
NOTES

TAKING AIM AT FELONY POSSESSION

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The Supreme Court's 2008 decision in District of Columbia v. Heller announced, for the first time, that the Second Amendment to the U.S. Constitution secures an individual right to keep and bear arms. The ever-divisive gun control debates will now be shaped by Heller and the lower court rulings that have followed in its wake. One of the most well-known ways in which governments regulate firearm possession is by prohibiting gun ownership by felons. At the federal level, 18 U.S.C. § 922(g)(1) makes it a felony for any person already convicted of a felony under state or federal law to possess a firearm. While this is an undoubtedly laudable goal, § 922(g)(1) prohibits gun possession by practically all nonviolent felons in addition to those that pose a serious risk of future danger. In light of Heller's recognition of an individual right to bear arms for self-defense, the sheer breadth of the law may pose constitutional problems. In short, nonviolent felons appear to have at least plausible claims that the law may be overbroad.

Following the announcement of the Court's decision in Heller, large numbers of violent or otherwise unsympathetic felons convicted under § 922(g)(1) sought to challenge their convictions on the ground that the law violated their Second Amendment rights. Some lower courts addressing these challenges have issued narrow holdings, dismissing the challenges at hand but recognizing that a nonviolent offender may fare better in an as-applied challenge. Others have taken the stance that all felons can constitutionally be barred from possessing firearms.

This Note examines the litigation taking place in the lower federal courts. It chronicles the efforts of the courts to articulate a standard for evaluating Second Amendment claims. The Note then explains why challenges to § 922(g)(1) brought by nonviolent offenders deserve more attention than some courts allow under the categorical approach they have adopted. Finally, the Note scrutinizes the Heller opinion and historical and means-ends justifications for barring firearm possession by nonviolent felons. In this regard, the Note concludes that complete foreclosure of the possibility of a successful as-applied challenge is not dictated by Heller and that the justifications currently relied on to support the law are far weaker when the law is applied to nonviolent felons. This Note recommends that courts follow the example of the Third, Fourth, and Seventh Circuits by leaving consideration of the law's applicability to nonviolent felons to an appropriate case and putting the government to its task of proving the law's constitutionality.

INTRODUCTION

Among the many social issues to capture attention in American politics, one of the most persistently divisive is the debate over gun control.¹ This debate is

¹ See BERNARD E. HARCOURT, GUNS, CRIME, AND PUNISHMENT IN AMERICA 1-2 (2003) (explaining that "the great American gun debates remain some of the most ideological, visceral, polarized, ad hominem – and, often, ugly – debates in contemporary law and

frequently colored by the biased efforts of both the pro-gun and gun control lobbies.² The gun control debate has, of course, taken place in the shadow of the Second Amendment's guarantee of the right to keep and bear arms.³ Prior to 2008 and the Supreme Court's decision in *District of Columbia v. Heller*,⁴ however, the nature of the right to bear arms had not been frequently discussed by the Court but was the subject of much scholarly debate. In particular, scholars and commentators disagreed as to whether the Second Amendment secured an individual right to each citizen, or merely a collective right associated with militia service.⁵ *Heller* squarely resolved the debate over the nature of the right to bear arms in favor of an individual right,⁶ which is fully applicable against the states.⁷ Numerous questions remain, however, concerning the scope of the right recognized in *Heller*. One of those questions is to what extent the federal and state governments may limit the right to bear arms. This Note explores the potential for future development of the law in one context in which governments frequently choose to limit the right to bear arms, firearm possession by convicted felons.

Given the prevalent use of firearms in violent crimes,⁸ perhaps one of the most sensible ways in which governments choose to regulate the right to bear

politics, matched only perhaps by the debates surrounding abortion and the death penalty"). If any confirmation of the divisiveness of these debates is required, one need only look to the burgeoning number of attacks on and defenses of firearms in the wake of the horrific tragedy at Sandy Hook Elementary School in Newtown, Connecticut in December 2012. See *Updates on the Gun Violence Debate*, N.Y. TIMES LEDE (Jan. 18, 2013, 4:00 PM), <http://thelede.blogs.nytimes.com/2013/01/18/updates-on-the-gun-violence-debate-7/> (providing links to comprehensive coverage of the developing gun control debates).

² See HARCOURT, *supra* note 1, at 3 ("The great American gun debates are presently polarized along two extreme positions for and against gun control measures. This polarization obscures, rather than clarifies, the debate."). The major political parties have, of course, also played a role in the divisive debate on gun control. JOHN M. BRUCE & CLYDE WILCOX, *THE CHANGING POLITICS OF GUN CONTROL* 9 (1998) (comparing the GOP's "mobiliz[ation] of gun enthusiasts" with Democrats' support of gun control efforts).

³ U.S. CONST. amend. II.

⁴ 554 U.S. 570, 579 (2008).

⁵ See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983).

⁶ *Heller*, 554 U.S. at 592.

⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

⁸ In 2010, firearms of some type were used in 67.5% of murders, 41.4% of robberies, and 20.6% of aggravated assaults. See *Expanded Homicide Data Table 7: Murder, Types of Weapons Used*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl07.xls> (last visited Jan. 26, 2013); *Table 21: Robbery by State, Types of Weapons*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl21.xls> (last visited Jan. 26, 2013); *Table 22: Aggravated Assault by State, Types of Weapons*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl22.xls> (last visited Jan. 26, 2013).

arms is by limiting felon access to firearms and punishing felons who seek them out. Numerous states have laws regulating felons' access to and possession of firearms.⁹ Congress chose to regulate convicted felons possessing firearms in or affecting interstate commerce through 18 U.S.C. § 922(g)(1).¹⁰ Section 922(g)(1) tackles the problem of dangerous felons possessing firearms by making it unlawful for any person "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to, *inter alia*, "possess in or affecting commerce, any firearm or ammunition."¹¹

To many, § 922(g)(1) may seem unobjectionable; one must consider, however, that the law, with practically no exceptions,¹² potentially permanently¹³ strips many nonviolent individuals of an enumerated constitutional right to bear arms for their own defense.¹⁴ Concerns arise due to the sheer breadth of § 922(g)(1). The law significantly burdens the Second Amendment rights of any person whose activities are punishable by a state as a felony with a maximum prison sentence exceeding one year or a misdemeanor with a maximum prison sentence exceeding two years. The law also effectively denies Second Amendment rights to those convicted of federal felonies.¹⁵ Thus, the federal law reaches individuals convicted of a wide array of nonviolent crimes and bars those individuals from exercising the individual right recognized in *Heller*, lest they be convicted of a new felony.

In the wake of *Heller* and *McDonald*, courts began hearing numerous challenges to individual convictions under § 922(g)(1) premised on a violation of Second Amendment rights. Quite unsurprisingly, many of the individuals bringing these challenges have been unsympathetic felons seeking "get-out-of-

⁹ *E.g.*, CAL. PENAL CODE § 29800 (West 2012) (making it a felony for any person convicted of a felony under the laws of the United States, California, or any other state to possess a firearm); MONT. CODE ANN. § 45-8-351 (2011) (barring local governments from prohibiting firearm possession but excepting felony possession laws); N.C. GEN. STAT. § 14-415.1 (2011) (making it a Class G felony for a convicted felon to possess a firearm, but excluding individuals whose firearm rights have been restored); TEX. PENAL CODE ANN. § 46.04 (West 2011) (making it a felony for a convicted felon to possess a firearm if he or she possesses the firearm before five years have passed since the felony conviction, or if the firearm is possessed outside the home at any time).

¹⁰ 18 U.S.C. § 922(g)(1) (2006).

¹¹ *Id.*

¹² Section 922(g)(1) provides three exceptions by way of the definition of "crime punishable by imprisonment for a term exceeding one year" contained in 18 U.S.C. § 921(a)(20). These exceptions and their limitations are discussed *infra* Part III.B.

¹³ *See infra* note 158 and accompanying text. The length of a felon's firearm disability turns on state and federal procedure for rights restoration. Whether an individual is convicted of a state or federal offense makes a world of difference in determining whether that individual may have his or her rights restored.

¹⁴ The importance of self-defense to the right to bear arms is discussed *infra* Part I.A.1.

¹⁵ *See infra* Part III.B.

jail-free card[s]”¹⁶ with little to no hope of successfully challenging the law.¹⁷ Unfortunately, the lack of sympathetic cases, combined with the Supreme Court’s cautious language regarding § 922(g)(1),¹⁸ has led some lower courts to issue opinions that promise harsh consequences for even nonviolent felons wishing to challenge convictions under § 922(g)(1) on an as-applied basis.¹⁹

¹⁶ Adam Winkler, *Shooting Blanks*, DAILY BEAST (Mar. 3, 2010, 10:26 AM), <http://www.thedailybeast.com/articles/2010/03/03/shooting-blanks.html>.

¹⁷ See, e.g., *United States v. Barton*, 633 F.3d 168, 170 (3d Cir. 2011) (challenger with prior convictions for drug possession and receipt of a stolen firearm); *United States v. Rozier*, 598 F.3d 768, 769 (11th Cir. 2010) (challenger’s underlying convictions were several instances of possession and delivery of cocaine); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010) (finding § 922(g)(1) constitutional in light of a challenge brought by a plaintiff with drug-possession and car-burglary convictions).

