded that the Second Amendment does not “guarantee[ ] the right to keep and bear” a weapon unless it “has some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>142</sup> It expounded that the Second Amendment was enshrined for the purpose of “assur[ing] the continuation and render[ing] possible the effectiveness” of the militia.<sup>143</sup> In light of its purpose to promote a robust militia, the Court unambiguously declared the Second Amendment “must be interpreted and applied with that end in view.”<sup>144</sup>

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136 *United States v. Miller*, 307 U.S. 174, 175 (1939).

137 *See supra* text accompanying notes 25–28.

138 *Miller*, 307 U.S. at 175.

139 *Id.* at 177 n.1 (quoting National Firearms Act, ch. 757, § 11, 48 Stat. 1236, 1239 (1934)).

140 *Id.* at 177.

141 *Id.*

142 *Id.* at 178, 183.

143 *Id.*

144 *Id.*

The Court looked to “the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators” such as Blackstone and Adam Smith, to discern the place of the militia in American society around the time of the adoption of the Constitution and the Second Amendment.<sup>145</sup> Americans at this time widely and “strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.”<sup>146</sup> This partiality for state militias over standing armies caused the Framers to empower Congress to “call[ ] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and to “provide for organizing, arming, and disciplining, the Militia.”<sup>147</sup>

The militia was comprised of “all males physically capable of acting in concert for the common defense,” and when these men were “called for service,” they were “expected to appear bearing arms supplied by themselves and *of the kind in common use at the time.*”<sup>148</sup> In fact, a number of states in the late eighteenth century required that militia members arm themselves with appropriate weaponry in preparation for a call to arms.<sup>149</sup> To resolve the case at hand, the Court contented itself with the finding that the short-barreled shotgun at issue was not “of the kind in common use at the time” for militia defense,<sup>150</sup> and thus it was not protected by the Second Amendment.<sup>151</sup>

Because ownership of *this kind of firearm* did not, in the Court’s view, implicate the appellees’ Second Amendment “right to keep and bear [Arms],” there was no longer any constitutional hurdle to Congress mandating the registration of such a weapon.<sup>152</sup> The legal matter at hand disposed of, the Court ended its analysis. It did not opine on the fate of a registration requirement of a firearm that *is* protected by the Second Amendment, nor even what it takes for a firearm, other than a short-barreled shotgun, to receive Second Amendment protection.

Does the protection extend merely to those *classes* of weapons fit for use in state militias? If so, would the right apply only to the weapons used by the eighteenth-century militias, or would it include modern weapons of war?

Or does the Second Amendment right concern the actual *use* of the weapon? Does it cover the ownership of a weapon only when that weapon is used for militia service, or is the right more general? *Miller* left unanswered

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145 *Id.* at 179.

146 *Id.*

147 U.S. CONST. art. I, § 8, cl. 15–16; *see Miller*, 307 U.S. at 178.

148 *Miller*, 307 U.S. at 179 (emphasis added).

149 *See id.* at 180–82 (explaining that Massachusetts, New York, and Virginia each enacted laws mandating that militiamen arm themselves, often requiring a musket with a barrel of appropriate length).

150 *Id.* at 178–79.

151 *Id.* at 178.

152 *See id.*

the vital question of what precisely the Second Amendment protects, trailing a substantial measure of confusion in its wake.<sup>153</sup>

## 2. *District of Columbia v. Heller*

The Supreme Court did not squarely address the scope of the Second Amendment again until sixty-nine years after *Miller*, in *District of Columbia v. Heller*.<sup>154</sup> This case was seminal in Second Amendment jurisprudence, and it consequently attracted ample academic attention.<sup>155</sup> In spite of *Heller*'s status as a case study in constitutional interpretation and its obvious relevance to gun rights writ large, this Note will not undertake a rigorous reexamination of the legal reasoning undergirding the lengthy opinions. That ground, once fertile, has since been well trodden and will not benefit greatly from another till. Rather, the analysis that follows focuses on those issues broadly relevant to the inquiry at hand as background information to inform the kind of constitutional attention a federal gun registration bill may garner.

Before turning to the details of *Heller*, it is helpful to note the Court's fractured take on the holding of *Miller*. Justice Scalia, writing for a majority of five, "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."<sup>156</sup> Scalia contended this interpretation of *Miller* "accords with the historical understanding of the scope of the right."<sup>157</sup> Scalia correctly argued that the *Miller* Court distinguished between *types* of weapons, but *Miller* did not do so simply by asking whether the firearm in question was "typically possessed by law abiding citizens."<sup>158</sup> As discussed above, *Miller* framed the scope of Second Amendment protection based on whether the type of gun was commonly owned *for militia service*.<sup>159</sup>

153 See, e.g., Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696, 709 (1978) ("Although the courts continue to cite *United States v. Miller* . . . for the proposition that the Second Amendment right to keep and bear arms is not applicable when there is no relationship to the preservation or efficiency of a well-regulated militia . . . some courts and commentators have had difficulty understanding what the Supreme Court actually held in *United States v. Miller*." (emphasis added)).