Professor Nancy Leong discusses in a 2012 Article the increased skepticism with which judges view constitutional claims brought by criminal defendants as compared to those brought by civil plaintiffs. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 434-36 (2012) (explaining that, in the Fourth Amendment context, “the unappealing facts undergirding criminal proceedings likely influence both the outcome and the contours of the claims litigated in such proceedings”). Professor Leong further suggests that courts may be more willing to take a sympathetic view of Second Amendment claims when they are brought by citizens not charged with criminal offenses. *Id.* at 474. She explains that the consequences of recognizing a Second Amendment right differ markedly in the civil and criminal contexts: “[Recognizing a right in the criminal context] results in overturning a conviction and often invalidating a statute, while [recognizing a right in the civil context] merely returns an area of citizen conduct to its pre-government-regulation state.” *Id.*

While Professor Leong’s analysis focuses on the differences between criminal and civil litigants, similar observations can be posited about claims brought by violent and nonviolent felons. Like a civil litigant not facing criminal charges, a person convicted of, say, tax evasion, evokes more sympathy in the firearm-possession context than does a person convicted of murder. Moreover, a successful challenge brought by a violent felon would almost certainly result in the wholesale invalidation of § 922(g)(1), whereas a successful challenge brought by a nonviolent felon would likely result in the statute’s inapplicability to certain categories of nonviolent crimes, or be limited to the facts of the case. Such a result is unlikely to threaten law-abiding citizens with an increased risk of firearm violence, and thus courts may be willing to adopt a more expansive interpretation of the Second Amendment where a nonviolent felon is involved.

¹⁸ In *Heller*, the Court was very careful to insert language into the opinion that strongly suggests the facial constitutionality of some federal laws, including § 922(g)(1), despite the scope of the right the Court recognized. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill”). The court reiterated these warnings in *McDonald*. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (repeating the *Heller* warnings and stating that “incorporation does not imperil every law regulating firearms”). This language will be discussed in further detail in Parts II and IV.B *infra*.

¹⁹ See, e.g., *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich,

This Note examines the federal circuit courts' approaches in evaluating challenges to firearm regulations post-*Heller*. The Note begins by exploring the right recognized in *Heller* and the language the Court used to describe limitations on that right. The Note then proceeds to examine how the circuit courts diverge in leaving open the possibility of a successful as-applied challenge to § 922(g)(1) by a plaintiff whose particular conviction may not justify the potentially permanent stripping of Second Amendment rights. Given the relative novelty of the individual right to bear arms and the uncertainty of the right's scope, a number of important questions await further illumination by the courts. Several of the federal courts of appeals have relied on the cautionary language of *Heller*²⁰ to conclude that § 922(g)(1) is constitutional as applied to all felons, under all circumstances.²¹ This has the unfortunate consequence of prematurely foreclosing some of the lower-court development that would otherwise take place.²²

This Note concludes that neither *Heller* nor the historical and means-ends justifications on which some courts currently rely support such sweeping holdings in cases involving only violent offenders. The effect of these rulings is to say that the Second Amendment permits the government to limit the firearm possession of tax evaders and polluters to the same extent as that of murderers and rapists. While this would be a relatively unobjectionable outcome if dictated by *Heller* or the history of felon dispossession, or supported by a compelling justification, several courts appear to have totally foreclosed the possibility of nonviolent felons' successfully challenging § 922(g)(1) based on overly broad holdings in cases dealing only with violent offenders, and without due regard to the merits of doing so. This Note further concludes that those courts that have so held, or have yet to address the issue, should carefully (re)consider an approach similar to those that the Third, Fourth, and Seventh Circuits articulate. This Note does not purport to suggest that § 922(g)(1) ultimately will or should be upheld as applied to any particular type of felon. On the other hand, this Note does argue that the question deserves more consideration than some lower courts are currently giving it, and presents a closer and more complex issue than those courts have intimated.

Part I introduces the nature, scope, and possible limitations of the Second Amendment right articulated in *Heller*. Part II describes the standards employed by the various courts of appeals in evaluating Second Amendment claims. Part III explains why more thorough consideration of potentially

J., concurring) (lamenting the fact that *Heller*'s dicta "forecloses . . . a more sophisticated interpretation of § 922(g)(1)'s scope"). As discussed in Parts III.B and III.C *infra*, the circuit courts take diverging approaches to examining challenges to § 922(g)(1).

²⁰ See *infra* Part I.A.2.

²¹ See *infra* Part II.C.

²² See *McCane*, 573 F.3d at 1050 (Tymkovich, J., concurring) (finding that *Heller*'s dicta "short-circuits at least some of the analysis and refinement that would otherwise take place in the lower courts").

meritorious challenges to § 922(g)(1) is necessary. Finally, Part IV explains why *Heller* and the historical and means-ends justifications currently relied on by some courts do not totally foreclose the possibility of a successful challenge to § 922(g)(1).

I. RECOGNITION OF AN INDIVIDUAL RIGHT AND ITS LIMITATIONS

In *Heller* the Supreme Court settled the debate over whether the Second Amendment secures an individual or collective right against the federal government in favor of the former view.²³ In *McDonald* the Court then held that the right to bear arms is also applicable against the states.²⁴ This Part describes the nature and extent of that right, as well as the ways in which the Court carefully limited its holdings in both opinions.

A. *Heller: A Mixture of Clarification and Uncertainty*

1. The Right Recognized

As noted, *Heller* recognizes that the Second Amendment protects an individual right to bear arms, as opposed to securing only a collective right.²⁵ At issue in *Heller* were several related District of Columbia laws that effectively prohibited the possession of handguns.²⁶ Specifically, the laws criminalized the carrying of an unregistered handgun while simultaneously prohibiting the registration of handguns. The laws also required any lawfully owned firearms to be unloaded and disassembled or under trigger lock unless located in a place of business or being utilized for lawful recreation.²⁷ Ultimately, the Court found these laws violated the Second Amendment, stating: “Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”²⁸

Justice Scalia’s majority opinion extensively set forth, discussed, and defended the historical support for the individual-right interpretation. Additionally, the opinion explored the historical sources in order to define partially the contours of the right to bear arms. First, the Court defined the phrase “keep and bear arms” to “guarantee the individual right to possess and carry weapons in case of confrontation.”²⁹ Next, in discussing the founders’

²³ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

²⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

²⁵ The collective right view interprets the Second Amendment as securing only the right of the states to maintain well-regulated militias in the event that resistance to the federal government becomes necessary, while securing no rights to individuals. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 488-90 (1995).

²⁶ *Heller*, 554 U.S. at 574.

²⁷ *Id.* at 574-75.

²⁸ *Id.* at 629, 635.

²⁹ *Id.* at 592.

reasons for securing the right to bear arms in the Constitution, the Court stated that “preserving the militia was [not] the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”³⁰ Similarly, in rejecting Justice Breyer’s assertion that self-defense is only a “subsidiary interest” of the right to bear arms,³¹ the Court stated that self-defense “was the *central component* of the right itself.”³²

The majority discussed the importance of self-defense to the right at numerous other points in its historical analysis. The opinion clearly viewed much of the Second Amendment’s guarantees as tied to individuals’ need to defend themselves. The full scope of the right, however, is not entirely clear because the *Heller* opinion only addressed the facts of that particular case and did not purport to define every facet of the right to bear arms.³³ The majority further discussed the importance of the fact that the District’s prohibitions extended to the home, “where the need for defense of self, family, and property is most acute.”³⁴ This language, combined with some of the limitations the *Heller* Court endorsed, leaves unclear the extent to which the right is applicable beyond the home.³⁵ After marshaling historical sources in its favor, the *Heller* majority found that because the laws banned the possession and use of handguns, “the quintessential self-defense weapon,”³⁶ and “[made] it impossible for citizens to use them for the core lawful purpose of self-defense” the laws were unconstitutional.³⁷

2. The Limitations Endorsed

In addition to providing the first articulation of what the Second Amendment protects, Justice Scalia’s opinion also deliberately endorsed certain existing limitations on the right to bear arms, which generated a large

³⁰ *Id.* at 599. Due to the nature of the case, the rest of the Court’s opinion focused almost exclusively on the centrality of self-defense to the Second Amendment right. The right to use firearms for the purpose of hunting was not explored.

³¹ *Id.* at 681-82 (Breyer, J., dissenting) (“[O]ne objective (but . . . not the *primary* objective) of . . . the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense.”).

³² *Id.* at 599 (majority opinion).

³³ *Id.* at 635 (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

³⁴ *Id.* at 628.

³⁵ The actual scope of the holding in *Heller* “can be effectively stated as being that . . . the Second Amendment confers on an individual the right to possess a usable handgun in the home unconnected to militia service.” Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 615 (2009). As such, development of the extent to which the right extends beyond the home is left to later decisions. *See id.*

³⁶ *Heller*, 554 U.S. at 629.

³⁷ *Id.* at 630.

volume of scholarly debate and criticism.³⁸ The Court's endorsement of these limitations has serious implications for any person seeking to challenge firearm regulations under the Second Amendment and, particularly for purposes of this Note, any felon seeking to challenge § 922(g)(1).³⁹ This Part will set forth these limitations and the *Heller* Court's discussion of them.

The *Heller* Court found that, like all rights, the Second Amendment right "is not unlimited" and does not include the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."⁴⁰ Perhaps least controversially among its holdings, the Court recognized that the Second Amendment does not protect the right to carry any type of firearm a person wishes.⁴¹ The Court also indicated that laws regulating or barring the concealed carrying of firearms are constitutional.⁴² Of far more importance to this Note, the majority included the following language in its opinion:

³⁸ See, e.g., Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 419-20 (2009) (arguing that the reasoning behind the articulated lawful regulations lacks explanation and was merely a compromise to secure a fifth vote); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 284 (2009) (arguing that the Court's statement that there would be time to explore the historical justifications for the excepted limitations "is not reassuring at all" and that "[e]ven if *Heller* itself sought to be simple, it has simply opened the door"); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1568 (2009) ("It is hard to square the right to have a gun for self-defense with the exceptions recognized by the *Heller* majority. Why don't felons have the same right of self-defense as everyone else?").

³⁹ For discussion of how some of the federal courts of appeals have relied on the Supreme Court's approval to cursorily hold that all felons are incapable of successfully challenging § 922(g)(1), see *infra* Part II.C.

⁴⁰ *Heller*, 554 U.S. at 626.

⁴¹ *Id.* at 625, 627 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."). This is not to say that this limitation will be free from future problems of interpretation. Professor Eugene Volokh points out a number of interpretive problems this limitation may encounter. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1479-81 (2009). Limitations on highly dangerous weapons, however, appear far more defensible under some form of means-ends scrutiny than does an absolute ban on possession of firearms for self-defense by all nonviolent felons.

⁴² *Heller*, 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."). *Heller* was not terribly clear on this matter, however, as other language in the opinion indicates the right extends beyond the home. See *infra* note 155 and accompanying text. What this means for concealed-carry prohibitions is subject to dispute. A panel of the Seventh Circuit struck down Illinois' concealed-carry ban as a violation of the Second Amendment, with the majority and dissenting opinions sparring over these issues. See generally *Moore v. Madigan*, Nos. 12-1788, 12-1269, 2012 WL 6156062 (7th Cir. Dec. 11, 2012).

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the [] sale of arms.⁴³

The Court went to even greater lengths to head off a wave of challenges to gun control laws by noting that the list of “presumptively lawful” regulations was merely illustrative.⁴⁴

In restating the recognized right, the majority emphasized that “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding*, responsible citizens to use arms in defense of hearth and home.”⁴⁵ The impact of this language may be that different levels of scrutiny apply depending on whether the citizens involved are law-abiding.⁴⁶ Finally, in responding to Justice Breyer’s criticism that the majority failed to provide “extensive historical justification” for the permissible regulations,⁴⁷ Justice Scalia wrote, “there will be time enough to expound upon the historical justification for the exceptions we have mentioned if and when those exceptions come before us.”⁴⁸

The preceding language marks the extent of the majority’s discussion of limitations on the right secured by the Second Amendment. The extent to which the Court’s acceptance of these limitations should preclude challenges to § 922(g)(1) by nonviolent felons will be explored in Part IV.A. For now, it is instructive to make a few key observations regarding *Heller*’s cautionary language. First, the endorsement may well have been inserted merely to secure a fifth vote, regardless of the consequences for the rest of the opinion.⁴⁹ While such an observation, if true, has little bearing on the force that lower courts

⁴³ *Heller*, 554 U.S. at 626-27.

⁴⁴ *Id.* at 627 n.26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

⁴⁵ *Id.* at 635 (emphasis added).

⁴⁶ *Cf. Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (explaining that the rigor of judicial review depends “on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right”).

⁴⁷ *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (“I am similarly puzzled by the majority’s list . . . of provisions that in its view would survive Second Amendment scrutiny. . . . Why these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues.”). Justice Scalia articulates Justice Breyer’s criticism as a lack of “extensive” historical analysis. *Id.* at 635 (majority opinion). Given the sudden insertion of the exceptions near the end of the opinion and the actual language used by Justice Breyer, however, a more fair articulation might be the failure to provide *any* historical justification.

⁴⁸ *Id.* at 635.

⁴⁹ *See* Tushnet, *supra* note 38, at 420 (asserting that the language was “clearly tacked on to the opinion to secure a fifth vote (presumably Justice Anthony Kennedy’s)”).

will give to this language, when combined with the lack of historical support and the other language the Court uses, it does suggest *Heller* will not be the last word on the legality of the enumerated regulations. Whatever the reason for the inclusion of the limitations, examination of the opinion reveals that no justification for them was advanced other than the fact that they are “longstanding.” In the case of laws regulating possession of firearms by felons (and particularly nonviolent felons), however, even that justification is unsatisfying.⁵⁰ Second, one should note that the Court referred to these regulations as “presumptively” lawful and explained that historical justifications for them will be advanced when the issue arises. The import of these observations will be explained in greater detail.⁵¹

3. The Confusing Standard of Scrutiny (or Lack Thereof)

Justice Breyer’s dissent, in addition to criticizing the majority for not providing convincing justifications for the presumptively lawful regulations, also disapproved of the confusing state in which the majority left the issue of the applicable standard of scrutiny.⁵² In evaluating the District’s laws, the *Heller* Court held that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, [these regulations] would fail constitutional muster.”⁵³ This statement regarding the standard of scrutiny for gun control regulations provides little guidance to lower courts. While this is not all the Court had to say on the matter, the additional discussion regarding the proper level of scrutiny was not particularly illuminating.

First, the majority agreed with Justice Breyer that the regulations would have been upheld under rational basis, but rejected that standard as inappropriate for an enumerated right.⁵⁴ Second, the majority rejected the “interest-balancing” standard that Justice Breyer proposed for Second Amendment claims.⁵⁵ The majority found that “[t]he very enumeration of the

⁵⁰ See C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698-99 (2009) (pointing out that laws barring firearm possession by felons were limited to those convicted of violent crimes until 1961, a relatively short amount of time to consider the law longstanding); discussion *infra* Part IV.B.

⁵¹ See discussion *infra* Part IV.A.

⁵² *Heller*, 554 U.S. at 689, 719-22 (Breyer, J., dissenting) (arguing that the majority was wrong in asserting the District’s regulations would fail under any standard of scrutiny and pointing out numerous problems created by the majority opinion).

⁵³ *Id.* at 628-29 (majority opinion).

⁵⁴ *Id.* at 628 n.27 (“[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. . . . Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”).

⁵⁵ *Id.* at 634. Justice Breyer observed that the realm of gun control regulation is an inappropriate area for the Court to presume either constitutionality or unconstitutionality,

right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”⁵⁶ Strict scrutiny is probably also off the table, however, for several reasons. As Justice Breyer pointed out, “strict scrutiny . . . will *in practice* turn into an interest-balancing inquiry.”⁵⁷ Additionally, the limitations the majority endorsed would be difficult to reconcile with the application of strict scrutiny.⁵⁸ Finally, gun control regulations would have serious difficulties meeting strict scrutiny’s requirement that a law be narrowly tailored to achieve its ends.⁵⁹

Thus, the opinion explicitly rejected both rational basis and “interest-balancing,” and appeared to implicitly reject strict scrutiny. This might leave several other possibilities including intermediate scrutiny or the undue burden test.⁶⁰ Ultimately, the applicable standard of scrutiny, assuming the Court intends there to be a single standard for all Second Amendment claims, remains unclear after *Heller*. The goal here is not to attempt to resolve this issue but to merely note its existence, as whatever standard on which the Court finally settles will affect the ability of individuals to challenge § 922(g)(1). As discussed in Part II.A, the courts of appeals have applied varying forms of analysis to § 922(g)(1) and other gun control regulations.

B. McDonald: *Extension and Affirmation*

1. Application to the States

Two years after deciding *Heller*, the Supreme Court had the opportunity to return to the Second Amendment and consider its applicability to the states. In *McDonald*, several Chicago residents and one of the city’s suburbs brought challenges to gun control laws that, like the laws at issue in *Heller*, effectively banned the possession of handguns.⁶¹ Reaching a fairly unsurprising result,⁶²

but should instead ask “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *Id.* at 689-90 (Breyer, J., dissenting).

⁵⁶ *Id.* at 634 (majority opinion).

⁵⁷ *Id.* at 689 (Breyer, J., dissenting) (suggesting that the only question would be whether Second Amendment interests were impermissibly burdened in the process of advancing the government’s compelling interest).

⁵⁸ 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, 1379 (2009) (concluding that it is “doctrinally impossible” for the application of strict scrutiny to gun control laws to coexist with the *Heller* exceptions).

⁵⁹ Tushnet, *supra* note 38, at 431 (arguing that gun control laws generally achieve small reductions in crime and may actually promote crime, thereby offsetting those reductions to some degree); Volokh, *supra* note 41, at 1465-67 (describing the difficulties in producing the empirical evidence necessary to show narrow tailoring).

⁶⁰ As Professor Larson points out, Justice Scalia is quite unlikely to endorse the undue burden test as the appropriate standard. *See* Larson, *supra* note 58, at 1380.