154 554 U.S. 570, 570 (2008).

155 See generally Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371 (2009); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551 (2009).

156 *Heller*, 554 U.S. at 625.

157 *Id.*

158 *Id.*

159 *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that unless the firearm at issue was shown to have "some reasonable relationship to the preservation or efficiency of a well regulated militia," the Second Amendment does not "guarantee[ ] the right to keep and bear such an instrument").

Indeed, lest the *Miller* Court's explicit use of the word "militia" be mistaken as an errant one, that Court consumed the better part of its unanimous opinion with discussion of the laws and practices of state militias around the time of the Founding.<sup>160</sup> Justice Stevens, writing for a dissent of four, seemed equally perplexed by the majority's reading of *Miller*; he interpreted *Miller* to hold "that [the Second Amendment] protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons."<sup>161</sup> Beyond a mere quibble over the comprehension of the Court's longstanding precedent, Stevens saw his version of the *Miller* holding to be "both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption."<sup>162</sup> Undergirding these diametrically opposed readings of a rather simple Supreme Court decision, however, is not actually confusion of what past Justices said. At base, the disagreement is about whether what *Miller* said comports with the Second Amendment itself.<sup>163</sup> *Heller* is thus most important for its novel discussion of the scope of the Second Amendment and not so much for its take on whether *Miller* was correctly decided.

At issue in *Heller* were restrictions on the ownership and use of handguns.<sup>164</sup> The District of Columbia effectively banned handguns by simultaneously criminalizing the carrying of an unregistered firearm and prohibiting handgun registration.<sup>165</sup> The District of Columbia also mandated that owners of lawful guns keep them "unloaded and disassembled or bound by a trigger lock or similar device" in the home.<sup>166</sup> When Dick Heller, a Washington, D.C., police officer, applied for a registration certificate for a handgun and was denied pursuant to the law, he sued on Second Amendment grounds to enjoin the enforcement of these provisions.<sup>167</sup>

The Court agreed with *Heller* by holding, in a 5–4 decision, the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."<sup>168</sup> It expounded that "self-defense . . . was the *central component* of the [Second Amendment] right itself."<sup>169</sup> The Court's decision resulted from a protracted and winding examination of the Second Amendment through the use of its text in other places in the Consti-

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160 *See id.* at 178–82.

161 *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

162 *Id.* at 637–38.

163 *See id.* at 679 ("[T]he majority simply does not approve of the conclusion the *Miller* Court reached.").

164 *See id.* at 573 (majority opinion).

165 *Id.* at 574–75.

166 *Id.* at 575.

167 *See id.* at 575–76.

168 *Id.* at 577.

169 *Id.* at 599 (emphasis added).

tution,<sup>170</sup> contemporaneous dictionary definitions,<sup>171</sup> the historical background to the Amendment,<sup>172</sup> the content of the 1788 ratification debates,<sup>173</sup> and contemporaneous state constitutional provisions that served as “analogues” to the federal Second Amendment.<sup>174</sup> Justice Stevens’s dissent touched on all of these same interpretive methods but came to an opposing conclusion: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia.”<sup>175</sup>

Commentary on the tools of constitutional interpretation employed in *Heller* could span volumes, but all that matters in the context of this Note is *Heller*’s legal precedent and whether it would permit a federal firearm registration system. Important here, then, is that *Heller* read the Second Amendment right to “keep and bear Arms” in a way that more widely protects gun ownership against intrusion from the federal government than had any previous Supreme Court decision.<sup>176</sup> Whether *Heller*’s splitting of the right to own a firearm from any relation to militia service would change the outcome in a case concerning a system of firearm registration, however, is yet unanswered by the Court.

In assessing the constitutionality of the laws in question, Scalia was principally concerned with whether they “burden[ed] the right of self-defense.”<sup>177</sup> Here, the Court did not delineate to what degree a law must burden the right of self-defense before it becomes unconstitutional—the “absolute ban on handguns” at issue was a severe and obvious case.<sup>178</sup> When the Court decides on the constitutionality of a federal gun registration system, the extent to which the law “burdens” the Second Amendment right to self-defense will indubitably be central to its inquiry.

### 3. *McDonald v. City of Chicago*

The Bill of Rights for a long time applied only to protect citizens from actions taken by the federal government, not the states. The Supreme Court affirmed this principle, reiterating that the Second Amendment only prohibits *Congress* (and presumably also the federal executive and judicial branches)

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170 See *id.* at 579–81 (“[I]n all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.”).

171 See *id.* at 581–82.

172 See *id.* at 592–95 (discussing the Stuart Kings’ tactics of suppressing political dissidents by disarmament).

173 See *id.* at 598–99.

174 See *id.* at 600–03.

175 *Id.* at 637 (Stevens, J., dissenting).

176 Justice Scalia may, however, contend his holding in *Heller* aligns with that of *Miller* and the historical intention of the Founders. In any case, at the very least *Heller* interpreted a broader Second Amendment rule with more *clarity* than any Supreme Court case ever had before.