⁶¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

the Court held that the Second Amendment applies to the states.⁶³ The petitioners in *McDonald* advanced, as their primary argument, the theory that the Second Amendment applies to the states via the Privileges and Immunities Clause of the Fourteenth Amendment. As a secondary argument, the petitioners argued that the Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment.⁶⁴ Declining to revisit the holding of the *Slaughter-House Cases*,⁶⁵ Justice Alito's plurality opinion instead proceeded to consider incorporation under the Due Process Clause.⁶⁶ After describing the Court's doctrine of selective incorporation and extensively surveying the historical evidence of the status of the Second Amendment right at the time of Reconstruction, the plurality found that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."⁶⁷ Finding no other reason to refrain from incorporating the right against the states, the plurality held that the right to bear arms is incorporated via the Due Process Clause.⁶⁸

2. Reaffirmation of the *Heller* Limitations

In incorporating the Second Amendment against the states, the *McDonald* Court took the opportunity to reiterate the presumptively lawful regulations articulated in *Heller*. One of the arguments advanced by Chicago and Oak Park was that the Court should refrain from incorporating the Second Amendment against the states in order to respect the principle of federalism and allow state experimentation with gun control laws to continue.⁶⁹ This argument is premised on the idea that different localities have different conditions, problems, and views on gun control.⁷⁰ As such, the respondents argued, the Court should allow localities to "enact any gun-control laws that they deem to

⁶² Professors Denning and Reynolds describe *McDonald* as an overdetermined case, meaning that several factors contributed to the result, "any one of which could have been sufficient to produce the result." Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 277 (2011). They argue that the decision in *Heller*, the Court's selective incorporation doctrine, the history of Reconstruction and adoption of the Fourteenth Amendment, and popular opinion regarding the inappropriateness of laws such as Chicago's all contributed to the result. *Id.* at 277-85.

⁶³ *McDonald*, 130 S. Ct. at 3050.

⁶⁴ *Id.* at 3028.

⁶⁵ 83 U.S. 36, 74 (1872).

⁶⁶ *McDonald*, 130 S. Ct. at 3030-31.

⁶⁷ *Id.* at 3042.

⁶⁸ *Id.* at 3050. Justice Thomas's concurring opinion provided the fifth vote. Justice Thomas, however, concluded that the right applies to the states via the Privileges and Immunities Clause. *Id.* at 3088 (Thomas, J., concurring).

⁶⁹ *Id.* at 3045-46 (plurality opinion)

⁷⁰ *Id.* at 3046.

be reasonable.”⁷¹ In rejecting this argument, the Court once again made clear that the Second Amendment is not subject to some form of interest balancing as the respondents and Justice Breyer’s dissent in *Heller* advocated.⁷²

The respondents relied on a variety of previously upheld firearm regulations in an attempt to convince the Court that the Fourteenth Amendment does not restrict the authority of states and localities to regulate firearms. The Court, however, had no trouble dismissing these arguments. Specifically, the Court found that none of the laws upheld were as draconian as the laws at issue in *McDonald* and *Heller*.⁷³ At this point, the Court reiterated the presumptively lawful forms of regulation that the Court endorsed in *Heller*.⁷⁴ Thus, the Court declared, “[d]espite [] respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”⁷⁵

II. COURTS OF APPEALS’ TREATMENT OF FIREARM REGULATIONS

As was to be expected, the federal courts were hit with a deluge of suits challenging numerous gun control regulations in the wake of the *Heller* decision.⁷⁶ Perhaps unsurprisingly, given the narrow scope of the opinion and the limitations it endorsed, most of these regulations have been upheld.⁷⁷ Despite the Supreme Court’s cautious language regarding the presumptive lawfulness of regulations on felony possession and other bans, the federal courts have had numerous occasions to address the various federal gun control regulations contained in 18 U.S.C. § 922. The courts have either found that the predicate offenses of the individuals charged under those provisions justify the laws’ application or that the Second Amendment poses no challenge to the laws’ application whatsoever.

This Part describes how the federal courts of appeals are dealing with these challenges in more detail. The first Section explores the varying methods of analysis the courts utilize in evaluating gun control regulations generally. The second Section describes the more specific analysis the Third, Fourth, and Seventh Circuits apply to challenges to § 922(g)(1). The final Section describes the approach the Ninth, Tenth, and Eleventh Circuits take in

⁷¹ *Id.*

⁷² *Id.* at 3047.

⁷³ *Id.*

⁷⁴ *Id.* (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))).

⁷⁵ *Id.*

⁷⁶ See Anna Stolley Persky, *An Unsteady Finger on Gun Control Laws*, 96 A.B.A. J. 14, 14 (2010) (stating that by late 2010, at least 260 lawsuits challenging various gun control regulations had been filed).

⁷⁷ *Id.*

analyzing challenges to § 922(g)(1), including the reliance of those courts on *Heller*'s cautionary language regarding presumptively lawful regulations.

A. *The Lower Courts Grasp for an Appropriate Standard of Scrutiny*

As previously described, *Heller* recognizes an individual right to keep and bear arms but provides little in the way of guidance to lower courts as to how to scrutinize laws restricting that right.⁷⁸ Thus, the lower courts have had to determine the appropriate analysis themselves, guided by the Supreme Court's approach in *Heller*. The courts have not taken a uniform approach. One judge stated: "*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations."⁷⁹ Because the courts' general modes of analysis often affect their consideration of challenges to § 922(g)(1), this Note will explore these approaches briefly before more specifically examining the treatment of § 922(g)(1).

One approach a court might take in evaluating challenges to gun control regulations, particularly the provisions of § 922(g), is simply to analogize to *Heller*'s list of presumptively lawful regulations. Under this approach, if the challenged regulation is similar in rationale and application to those regulations, it is constitutional. This is the approach the Eleventh Circuit took in *United States v. White*.⁸⁰ In *White*, the court upheld a defendant's conviction under 18 U.S.C. § 922(g)(9), which prohibits individuals who have been convicted of a misdemeanor crime of violence from possessing firearms.⁸¹ In evaluating the defendant's challenge to the law, the court announced that it was "limit[ing its] holding to deciding whether § 922(g)(9) may be properly included as a presumptively lawful longstanding prohibition[] on the possession of firearms."⁸² The court did not attempt to examine *why* the regulations endorsed in *Heller* are longstanding or otherwise presumptively lawful. In concluding that § 922(g)(9) is presumptively lawful, and therefore constitutional, the court compared the law to § 922(g)(1).⁸³ The court found that unlike § 922(g)(1), which is presumptively lawful, § 922(g)(9) requires that the individual have acted violently and was enacted to address "the thorny problem of domestic violence."⁸⁴ As such, the Eleventh Circuit found "no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt."⁸⁵

A panel of the Ninth Circuit articulated a substantial burden test in evaluating whether a particular regulation infringed the petitioners' Second

⁷⁸ See *supra* Part I.A.3.

⁷⁹ *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring).

⁸⁰ 593 F.3d 1199, 1205 (11th Cir. 2010).

⁸¹ *Id.* at 1200.

⁸² *Id.* at 1205 (second alteration in original) (internal quotation marks omitted).

⁸³ *Id.* at 1205-06.

⁸⁴ *Id.* at 1206.

⁸⁵ *Id.*

Amendment rights in *Nordyke v. King*.⁸⁶ *Nordyke* involved a challenge to a county ordinance “making it a misdemeanor to bring onto or to possess a firearm or ammunition on county property.”⁸⁷ Under this test, the court held that “only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny” but refrained from deciding what *type* of heightened scrutiny would apply to such laws.⁸⁸ The panel then relied on First Amendment principles to find that where the “government restricts the distribution of a constitutionally protected good or service, courts typically ask whether the restriction leaves open sufficient alternative avenues for obtaining the good or service.”⁸⁹ Thus, the question becomes whether the ordinance leaves “*law-abiding citizens* with reasonable alternative means for obtaining firearms.”⁹⁰ In applying this standard, the court explained that a law does not substantially burden a right if the law simply makes exercising the right more expensive or difficult.⁹¹ A law is also unlikely to substantially burden a right by merely refusing to facilitate the exercise of the right with government funds or property.⁹² Ultimately, the panel concluded that the plaintiffs’ complaint did not allege facts sufficient to survive a motion to dismiss because it did not allege that the ordinance made acquiring firearms materially more difficult or that a shortage of places to purchase firearms existed.⁹³

The panel’s decision was subsequently vacated, and the county, at oral arguments before the en banc court, conceded that the plaintiffs could hold gun shows on county property so long as they complied with certain regulations, including the securing of firearms to prevent unauthorized use.⁹⁴ The court’s opinion left considerable uncertainty as to the scope of the analysis being applied. Relying in part on a portion of the *Heller* safe-harbor language concerning regulations on the commercial sale of firearms and in part on First Amendment principles, the court concluded that the plaintiffs could not state a viable Second Amendment claim because the ordinance regulated the sale of

⁸⁶ *Nordyke v. King*, 644 F.3d 776, 784, 788 (9th Cir. 2011) (“[W]e must determine whether the [complaint] alleged sufficient facts to suggest plausibly that the Ordinance substantially burdens the Nordykes’ right to keep and to bear arms.”).

⁸⁷ *Id.* at 780. The apparent goal of the county supervisor in sponsoring the ordinance was to prohibit the holding of gun shows on county property. *See id.* at 780-81.

⁸⁸ *Id.* at 786 & n.9.

⁸⁹ *Id.* at 787.

⁹⁰ *Id.* (emphasis added). As discussed in Part II.C *infra*, the emphasized language is important in reconciling the panel’s approach in *Nordyke* with the Ninth Circuit’s approach in cases evaluating the constitutionality of § 922(g)(1).

⁹¹ *Id.* at 787-88 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007); *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978)).

⁹² *Id.* at 788 (citing *Harris v. McRae*, 448 U.S. 297, 313 (1980)).

⁹³ *Id.*

⁹⁴ *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc).

firearms “only minimally, and only on County property.”⁹⁵ Two separate concurrences bemoaned the majority’s failure to affirmatively adopt a particular standard. Judge O’Scannlain stated that he would adopt the substantial burden test articulated in the panel opinion.⁹⁶ Judge Ikuta was less clear, stating that the proper standard was the intermediate scrutiny standard utilized by the Third and Fourth Circuits⁹⁷ and the substantial burden standard articulated in the panel opinion, without appearing to draw a distinction between the two.⁹⁸ In any event, four judges on the Ninth Circuit apparently continue to endorse the substantial burden standard.

Finally, a number of circuits apply some variation of a two-step inquiry. This approach was first articulated in the now-vacated decision in *United States v. Skoien*,⁹⁹ decided by a panel of the Seventh Circuit. Aside from the Seventh Circuit, some form of this inquiry has been applied by the Third, Fourth, and Tenth Circuits. The Seventh Circuit subsequently discussed the application of this test. The court explained that the first inquiry is one of “scope,” which requires determining whether the conduct was historically understood to be within the rights the Second Amendment protects.¹⁰⁰ If the conduct is found to be outside the historical understanding of the Second Amendment’s protection, no further analysis is necessary. If the government cannot show that the conduct is unprotected, however, the court must then scrutinize the strength of the government’s justification for infringing on the right.¹⁰¹ In conducting this inquiry, the Seventh Circuit found that the rigor of this inquiry “depend[s] on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.”¹⁰²

In *United States v. Marzzarella*¹⁰³ the Third Circuit also concluded that this form of analysis is required in Second Amendment challenges.¹⁰⁴ In doing so, the court confronted the question of *why Heller* labeled certain limitations as presumptively lawful. The court recognized that “presumptively lawful” might be interpreted in different ways but concluded that the better reading is that the

⁹⁵ *Id.* at 1044-45.

⁹⁶ *Id.* at 1045 (O’Scannlain, J., concurring).

⁹⁷ This standard is discussed in further detail *infra* Part II.B.

⁹⁸ *Nordyke*, 681 F.3d at 1046 (Ikuta, J., concurring).

⁹⁹ 587 F.3d 803, 809 (7th Cir. 2010).

¹⁰⁰ *Ezell v. City of Chicago*, 651 F.3d 684, 701-02 (7th Cir. 2011). The court also pointed out that *Heller* suggested, and *McDonald* confirmed, that some conduct falls outside Second Amendment protection as a matter of scope. *Id.* at 702.

¹⁰¹ *Id.* at 703.

¹⁰² *Id.* The court explained that both *Heller* and *McDonald* indicate that laws similar to the ones at issue in those cases are “categorically unconstitutional.” *Id.* In cases involving less severe restrictions, however, the court must determine the proper level of heightened scrutiny to apply. *Id.*

¹⁰³ 614 F.3d 85 (3d Cir. 2010).

¹⁰⁴ *Id.* at 89.

enumerated limitations fall outside the scope of the Second Amendment.¹⁰⁵ Applying this standard, the court found that 18 U.S.C. § 922(k)'s restriction on the possession of firearms with obliterated serial numbers might not fall outside the scope of the Amendment but is sustainable under intermediate scrutiny.¹⁰⁶ The Fourth Circuit's articulation of this form of inquiry in *United States v. Chester*¹⁰⁷ is similar to that of the Seventh and Third Circuits. Finally, the Tenth Circuit also adopted this mode of inquiry in *United States v. Reese*.¹⁰⁸ Interestingly, in applying the first prong of the test, the *Reese* court stated: "[T]here is little doubt that the challenged law, § 922(g)(8), imposes a burden on conduct, i.e., Reese's possession of otherwise legal firearms, that generally falls within the scope of the right guaranteed by the Second Amendment."¹⁰⁹ This same reasoning would also seemingly apply to nonviolent felons unless they fall wholly outside the scope of the Second Amendment due to their status as felons.¹¹⁰

Thus, the federal courts of appeals apply several different standards of review to gun regulations.¹¹¹ The next two Sections look more specifically at how the courts handle challenges to § 922(g)(1), which falls squarely within

¹⁰⁵ *Id.* at 91 ("On the one hand, this language could be read to suggest the identified restrictions . . . regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions . . . pass muster under any standard of scrutiny. Both readings are reasonable interpretations . . .").

¹⁰⁶ *Id.* at 97.

¹⁰⁷ 628 F.3d 673, 680 (4th Cir. 2010).

¹⁰⁸ 627 F.3d 792, 800-01 (10th Cir. 2010).

¹⁰⁹ *Id.* at 801. Section 922(g)(8) prohibits firearm possession by individuals subject to certain court orders that prohibit the harassment of an intimate partner or the partner's child. 18 U.S.C. § 922(g)(8) (2006).

¹¹⁰ Yet, as is discussed *infra* Part II.C, the Tenth Circuit has simply relied on *Heller*'s presumptively lawful language to preclude challenges to § 922(g)(1) by all felons.

¹¹¹ The First Circuit's cases do not fall neatly into one category or another. That circuit's decisions are, however, arguably consistent with the two-step inquiry. In *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009), the court found that 18 U.S.C. § 922(x)(2)(A), which prohibits juveniles from possessing handguns, is constitutional under the Second Amendment. *Id.* at 16. Although the court discussed that the statute is narrowly drawn and might survive strict scrutiny, the court relied heavily on the understanding, at the time of the founding, that juveniles may be prohibited from possessing firearms. *Id.* at 15-16. The First Circuit subsequently upheld § 922(g)(9) against a Second Amendment challenge because the law satisfied intermediate scrutiny. *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011). In doing so, the court noted that "historical attitudes towards and regulation of firearms are relevant to a law's constitutionality," but a law may be found constitutional without "reference to its historical provenance." *Id.* at 24 n.15. These cases may be consistent with the two-step inquiry, with the court deciding *Rene E.* under the first step and *Booker* under the second step. More recently, a federal district court for the District of Massachusetts applied this framework in concluding that Massachusetts' citizenship requirement for firearm possession violated the Second Amendment as that law applied to lawful permanent resident aliens. *Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass. 2012).

Heller's list of presumptively lawful regulations. Further, whether the courts leave open the possibility of an appropriate as-applied challenge or foreclose such a possibility is considered. One should keep in mind that all of these cases have been brought by defendants with little hope of actually lodging a successful challenge to the law.

B. *Preserving the Possibility of As-Applied Challenges*

As explained, the Third, Fourth, and Seventh Circuits all adopt some form of the two-step inquiry in resolving Second Amendment challenges to gun control regulations. Further, each has had the opportunity to consider challenges to § 922(g)(1). Given the particular individuals bringing these challenges, the courts have unsurprisingly upheld the constitutionality of the law in both facial and as-applied challenges. More interesting is the care these courts have taken in distinguishing between violent and nonviolent felons.

In *United States v. Williams*,¹¹² the Seventh Circuit heard an as-applied challenge brought by a defendant convicted under § 922(g)(1).¹¹³ Police discovered Williams' possession of a firearm when executing a search warrant after Williams sold crack cocaine and marijuana to a confidential informant.¹¹⁴ Williams' predicate offense for conviction under the law was an "egregiously violent robbery," which left the victim in need of sixty-five stitches.¹¹⁵ Based on the en banc *Skoien* decision,¹¹⁶ the court felt no need to determine whether felons fell outside the scope of the Second Amendment.¹¹⁷ Further, the court stated that scholarly writings discussing whether felons were historically excluded from exercising Second Amendment rights were "inconclusive at best" and thus moved on to the second step of the inquiry.¹¹⁸ The court then determined that, although § 922(g)(1) is "presumptively lawful," the government is still required to satisfy some "strong showing" that the law is constitutional.¹¹⁹ Importantly, the court read "presumptively lawful" to leave open the possibility of a successful as-applied challenge.¹²⁰ While finding that the law was constitutional as applied to Williams, the court recognized "that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent."¹²¹

¹¹² 616 F.3d 685 (7th Cir. 2010).

¹¹³ *Id.* at 687.

¹¹⁴ *Id.*

¹¹⁵ Brief for the United States at 9, 31, *Williams*, 616 F.3d 685 (No. 09-3174).

¹¹⁶ *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

¹¹⁷ *Williams*, 616 F.3d at 692.

¹¹⁸ *Id.* (quoting *Skoien*, 614 F.3d at 650 (Sykes, J., dissenting)).

¹¹⁹ *Id.*

¹²⁰ *Id.* ("*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban *could be unconstitutional* in the face of an as-applied challenge." (emphasis added)).

¹²¹ *Id.* at 693.