177 See *id.* at 632 (majority opinion).

178 See *id.*

from infringing on the right to keep and bear arms<sup>179</sup> in a trio of late nineteenth-century cases: *United States v. Cruikshank*,<sup>180</sup> *Presser v. Illinois*,<sup>181</sup> and *Miller v. Texas*.<sup>182</sup> *Heller* did not alter this proposition because the matter at issue there was a law of the District of Columbia, not a state, and thus the prohibition was akin to Congress itself infringing on the right to keep and bear arms.<sup>183</sup>

At issue in *McDonald v. City of Chicago*, on the other hand, were effective bans on handgun possession in Chicago and Oak Park, Illinois.<sup>184</sup> Illinois is most assuredly a state, so the case raised the question of whether, notwithstanding the Supreme Court precedent to the contrary, the Second Amendment applied to the state governments as it did to the federal government.<sup>185</sup> Specifically, the Court sought to decide if “the Second Amendment right to keep and bear arms is incorporated in the concept of due process” articulated in the Fourteenth Amendment.<sup>186</sup>

The Court restated the essential tenet it espoused in *Heller* just a couple years earlier: “the Second Amendment protects the right to keep and bear arms *for the purpose of self-defense*.”<sup>187</sup> The “basic right” of “individual self-defense is ‘the *central component*’ of the Second Amendment.”<sup>188</sup> In light of the Fourteenth Amendment’s Due Process Clause, the Court most novelly held “that the Second Amendment right,” as delineated in *Heller*, “is fully applicable to the States.”<sup>189</sup> *McDonald*, in other words, incorporated the Second Amendment so that it applies with equal force against state governments as it does against the federal government.

The functional significance of *McDonald* is that courts must analyze laws regulating firearms, be they enacted by Congress or state legislatures, under the same Second Amendment framework as outlined in *Heller*. These cases make obvious that no jurisdiction in the United States can constitutionally institute a handgun ban because it presents too great a burden on the Second Amendment right to keep and bear arms.<sup>190</sup>

The legal framework thus established contextualizes the Supreme Court’s jurisprudence on firearm regulation under the Second Amendment,

179 See *McDonald v. City of Chicago*, 561 U.S. 742, 757–58 (2010).

180 92 U.S. 542, 553 (1875).

181 116 U.S. 252, 265 (1886).

182 153 U.S. 535, 538 (1894).

183 See *Heller*, 554 U.S. at 573 (“[C]onsider[ing] whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”).

184 *McDonald*, 561 U.S. at 750.

185 See *id.* at 750, 752.

186 *Id.* at 767; see U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

187 *McDonald*, 561 U.S. at 749–50 (emphasis added).

188 *Id.* at 767 (emphasis added) (quoting *Heller*, 554 U.S. at 599).

189 *Id.* at 750.

190 See *Heller*, 554 U.S. at 636.

but it offers no authoritative answer on the constitutionality of a federal firearm registration system. It is to this matter we turn next.

### III. APPLICATION OF *HELLER* TO FIREARM REGISTRATION

Part III details the efforts of the lower courts to apply *Heller*'s principles to mandatory firearm registration laws. The Supreme Court's interpretation of the Second Amendment is certainly instructive, but, short of a handgun ban, the Court has yet to set a discrete line over which a gun regulation violates the Constitution. Concededly, requiring all gun owners to register their weapons burdens to some degree the otherwise mostly unrestricted ability to possess a gun, but the Court enunciated no precise definition of how much of a burden is too much. That line was left to be drawn by the lower courts.

#### A. *Application of the Heller Standard: Heller II*

After the Supreme Court's decision in *Heller* overturned the District's indirect ban on handgun possession in the home, "the D.C. Council passed emergency legislation" amending its gun regulations to bring them into compliance with the ruling while still enforcing stringent registration requirements.<sup>191</sup> Plaintiffs sued again—in addition to challenging the District's ban on "assault weapons" and magazines with more than ten rounds of ammunition,<sup>192</sup> they contended the registration requirements unconstitutionally burdened their Second Amendment right.<sup>193</sup> Plaintiffs challenged the law's registration certificate requirements that directed each applicant to: (1) "[d]isclose certain information about himself—such as his name, address, and occupation—and about his firearm"; (2) submit to a "ballistics identification procedure" for each pistol; (3) appear in person at the police department with "the firearm to be registered"; (4) "[r]egister no more than one pistol in a [thirty]-day period"; (5) renew each registration certificate every three years; (6) pass a vision test equivalent to that needed for a driver's license; (7) "[d]emonstrate knowledge of the District's [gun] laws," including knowledge of the "safe and responsible use, handling, and storage" of firearms; (8) "[s]ubmit to being fingerprinted and photographed"; (9) "[u]ndergo a background check every six years"; and (10) "[a]ttend a firearms training or safety course" consisting of at least five hours of time spent in the classroom and shooting range.<sup>194</sup>

The court began the relevant analysis by emphasizing *Heller*'s proclamation that "'longstanding' regulations are 'presumptively lawful,'" meaning

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191 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1248 (D.C. Cir. 2011).