The Third Circuit considered facial and as-applied challenges to § 922(g)(1) brought by a defendant whose predicate offenses included possession of cocaine with an intent to distribute and receipt of a stolen firearm.¹²² Like the Seventh Circuit, the Third Circuit read “presumptively lawful” as implying that a rebuttal of the law’s constitutionality is possible. In line with the Third Circuit’s earlier determination that the regulations were presumptively lawful because such conduct fell outside the scope of the Second Amendment,¹²³ the court evaluated Barton’s as-applied challenge against historical justifications for barring felon possession.¹²⁴ The court offered several scenarios in which a felon might raise a successful as-applied challenge. For example, the court suggested that “a felon convicted of a minor, non-violent crime” or “a felon whose crime of conviction is decades-old” might prevail in an as-applied challenge.¹²⁵

Finally, the Fourth Circuit first considered a challenge to § 922(g)(1) in an unpublished opinion, *United States v. Pruess*.¹²⁶ Here, the defendant’s predicate convictions included illegally dealing in firearms and explosives and unlawful transport and possession of machine guns.¹²⁷ The Fourth Circuit did not explicitly indicate that some felons might raise a successful as-applied challenge. Rather, the court took issue with the district court’s dismissal of the challenge based solely on *Heller*’s “presumptively lawful” language.¹²⁸ Thus, the court remanded with instructions to apply the two-step inquiry adopted in *Chester*.¹²⁹

The Fourth Circuit considered this issue more fully in *United States v. Moore*.¹³⁰ Moore’s predicate offenses included numerous convictions for selling cocaine, robbery, and assault of a government official with a deadly weapon.¹³¹ The court first found that *Heller* itself indicates facial challenges to the law must fail.¹³² The court recognized, however, that a defendant might

¹²² *United States v. Barton*, 633 F.3d 168, 170 (3d Cir. 2011).

¹²³ *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

¹²⁴ *Barton*, 633 F.3d at 173. The court went on to consider the fact that the first federal law barring felon possession was limited to violent felons and was not expanded to cover nonviolent felons until 1961. *Id.* After considering other founding-era sources, the court stated: “To raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections.” *Id.* at 174.

¹²⁵ *Id.* at 174.

¹²⁶ 416 F. App’x 274 (4th Cir. 2011).

¹²⁷ *Id.* at 274-75.

¹²⁸ *Id.* at 275.

¹²⁹ *Id.*

¹³⁰ 666 F.3d 313 (4th Cir. 2012).

¹³¹ *Id.* at 315.

¹³² *Id.* at 318 (“To the extent that Moore, or any similarly situated defendant, raises a facial challenge to the validity of § 922(g)(1), the clear declaration in *Heller* that such felon in possession laws are a presumptively lawful regulatory measure resolves that challenge

mount a successful as-applied challenge. The court indicated that a defendant seeking to attack the constitutionality of the law's application would have a heavy burden to carry. It stated that a defendant "must show that his factual circumstances remove his challenge from the realm of ordinary challenges."¹³³ The court focused on the *Heller* Court's use of the phrase "law-abiding, responsible citizens."¹³⁴ Given the defendant's violent criminal history, the court concluded that "[h]owever the Supreme Court may come to define a 'law-abiding responsible citizen' for Second Amendment purposes, Moore surely would not fall within that group."¹³⁵ The Fourth Circuit reaffirmed this conclusion in *United States v. Smoot*¹³⁶ under similar factual circumstances. Yet it remains unclear what type of showing the Fourth Circuit would require of a defendant seeking to challenge § 922(g)(1)'s application.¹³⁷

C. *Premature Foreclosure of As-Applied Challenges*

In contrast to those courts that leave open the question of whether a successful as-applied challenge to § 922(g)(1) might be raised (either explicitly or by inference), the Ninth, Tenth, and Eleventh Circuits either expressly or impliedly foreclose the possibility. In *United States v. Vongxay*,¹³⁸ the Ninth Circuit considered the as-applied challenge of a defendant whose predicate offenses included two burglary convictions and a conviction for drug possession.¹³⁹ The court rejected Vongxay's assertion that *Heller's* "presumptively lawful" language is mere dicta and relied on that language to conclude that "felons are categorically different from individuals who have a fundamental right to bear arms."¹⁴⁰ Significantly, all of Vongxay's predicate offenses were nonviolent. Despite this, one of the defendant's predicate

fairly quickly.")

¹³³ *Id.* at 319.

¹³⁴ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹³⁵ *Moore*, 666 F.3d at 319. The court further stated: "We do not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to § 922(g)(1) could succeed. But while we acknowledge such a showing theoretically could be made, *Moore* is not remotely close." *Id.* at 320.

¹³⁶ 690 F.3d 215 (4th Cir. 2012).

¹³⁷ The *Smoot* court suggested, however, that the inquiry would focus on the defendant's criminal history and the type of crimes for which he or she was convicted. *Id.* at 221 & n.8.

¹³⁸ 594 F.3d 1111 (9th Cir. 2010).

¹³⁹ *Id.* at 1114.

¹⁴⁰ *Id.* at 1115. The court relied on *Heller's* focus on law-abiding citizens in reaching this conclusion. *Id.* This language is likely the key to distinguishing this case from other scenarios in which at least some of the judges on the Ninth Circuit would presumably apply the substantial burden test articulated in *Nordyke*. If felons were not categorically excluded from exercising Second Amendment rights, the *Nordyke* standard would ask whether the individuals' Second Amendment rights are substantially burdened, a standard potentially favorable to felons since § 922(g)(1) completely eliminates those rights, at least for some period of time.

convictions was for drug possession, and even a court not relying solely on *Heller*'s safe harbor would likely have reached the same conclusion.¹⁴¹ Yet this decision has important implications because it suggests that no felon can ever raise a successful as-applied challenge. In fact, the Ninth Circuit confirmed this reading. In *United States v. Duckett*,¹⁴² the Ninth Circuit dismissed another as-applied challenge by citing *Vongxay* without further discussion.¹⁴³

The Tenth Circuit reached essentially the same conclusion as the Ninth Circuit. In *United States v. McCane*,¹⁴⁴ the Tenth Circuit disposed of a defendant's challenge to § 922(g)(1) in one sentence simply by citing *Heller*'s warning that the decision did not cast doubt on longstanding prohibitions, including felony dispossession laws.¹⁴⁵ Like *Duckett*, this decision produced a concurring opinion lamenting the inability to further consider the constitutionality of the statute.¹⁴⁶

Finally, the Eleventh Circuit also reached the conclusion that felons, as a class, are barred from possessing firearms, without the need to consider the specifics of any given case. In *United States v. Rozier*,¹⁴⁷ the court considered the challenge of a defendant whose predicate offenses included several convictions for possession and delivery of cocaine and marijuana.¹⁴⁸ The court found that *Heller* conditioned the right to possess a firearm for self-defense on a person's not being "otherwise disqualified" and that the initial inquiry in any case is whether the person is qualified to possess a firearm.¹⁴⁹ As was the case in the Ninth and Tenth Circuit decisions, the court simply referenced *Heller*'s "presumptively lawful" language, adding that the language "suggests that statutes disqualifying felons from possessing a firearm *under any and all*

¹⁴¹ See *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009) (finding "no constitutional problem with separating guns from drugs").

¹⁴² 406 F. App'x 185 (9th Cir. 2010).

¹⁴³ *Id.* at 186. Judge Ikuta concurred in the opinion and expressed concern with the potential overbreadth of § 922(g)(1), but nonetheless felt herself bound by the court's decision in *Vongxay*. *Id.* (Ikuta, J., concurring) (indicating she would examine the challenge to the statute under intermediate scrutiny).

¹⁴⁴ 573 F.3d 1037 (10th Cir. 2009).

¹⁴⁵ *Id.* at 1047.

¹⁴⁶ *Id.* at 1047-50 (Tymkovich, J., concurring). In this case, Judge Tymkovich felt himself bound not by circuit precedent but rather by *Heller* itself. Like the concurring opinion in *Duckett* and the opinions of those courts that leave open the possibility of as-applied challenges, Judge Tymkovich found the historical justifications for a permanent restriction on nonviolent felons to be questionable. Ultimately, however, Judge Tymkovich concluded that there was no reason to consider the standard of scrutiny to be applied or to consider the government's interest. *Id.* at 1050.

¹⁴⁷ 598 F.3d 768 (11th Cir. 2010).

¹⁴⁸ *Id.* at 769 n.1.

¹⁴⁹ *Id.* at 770 (explaining that, in this case, "the most relevant modifier, as to the question of qualification, is 'felon'").

circumstances do not offend the Second Amendment.”¹⁵⁰ The court thus concluded that the defendant was precluded from possessing a firearm, regardless of the fact that the reason for possession was self-defense.¹⁵¹ Thus, three circuits have simply relied on the *Heller* safe harbor and, seemingly, foreclosed any future possibility for nonviolent felons to challenge their firearm dispossession.