192 *See id.* at 1247; D.C. CODE § 7-2502.02(a)(6) (2020) ("A registration certificate shall not be issued for . . . [a]n assault weapon . . ."); *id.* § 7-2506.01(b) ("No person in the District shall possess . . . a magazine . . . that has a capacity of . . . more than 10 rounds of ammunition.")

193 *See Heller II*, 670 F.3d at 1247.

194 *Id.* at 1248–49.



they “are presumed not to burden conduct within the scope of the Second Amendment.”<sup>195</sup> Conversely, firearm regulations “of newer vintage” do not carry the same presumption of lawfulness.<sup>196</sup> As to the specific facts of the case, the court concluded that “basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional.”<sup>197</sup> In deeming the practice of mandatory handgun registration longstanding enough to merit a presumption of constitutionality, the court detailed similar state laws dating back to the beginning of the twentieth century,<sup>198</sup> a time period apparently distant enough in history for the *Heller* Supreme Court to regard the practice as “longstanding.”<sup>199</sup> The court found nothing in “the historical record or the record of this case to rebut [the] presumption” that a handgun registry is a familiar practice in American law.<sup>200</sup> This means in effect that a registration system for handguns does not even implicate the Second Amendment because of the “longstanding” history of similar regulatory practices.

Elaborating on this conclusion, the court in sweeping language declared “basic registration requirements [to be] self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous.”<sup>201</sup> While these words do not appear limited to systems of *handgun* registration, and out of context may be read to greenlight the registration of any kind of firearm, the court was careful to point out that basic registration requirements for *long guns* “are novel, not historic,” and thus do not deserve the same presumption of constitutionality as handgun registries.<sup>202</sup> A system of gun registration, however, may of course still have a de minimis impact on a person’s Second Amendment right even if it has never before been implemented. So while the court’s statement that “basic registration requirements are self-evidently de minimis” should be read in context as most directly discussing handgun registries,<sup>203</sup> the fundamental point still holds: basic registration requirements of any firearm do no harm to the right to keep and bear arms for self-defense.<sup>204</sup>

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195 *Id.* at 1253 (quoting *Heller*, 554 U.S. at 626–27 & n.26).

196 *Id.*

197 *Id.*

198 *Id.* at 1253–54 (noting that the following jurisdictions had some form of handgun registration or other similar system in place: New York in 1911, Illinois in 1881, Georgia in 1910, Oregon in 1917, Michigan in 1927, California in 1917, Hawaii in 1927, and the District of Columbia in 1932).

199 *See id.* at 1253 (“The Court in *Heller* considered ‘prohibitions on the possession of firearms by felons’ to be ‘longstanding’ although states did not start to enact them until the early [twentieth] century.” (quoting *Heller*, 554 U.S. at 626–27)).

200 *Id.* at 1254.

201 *Id.* at 1254–55.

202 *See id.* at 1255.

203 *See id.* at 1254–55.

204 Indeed, the court acknowledged “[t]he requirement of basic registration as applied to long guns may also be de minimis,” but was unable to come to a satisfactory conclusion

For those registration requirements without “longstanding,” historical precedent, referred to by the court as “novel,” their constitutionality turns on the level of judicial scrutiny applied. Plaintiffs sought application of strict scrutiny because *McDonald* placed “the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty,”<sup>205</sup> while the District opined such rigorous review “would be inappropriate because . . . the right to keep and carry arms has always been heavily regulated”; rather, the District would apply a “reasonable-regulation test.”<sup>206</sup> Without missing a beat the court rejected the District’s suggestion: “*Heller* clearly does reject any kind of ‘rational basis’ or reasonableness test . . . .”<sup>207</sup> Although it foreclosed a rational basis standard of review, the Supreme Court never specified which standard is most appropriate in reviewing gun laws, thus creating an ambiguity for lower courts to resolve.<sup>208</sup>

Like the First Amendment, the court reasoned, “the level of scrutiny applicable under the Second Amendment surely ‘depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.’”<sup>209</sup> This means a firearm restriction “that imposes a substantial burden upon the core right of self-defense” is unconstitutional absent “a strong justification,” and laws that impose “less substantial burden[s]” require less compelling justifications.<sup>210</sup> In the end, the court selected intermediate over strict scrutiny because the burden on the right of self-defense, the core purpose undergirding the Second Amendment right, was simply not severe enough to merit such exacting review.<sup>211</sup> “Indeed, none of the District’s registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose.”<sup>212</sup> A law that imposes no restriction on possession of a firearm, and thus no tangible burden on the right to self-defense, is worthy only of intermediate scrutiny.

Intermediate scrutiny demands the novel registration requirements “substantially relate[ ] to an important governmental objective,” and imposes on the District the burden of making that showing.<sup>213</sup> To achieve the “important or substantial governmental interest,” the registration law must qualify as “a means narrowly tailored to achieve the desired objective” even though it need not employ “the least restrictive means.”<sup>214</sup> While the District

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because of the inadequacies of the record. *Id.* at 1255 n.\*\*. The court opted to remand to the district court to conduct further factfinding with respect to “the application of registration requirements to long guns.” *Id.*

205 *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010); *Heller II*, 670 F.3d at 1256.