III. WHY REASONED CONSIDERATION OF CHALLENGES TO SECTION 922(G)(1) IS NEEDED IN THE LOWER COURTS

There are a number of reasons why lower courts should engage in fully reasoned analysis of as-applied challenges to § 922(g)(1). This Part briefly presents three reasons lower courts should carefully analyze potentially meritorious challenges to the law (as well as any state analog). The next Part then discusses why the reasoning on which courts in some circuits currently rely to summarily dismiss such challenges is unsatisfactory and need not preclude the possibility of a successful challenge by certain felons.

A. *Impediment to Future Development of Second Amendment Jurisprudence*

First, § 922(g)(1) implicates what is now understood to be an enumerated and fundamental individual right to bear arms. Despite its inclusion in the Bill of Rights, the Second Amendment received fairly minimal treatment by the Supreme Court until quite recently. Both *Heller* and *McDonald* involved extremely draconian laws that effectively banned handgun ownership within city limits.¹⁵² As such, the full scope of the right to bear arms is necessarily left to future litigation.¹⁵³ The clearest conclusion that can be drawn from the Supreme Court cases is that there is a fundamental right, the core of which is the right of law-abiding citizens to keep handguns in their homes for use in self-defense.¹⁵⁴ Yet the Supreme Court indicated that there may be other sorts of regulations that will be forced to give way to the Second Amendment.¹⁵⁵

¹⁵⁰ *Id.* at 771 (emphasis added). The Eleventh Circuit subsequently repeated this strong language, albeit in an unpublished decision. *See* *United States v. Feaster*, 394 F. App’x 561, 565 (11th Cir. 2010).

¹⁵¹ *Id.*

¹⁵² *Supra* Part I.A.1, B.1.

¹⁵³ *See* George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of This New Right*, 40 RUTGERS L.J. 353, 406-16 (2009) (discussing several types of limitations on the right to bear arms which will be litigated in the wake of *Heller*).

¹⁵⁴ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”); *Racine*, *supra* note 35, at 615.

¹⁵⁵ The use of the phrase “whatever else [the Second Amendment] leaves to future evaluation” indicates that the right may be, to some degree, broader than the narrow right

More important, because § 922(g)(1) is based on a person's status, it is in effect at all times and places, including in a person's home for the purpose of self-defense. Thus, other than the fact that an individual is a felon, the law unquestionably infringes on the core protections of the right to bear arms¹⁵⁶ and, perhaps, on some of the protections left to future evaluation.

Because the sheer breadth of the law implicates both central components of the right to bear arms and potentially other, secondary protections, challenges to the law present an opportunity for lower courts to explore the contours of this new and underdeveloped area of law. Reliance on the *Heller* safe harbor by the lower courts, however, cuts short much of this opportunity. As such, lower courts should carefully evaluate as-applied challenges to § 922(g)(1) in order to facilitate development of Second Amendment jurisprudence rather than relying on *Heller*'s "presumptively lawful" language to dispose of all challenges regardless of the specific situation at issue. Even were the law to be ultimately upheld in its entirety, those courts foreclosing the possibility of a successful challenge at the outset prevent any reasoned consideration of the scope of the law from taking place. This result would not be objectionable if truly required by *Heller*, as the courts would have little choice in the matter. As will be discussed, however, a careful reading of *Heller* does not require this outcome.¹⁵⁷

B. *Conceivably Any Conviction Can Result in Forfeiture of Second Amendment Rights*

As several courts have already observed, § 922(g)(1) is incredibly broad and applies to numerous types of nonviolent offenders in addition to violent felons.¹⁵⁸ The law applies to a person "convicted in any court of, a crime

recognized in *Heller* itself. *Heller*, 554 U.S. at 635. Furthermore, the Court elsewhere described the operative clause of the Amendment as guaranteeing citizens the right to "possess and carry weapons in case of confrontation," and included restrictions on carrying weapons in schools and government buildings among those longstanding and presumptively lawful regulations. *Id.* at 592, 626-27 (emphasis added). The logical inference to draw from this is that the right to bear arms protects some activity outside that at issue in *Heller*. Indeed, there would be no need to mention place restrictions as passing constitutional muster if the Second Amendment provides no protection for possession outside the home. See Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 45 (2009); Racine, *supra* note 35, at 638-39 (discussing the implications of *Heller*'s language for a right outside the home).

¹⁵⁶ See Volokh, *supra* note 41, at 1496 (explaining that such restrictions are substantial, as opposed to relatively minor, burdens on the right to bear arms, even if ultimately justifiable).

¹⁵⁷ See *infra* Part IV.A.

¹⁵⁸ *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (recognizing the law may be subject to an overbreadth challenge because it disqualifies even nonviolent felons); cf. *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) ("[I]n covering only those with a

punishable by imprisonment for a term exceeding one year.”¹⁵⁹ Moreover, the law remains extremely broad, despite three exceptions to the possession ban by way of the definition of “crime punishable by imprisonment for a term exceeding one year” in § 921(a)(20). First, Congress specifically excluded federal and state offenses “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.”¹⁶⁰ This “business practices” exception has been interpreted narrowly to apply only to convictions that contain, as an element of the offense, an effect on competition or consumers.¹⁶¹ Thus, the focus is on the elements the government must prove rather than any incidental effects on commerce the charged conduct may have.¹⁶² Additionally, courts construe “other similar offenses” narrowly to mean other types of anti-competitive activity.¹⁶³ Thus, while there is a quite narrow exception for some classes of business practice offenses, the law applies to virtually any other nonviolent offense that may have little bearing on an individual’s future dangerousness.¹⁶⁴ It is interesting that the law excepts conduct that may have potentially massive effects on consumers and the economy but makes no provision for other nonviolent offenses.

Second, § 922(g)(1) excludes “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.”¹⁶⁵ This “exception” is illuminating. The regulation is not so much a federal *felony* dispossession law as it is a dispossession law applicable to

record of violent crime, § 922(g)(9) is arguably more consistent with the historical regulation of firearms than § 922(g)(1)”); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010) (suggesting that § 922(g)(9)’s restriction on domestic violence misdemeanants is narrower than the ban contained in § 922(g)(1)).

¹⁵⁹ 18 U.S.C. § 922(g)(1) (2006).

¹⁶⁰ *Id.* § 921(a)(20)(A).

¹⁶¹ *E.g.*, *United States v. Stanko*, 491 F.3d 408, 415 (8th Cir. 2007); *United States v. Dreher*, 115 F.3d 330, 332-33 (5th Cir. 1997); *United States v. Meldish*, 722 F.2d 26, 28 (2d Cir. 1983).

¹⁶² *United States v. Schultz*, 586 F.3d 526, 530 (7th Cir. 2009); *Stanko*, 491 F.3d at 415.

¹⁶³ *United States v. Coleman*, 609 F.3d 699, 706-08 (5th Cir. 2010) (explaining that the exception is not unconstitutionally vague); *Stanko*, 491 F.3d at 413-14 (“The term ‘similar’ indicates an intent to limit the business practices clause’s reach to offenses which are ‘comparable’ or ‘nearly corresponding’ to the enumerated offenses.”).

¹⁶⁴ The business practices cases provide several examples of nonviolent crimes which result in the loss of the right to bear arms and illustrate nicely the disconnect between the possession ban and dangerousness. *Coleman*, 609 F.3d at 701 (conspiring to pirate encrypted satellite signals and infringe a copyright); *Schultz*, 586 F.3d at 529 (trafficking in counterfeit telecommunications instruments); *Stanko*, 491 F.3d at 410 (violating provisions of the Federal Meat Inspection Act); *Dreher*, 115 F.3d at 331 (conspiring to commit and committing mail fraud); *Meldish*, 722 F.2d at 27 (bringing goods into the United States by means of a false customs declaration).

¹⁶⁵ 18 U.S.C. § 921(a)(20)(B).

anyone whose conviction is punishable by a sufficient period of time.¹⁶⁶ A federal district court for the District of Columbia upheld application of § 922(g)(1) to a state misdemeanor conviction for common law assault and battery against Second Amendment challenge in *Schrader v. Holder*.¹⁶⁷ The conviction is more than forty years old and occurred at a time when Maryland prescribed no maximum punishment for the offense.¹⁶⁸ The district court reasoned that the offense was punishable by a term exceeding two years because discretion was left in the hands of the judge, who could have imposed a sentence exceeding two years.¹⁶⁹

Schrader both involves a common law crime that had no explicit statutory maximum penalty at the time of the offense and highlights the need for reasoned analysis in suits challenging § 922(g)(1). Currently, without the possibility of an as-applied challenge to the law, individuals who were convicted under any state or federal law that lacks a defined maximum sentence or carries a potential punishment exceeding one or two years – depending on the crime’s classification as a felony or misdemeanor – automatically forfeit all Second Amendment rights. This is true regardless of the severity of a particular offense, the penalty actually imposed, or the amount of time that has passed and the individual’s subsequent behavior. Thus, in addition to the large number of nonviolent felons who forfeit their Second Amendment rights upon conviction, § 922(g)(1) also sweeps in a wide array of misdemeanor offenses with maximum sentences exceeding two years. Common sense suggests there should be some difference in the extent to which the government can regulate a constitutionally protected activity when a relatively minor offense, as opposed to a violent crime, is involved. While courts might ultimately uphold these restrictions after full analysis, the analytical approach adopted by the Third, Fourth, and Seventh Circuits would at least allow courts to consider the merits of doing so.¹⁷⁰

Finally, federal law provides:

¹⁶⁶ *Schrader v. Holder*, 831 F. Supp. 2d 304, 309 (D.D.C. 2011).