206 *See Heller II*, 670 F.3d at 1256.

207 *Id.*

208 *See id.*

209 *Id.* at 1257 (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)).

210 *Id.*

211 *See id.* at 1257–58.

212 *Id.* at 1258.

213 *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

214 *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

has put forth the viable government objectives of protecting police officers and aiding in crime control, the court found the record too incomplete to determine whether the registration requirements are indeed “substantially related” to those ends.<sup>215</sup> Accordingly, the court remanded “the novel registration requirements, and all registration requirements as applied to long guns” for the district court to fill out the record.<sup>216</sup>

The D.C. Circuit thus found a system of handgun registration to be presumptively constitutional, and in this case, with no rebuttal to the presumption, ultimately so.<sup>217</sup> As to the copious other registration requirements listed above, the court merely established that a court must review such provisions using intermediate scrutiny but was unable to apply that standard itself given the state of the evidentiary record.<sup>218</sup> In emphatic dicta, however, the D.C. Circuit at the very least implied that basic registration requirements of firearms present only a de minimis burden on the right to self-defense.<sup>219</sup> A definite answer as to the burden of a registration requirement for long guns and the many other technical procedures attendant to registration generally were once again deferred, but the resolution was not long coming.

### B. *Application of the Heller Standard: Heller III*

After *Heller II* remanded the case back to the district court, the D.C. Council effected mostly minor repeals to the registration requirements intended to “reduce[ ] the burden upon registrants.”<sup>220</sup> The district court upheld the District’s remaining registration obligations as constitutional: (1) “the basic registration requirement as it pertains to long guns”; (2) the requirement that the applicant “appear in person to register a firearm and be fingerprinted and photographed”; (3) the discretionary power of the D.C. police to compel the applicant to bring in the gun to be registered; (4) “the expiration of the registration after three years”; (5) registration fees; (6) certain firearm training and educational requirements; and (7) “the prohibition on registration of more than one pistol per person in any [thirty]-day period.”<sup>221</sup> *Heller* on appeal challenged the constitutionality of these registration requirements.<sup>222</sup>

The D.C. Circuit in *Heller III* succinctly explained that in determining the constitutionality of gun registration laws, a court must apply a two-step

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215 See *id.* at 1258–60.

216 *Id.* at 1260.

217 See *id.* at 1253–54.

218 See *id.* at 1256–60.

219 See *id.* at 1254–55 (“[B]asic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous.”).

220 *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 269 (D.C. Cir. 2015) (repealing, for example, “the requirement that a pistol be submitted for ballistic identification”).

221 *Id.* at 270.

222 See *id.*

test: “[A]sk first whether [the law] impinges upon a right protected by the Second Amendment,” and if so, then ask whether the law survives intermediate scrutiny.<sup>223</sup> Under that standard of review, the District must show the law “promotes a substantial governmental interest that would be achieved less effectively absent the regulation”<sup>224</sup> and that “the harms to be prevented” by the law “are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>225</sup> Once the District successfully makes this showing, it must also demonstrate “the means chosen are not substantially broader than necessary to achieve that interest.”<sup>226</sup>

## 1. Long Gun Registration Requirement

The court without hesitation found “the burden of the basic registration requirement as applied to long guns is de minimis,” and therefore concluded “it does not implicate the second amendment right.”<sup>227</sup> This means that the D.C. Circuit declared basic registration requirements as applied to both handguns and long guns were not merely constitutional, but in fact did not even *implicate* any meaningful burden on the Second Amendment right. Whether federal or state, a law that merely requires the registration of a gun via the collection of a modest amount of information about the registrant and the gun carries with it the strong presumption of constitutionality. Straightforward firearm registration requirements present no burden on the Second Amendment right to keep and bear arms.

## 2. Particular Firearm Registration Requirements Under Intermediate Scrutiny

The other registration requirements were admittedly not de minimis, and thus had to survive an analysis under the intermediate scrutiny framework.<sup>228</sup> As identified in *Heller II*,<sup>229</sup> the District proffered two substantial state interests served by the registration requirements: protecting police officers and promoting public safety.<sup>230</sup> The court rejected the notion that the registration requirements actually protected police officers as they responded to calls because the police very rarely check the registration records.<sup>231</sup> Additionally, since police officers regularly exercise high caution when responding to a crime or other like incident, the fact that the gun registry may provide knowledge about the potentiality for a weapon seems

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223 *Id.* at 272 (quoting *Heller II*, 670 F.3d at 1252).

224 *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989)).

225 *Id.* at 272–73 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

226 *Id.* at 272 (quoting *Rock Against Racism*, 491 U.S. at 782–83).

227 *Id.* at 273–74 (citing *Heller II*, 670 F.3d at 1254–55).

228 *See id.* at 274.

229 670 F.3d at 1258.

230 *Heller III*, 801 F.3d at 274.

231 *See id.* at 275.

unlikely to greatly advance officer safety.<sup>232</sup> The District next claimed its firearm registration requirements promote public safety by “distinguishing criminals from law-abiding citizens, enabling police to arrest criminals immediately, facilitating enforcement against prohibited persons obtaining or continuing to possess firearms, reducing gun trafficking, and increasing the difficulty for criminals to acquire guns.”<sup>233</sup> The court then set about deciding if the registration provisions at issue would, “in a direct and material way,”<sup>234</sup> further the substantial state interest in public safety.<sup>235</sup>

a. In-person Fingerprinting and Photographing

The District requires each applicant to “appear in person to register a firearm and be fingerprinted and photographed.”<sup>236</sup> These requirements further the substantial state interest of public safety “by facilitating identification of a gun’s owner” at two crucial stages: “at the time of registration” and during later police checks of a gun’s registration.<sup>237</sup>

At the first stage, the District contended its fingerprinting requirement is essential to ensure firearm registrants are qualified to possess a gun.<sup>238</sup> Background checks that employ identification solely by name and social security number are “more susceptible to fraud” than ones that use identification by fingerprinting.<sup>239</sup> The District demonstrated the danger of background checks conducted using only limited identification information by highlighting a U.S. Government Accountability Office report in which undercover agents were “without exception” able to obtain firearms using false identities even after undergoing a NICS check.<sup>240</sup> Felons and others prohibited from owning a gun may easily thwart the background check system absent some greater means of identification on the front end. Given this danger, and even without a showing that such loopholes are actually exploited, mandating fingerprinting as a “prophylactic” measure is constitutional because it will “help to deter and detect fraud and thereby prevent disqualified individuals from registering firearms.”<sup>241</sup>

At the second stage, the District posits its photographing requirement is helpful “when the police encounter an armed registrant” by allowing the authorities to “quickly identify whether and to whom the firearm has been legally registered.”<sup>242</sup> This can help diffuse a situation and thereby support

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232 *See id.*

233 *Id.*

234 *Id.* at 272–73 (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 664).

235 *See id.* at 275.

236 *Id.* at 270.

237 *Id.* at 275.

238 *See id.* at 275–76.

239 *See id.* at 276.

240 *Id.*; *see Fake IDs Used to Buy Guns*, CBS NEWS (Mar. 21, 2001), <https://www.cbsnews.com/news/fake-ids-used-to-buy-guns/>.

241 *Heller III*, 801 F.3d at 276.

242 *Id.*

the safety of the officer, the suspect, and the public at large. Because it promotes the public safety in this way, the court deemed the requirement to photograph firearm registrants constitutional.<sup>243</sup>

Requiring the registrant to show up in person at the police department is also constitutional because it is merely a necessary corollary to the other lawful registration requirements.<sup>244</sup> In sum, the basic ability to reliably identify gun owners through fingerprinting and photographing adequately promotes the public safety to render such registration requirements constitutional.

b. Discretionary Power of the D.C. Police to Require Bringing in the Firearm

The District reserved to itself the discretionary power to compel a firearm registrant to bring the gun to be registered into the police station.<sup>245</sup> It posited that such a requirement would promote the public safety by verifying that the gun's information aligns with that on the registration certificate, guaranteeing "the firearm has not been altered or switched with another firearm."<sup>246</sup> The court was not persuaded by this rationale and found it unlikely that someone would go to the trouble of obtaining a registration certificate for a weapon other than the one in his possession.<sup>247</sup> Even more than failing to promote the public safety, requiring a registrant to bring a gun into the police station may actually jeopardize the public safety because of the risk the gun may be stolen or mistaken as a threat to police.<sup>248</sup> The discretionary authority to compel a firearm registrant to present the gun to the police does not facilitate public safety, and for that reason this registration requirement is unconstitutional.

c. Triennial Reregistration Requirement

The District also mandated firearm registrants reregister their guns every three years.<sup>249</sup> It argued this requirement was useful to check that the registrant had not become disqualified from gun ownership, maintain an updated registration database, and verify that registrants know "the whereabouts of their firearms."<sup>250</sup> The court dismantled all three justifications in turn. First, the court noted the District could uncover a gun owner's disqualifications without causing their registration to expire; the District could simply conduct background checks.<sup>251</sup> Second, while acknowledging the

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243 *See id.* at 276–77.

244 *Id.* at 277.

245 *See id.* at 270.

246 *See id.* at 277.

247 *Id.*

248 *Id.*

249 *See id.* at 270.

250 *Id.* at 277–78.

251 *Id.* at 277.

reregistration requirement may help maintain the registry database, it is unnecessary to “burden[ ] every gun owner” because “there is already a requirement that gun owners report relevant changes in their information.”<sup>252</sup> Third, the reregistration requirement is redundant because another District law already directs gun owners to report their lost or stolen firearms.<sup>253</sup>

Whether the court would reach the same result absent the other District laws is uncertain, but here the triennial reregistration requirement does not sufficiently promote public safety to justify the burden placed on gun owners. With these facts, then, the reregistration requirement was held unconstitutional.

#### d. Registration Fees

The court upheld the constitutionality of a firearm registration fee with a simple reference to its prior holding in *Heller II*: administrative procedures involved in registering a gun, like charging “reasonable fees . . . are lawful insofar as the underlying regime is lawful.”<sup>254</sup> Because the court previously found the underlying basic firearm registration requirements to be constitutional,<sup>255</sup> a reasonable fee incidental to that registration process must also be constitutional.

#### e. Firearm Education and Training Requirements

The District also imposed requirements “that a registrant complete a firearms safety and training course . . . and that the registrant pass a test to demonstrate his knowledge of the District’s firearms laws.”<sup>256</sup> The court reached different outcomes on whether each actually promotes the public safety.

The court found the one-hour firearms safety and training course constitutional because of the value of training in preventing accidental injury or death.<sup>257</sup> The court was satisfied with this inferential step not because of any report cited by the District, but rather because the confluence of “history, consensus, and simple common sense” inspired confidence in the proposition that firearm training leads to fewer firearm-related accidents.<sup>258</sup>

The same could not be said of the test of the District’s firearms laws. The District provided no evidence linking knowledge of the law to interest in

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252 *Id.* at 278.

253 *Id.*

254 *Id.* (quoting *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1249 n.\* (D.C. Cir. 2011)).

255 *See id.* at 273–74 (citing *Heller II*, 670 F.3d at 1254–55) (finding “the burden of the basic registration requirement as applied to long guns,” like that applied to handguns, to be “de minimis” and therefore constitutional).

256 *Id.* at 270.

257 *Id.* at 279.

258 *Id.* (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)).

public safety, and, in fact, many of the questions on the test were unrelated to public safety.<sup>259</sup> The additional burden on the Second Amendment right in requiring passage of this test was thus not supported by evidence tending to show it would increase the safety of the public, so the court deemed it unconstitutional.<sup>260</sup>

f. One-Pistol-Per-Month Rule

Finally, the District prohibited the “registration of more than one pistol per person in any [thirty]-day period.”<sup>261</sup> It reasoned that restricting the number of guns one person could register would “reduce gun trafficking” and generally promote public safety by reducing the number of guns in circulation.<sup>262</sup> The court was underwhelmed by the District’s scarce evidence in support of its argument that limiting the number of guns a person could register would reduce gun trafficking.<sup>263</sup> On the public safety front, the court noted that even if fewer guns made for less gun violence, it emphatically concluded that such a rationale “does not justify restricting an individual’s undoubted constitutional right to keep arms (plural) in his or her home.”<sup>264</sup> Seeing as the limit on the number of guns a person could register within a certain time period bore no great connection to the rationale of protecting the public, such a burden on the Second Amendment right was therefore unconstitutional.<sup>265</sup>

To summarize, the court in *Heller III* upheld as constitutional the fingerprinting and photographing requirements, reasonable firearm registration fees, and the mandatory firearms safety and training course. Though these prerequisites to registering, and thus lawfully possessing, a firearm burdened the Second Amendment right, their concurrent promotion of the public safety justified the burden. The court struck down as unconstitutional the ability of the D.C. police to force registrants to bring in their weapons, the triennial reregistration requirement, the test of registrants’ knowledge of D.C. gun laws, and the limiting of firearm registration to one per every thirty-day period. These conditions on registering firearms burdened the Second Amendment right without adequate promotion of the public safety, and they were thus adjudged unconstitutional.

As the Supreme Court unambiguously declared in *Heller*, “the right secured by the Second Amendment is not unlimited.”<sup>266</sup> When examining the constitutionality of laws touching on gun possession, the proper analysis is to determine the extent of the burden imposed on the right to keep and bear arms. The D.C. Circuit Court of Appeals found in *Heller II* and *III* that

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259 *See id.*

260 *See id.*

261 *Id.* at 270.

262 *Id.* at 280.

263 *Id.*

264 *Id.*

265 *Id.*

266 *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).



basic registration requirements, applied to both handguns and long guns, so insignificantly burden the right to possess a firearm that such laws need not undergo intermediate scrutiny.<sup>267</sup> Registration requirements on top of the baseline collection of personal and weapon information, however, as discussed in detail in *Heller III*, are likely more than a de minimis burden on the Second Amendment right but can still be constitutional if supported by evidence tying the law to the promotion of public safety.

The Supreme Court has never directly decided whether a firearm registration requirement is constitutional under the Second Amendment. Were its analysis to look at all like the D.C. Circuit's, though, the fundamental aspects of a federal firearm registration law would be convincingly upheld.

### CONCLUSION

Gun violence is ubiquitous in the United States. For those living in our country's most dangerous corners, fear of gun violence is ingrained and normalized.<sup>268</sup> For all Americans, the seeming prevalence and random nature of mass shootings instills a tangible fear of otherwise mundane public spaces like malls, schools, and movie theaters.<sup>269</sup> For those directly harmed, the consequences can be severe and sometimes fatal. In light of the enormous but perhaps unknowable extent of the damage inflicted by gun violence, a legislative fix is badly needed.

A federal firearm registration system may not be the natural first choice when legislating for gun violence prevention. It would inevitably provoke spirited opposition, likely facing criticism that it only enlarges the bureaucracy and amounts to governmental overreach. At its base, though, firearm registration is a simple, nonintrusive means for the national government to account for the number and type of guns owned, and to keep persons prohibited from gun ownership from acquiring them. It consists of data collection, storage, and analysis, and it in no way restricts the ability of those with the right to own a firearm from doing so. And while a national gun registry is not on its own a comprehensive way to reduce gun violence, it works well in tandem with other gun safety policies. For example, a gun registry would bolster the efficacy of background checks on firearm purchasers by providing

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267 See *Heller III*, 801 F.3d at 273–74 (citing *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1254–55 (D.C. Cir. 2011)) (finding “the burden of the basic registration requirement as applied to long guns,” like that applied to handguns, to be “de minimis” and therefore constitutional).

268 See, e.g., Krishnadev Calamur, *The Normalization of Gun Violence in Poor Communities*, THE ATLANTIC (June 24, 2018), <https://www.theatlantic.com/health/archive/2018/06/gun-violence/563582/> (“If you realized that there was a child that had to go to bed to the sound of gunfire, wake up to the sound of gunfire, maybe walk across yellow tape on the way to school, I think we would think about this issue very differently.”).

269 See *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, AM. PSYCHOL. ASS'N (Aug. 15, 2019), <https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting> (highlighting a survey finding “[a] large majority of adults in the United States are stressed by mass shootings”).

more complete and accurate information than would otherwise be available, thereby successfully screening out those ineligible to possess a firearm. It would also aid police in crimefighting by allowing them to more efficiently track down crime guns and their registered owners. Together with other policy measures, a federal firearm registration system could effectively mitigate gun violence without infringing on the liberty of Americans to lawfully possess firearms.

The federal government, though expressly hostile to general firearm registration requirements,<sup>270</sup> currently operates a successful registration system for certain kinds of dangerous weapons, such as machine guns.<sup>271</sup> NICS background checks also involve the collection, albeit not the storage, of information on potential gun purchasers and the guns they seek to buy.<sup>272</sup> Congress should transition to a system of universal required firearm registration simply by expanding NICS to cover all firearm transfers and inputting the information obtained from the ATF Form 4473s into the federal firearm registry, then retaining them indefinitely. The NRA itself highlighted this as a feasible method of implementing a firearm registry through NICS, where the registration of all firearm transfers would eventually result in a comprehensive gun registry.<sup>273</sup> Establishing a federal firearm registry through NICS would be simple and familiar, and thus less prone to missteps.

Existing systems of gun registration present a picture of what a fully realized federal policy could accomplish. Washington, D.C., Hawaii, and California, for example, employ universal firearm registration requirements applicable to all guns.<sup>274</sup> Once a registration system has been established on the federal level, it should thereafter operate like those state-level systems, which require the registration of all new guns and of all firearms transferred.

Laws regulating firearms violate the Second Amendment when they too greatly burden the right to keep and bear arms for self-defense.<sup>275</sup> In applying this principle to existing systems of gun registration, the D.C. Circuit found that if basic gun registration requirements pose any burden on the Second Amendment right, such burden is *de minimis*, and they are therefore presumptively constitutional.<sup>276</sup> Requirements that posed a greater burden on gun possession faced more intense judicial scrutiny, but were still found constitutional if closely enough related to the promotion of public safety.<sup>277</sup>

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270 See *supra* text accompanying notes 1–4.

271 See *supra* text accompanying notes 24–41 for a discussion of the National Firearms Act of 1934 and its subsequent amendments by the Gun Control Act of 1968 and the Firearm Owners' Protection Act of 1986.

272 See *supra* text accompanying notes 42–65.

273 See *supra* text accompanying note 21.

274 See *supra* text accompanying notes 66–133.

275 See *supra* text accompanying notes 134–90.

276 See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1254–55 (D.C. Cir. 2011) (“[B]asic registration requirements are self-evidently *de minimis*, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous.”).

277 See *supra* text accompanying notes 228–66.

The Second Amendment right to keep and bear arms runs deep in American culture and is fundamental to a great number in this country. Mandatory registration of firearms does not impinge on that right.

Of course, the Founding Fathers could never have envisioned a federal gun registration system. Neither could they have imagined that bullets and guns would cause so much irreversible devastation. They could not have fathomed that even after centuries of relative stability, peace, and economic prosperity, the citizens of the country they built continue to live in legitimate fear of the bullet of a compatriot. Surely, in light of the recurring tragedies wrought by gun violence, our Founders would not sit idly by and accept such a status quo as preordained, a symptom inevitably concomitant with the liberty recognized by the Second Amendment. None would sanction inaction, and neither should Americans today. Without infringing on the right to keep and bear arms, and even without altering the Supreme Court's interpretation of that right, bold and meaningful changes to our nation's gun policy can be adopted. And if we sincerely hope to stem gun violence in the United States, a system of gun registration is a sensible first step.