¹⁶⁷ *Id.* at 312. The court relied on *Heller*’s safe-harbor language and the fact that § 921(a)(20)(B) has been on the books since 1968 without successful challenge to conclude that the law is constitutionally unproblematic. The court explained the result, in part, by pointing to the fact that the law “‘promote[s] the government’s interest in public safety.’” *Id.* (quoting *Parker v. District of Columbia*, 370 F.3d 370, 399 (D.C. Cir. 2007)). Yet the opinion does not explain what standard of review it uses or how application of the law to the plaintiff, who had no other criminal record, furthers that interest.

¹⁶⁸ *Id.* at 305.

¹⁶⁹ *Id.* at 309-10.

¹⁷⁰ For example, the Third Circuit’s approach, in which felons are considered to be outside the scope of Second Amendment protections, would allow consideration of the justifications for continuing to deny the *Schrader* plaintiff gun rights based on a forty-four-year-old conviction. See *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2010) (suggesting “a felon whose crime of conviction is decades-old” might prevail in an as-applied challenge).

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.¹⁷¹

While a full discussion of this provision is beyond the scope of this Note, some observations are necessary here. The provision leaves to the states much of the determination of whether civil rights, including the right to bear arms, will be restored. This necessarily results in differences in each state as to which individuals may have their right to bear arms restored post-conviction and the time frame for doing so.¹⁷² Even states that have procedures in place to restore civil rights, either automatically or on application, may retain some restriction on the possession of firearms.¹⁷³ Additionally, the federal courts of appeals are currently split on the issue of what occurs when the content of state statutes and restoration documents conflict.¹⁷⁴ Admittedly, the restoration-expungement exception does mitigate the extent to which § 922(g)(1) may infringe on the right to bear arms, and many states do have such rights-restoration statutes. The extent of mitigation, however, varies with each individual state's procedure.¹⁷⁵ This leaves for determination the question of whether any particular state's procedures, as applied to particular individuals, pass constitutional muster in light of *Heller*. There exists the possibility that the availability of rights restoration for nonviolent offenders under state law will make it more difficult for felons to challenge the law's application under whatever standard of scrutiny is held to apply, since a temporary ban on firearm possession seems far more reasonable than a permanent one.¹⁷⁶ Unless

¹⁷¹ 18 U.S.C. § 921(a)(20) (2006).

¹⁷² *McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995) (“The very decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights. Furthermore, states have drastically different policies as to when and under what circumstances such discretionary acts of grace should be extended.”).

¹⁷³ *Logan v. United States*, 552 U.S. 23, 32-33 (2007) (explaining the effect of § 921(a)(20)'s inclusion of the “unless” clause).

¹⁷⁴ Daniel Brenner, Note, *The Firearm Owner's Protection Act and the Restoration of Felons' Right to Possess Firearms: Congressional Intent Versus Notice*, 2008 U. ILL. L. REV. 1045, 1057-65.

¹⁷⁵ *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (“[T]he statute tolerates different outcomes for persons convicted in different states . . .”).

¹⁷⁶ While this Note chiefly focuses on § 922(g)(1), similar questions arising from differences in state law exist when one considers state analogs to § 922(g)(1). The states do not take a uniform approach to regulating felon possession of firearms. *See supra* note 9. Consider, for example, Texas's felon-dispossession law. The law makes it an offense to

a court reaches that question, however, the merits cannot be considered. Additionally, those convicted of crimes in federal courts face practically insurmountable obstacles to having their right to bear arms restored,¹⁷⁷ which raises additional questions. Those courts that take a per se approach to the constitutionality of felon dispossession laws preclude consideration of, and dialogue concerning, which states' restoration procedures pass constitutional muster in light of *Heller* and leave those convicted of felonies in federal courts without recourse.

Thus, § 922(g)(1) applies to conceivably any offense a jurisdiction chooses to punish by a sufficient amount of time, regardless of the crime's correlation to violent behavior, with very limited exceptions. Moreover, a jurisdiction's procedures may or may not provide constitutionally adequate opportunity for an offender to have their rights restored. Rote application of *Heller's* safe-harbor language hampers the ability of individuals in such jurisdictions to receive any meaningful review of the constitutionality of their continued preclusion from firearm ownership. Whatever the ultimate outcome of any particular challenge, the approach of the Third, Fourth, and Seventh Circuits provides more robust discourse on these issues.

C. *Second Amendment Questions Are Likely To Percolate in the Lower Courts for Some Time*

A final reason that the federal courts of appeals should consider more carefully challenges to § 922(g)(1) is that the issue is unlikely to return to the Supreme Court anytime soon. Instead, the Court will likely allow Second Amendment issues to percolate in the lower courts for some time before returning to them, so as to take advantage of the lower courts' fact-finding and legal reasoning in a broader range of cases.¹⁷⁸ The fact that the Court is

possess a firearm under any circumstances for five years following a felony conviction, and to possess a firearm outside the person's home any time after that. TEX. PENAL CODE ANN. § 46.04(a) (West 2011). Would it make a difference for purposes of Second Amendment analysis that this law is less sweeping than a flat ban on possession altogether? What about as compared to a law that bans all firearm possession by felons with automatic full rights restoration, but with rights restoration occurring significantly later than five years out? If *Heller* is read to require closer scrutiny of dispossession laws that prevent self-defense in a person's home, such differences may turn out to be incredibly salient in Second Amendment challenges. Differences such as these, however, cannot be considered if a court reads *Heller* as permitting all felony dispossession laws.

¹⁷⁷ Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759, 1759-60 (2003) (explaining that congressional funding decisions and Supreme Court precedent make review of firearms disabilities by the Bureau of Alcohol, Tobacco, and Firearms and the courts essentially impossible under 18 U.S.C. § 925(c)).

¹⁷⁸ Persky, *supra* note 76, at 16 (reporting that the Supreme Court typically allows issues to percolate in lower courts following a major decision and there appears to be no reason for the Court to depart from that practice in gun control cases); Mark Tushnet, *Permissible Gun*

unlikely to return to this issue anytime soon¹⁷⁹ strengthens the case for lower federal courts to consider carefully as-applied challenges to § 922(g)(1). Concern with the law's breadth and need for lower courts to continue development in this area are both heightened when lower courts will provide the only analysis and review of the law for an unknown period of time. As explained, important questions still remain regarding the extent to which governments may permissibly regulate the right to bear arms and the level of governmental interest necessary to overcome the individual right.¹⁸⁰ If the Supreme Court does indeed allow Second Amendment issues to percolate in the lower courts in order to take advantage of those courts' accumulated knowledge and experience,¹⁸¹ lower courts must actually consider the merits of challenges so as to fulfill their role in the judicial hierarchy.

Regulations After Heller: Speculations About Method and Outcomes, 56 UCLA L. REV. 1425, 1430 (2009) (predicting the Supreme Court will leave the issue to develop in lower courts, resulting in a reduced need for the originalist reasoning of *Heller* in future decisions).

A frequently advanced justification for allowing issues to percolate in the lower courts is to allow the lower courts to consider the merits of various approaches to a legal issue from which the Supreme Court can draw upon to reach "better" judgments. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983) ("The many circuit courts act as the 'laboratories' of new or refined legal principles (much as the state courts may do in our federal system), providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments." (footnote omitted)). The Court and individual Justices have endorsed the general wisdom of this practice on various occasions. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.").

¹⁷⁹ Professor Tushnet points out that "were a lower court to invalidate an important federal gun regulation, the Court would almost certainly grant review." Tushnet, *supra* note 178, at 1430. *Heller's* safe harbor, however, has prevented this from happening. *See supra* Part II. Even those courts leaving open the possibility of a successful challenge have upheld the law thus far and will unquestionably continue to do so in any facial challenge, preventing the wholesale invalidation of important gun control laws. *See Moore v. United States*, 666 F.3d 313, 318 (4th Cir. 2012); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (explaining that a violent felon's as-applied challenge was easy to dismiss, even if others may not be).

¹⁸⁰ *See supra* Part I.A.3.

¹⁸¹ *See* Tushnet, *supra* note 178, at 1430.

IV. THERE REMAINS ROOM TO CONSIDER AS-APPLIED CHALLENGES
BROUGHT BY NONVIOLENT FELONS

This Part argues that the practice among many lower courts of simply citing *Heller*'s "presumptively lawful" language to dismiss challenges by nonviolent felons is not required by *Heller*. It also argues that the methods of analysis adopted by the courts of appeals leave open serious questions as to the possibility of a successful as-applied challenge by a nonviolent felon. First, this Part considers the obstacles potentially posed by *Heller* itself. Second, it discusses the disagreement over whether all felons historically fell outside the scope of the Second Amendment. Finally, it argues that means-ends justifications do not seem to shield the law from every conceivable challenge.

A. *The Impact of Heller*

The Third and Seventh Circuits have explicitly indicated that § 922(g)(1) may be too broad to survive all challenges, and the Fourth Circuit has accepted the "theoretical possibility" that some felons might mount a successful as-applied challenge. Other jurisdictions should not feel constrained by the language of *Heller* and should follow suit. Several courts have addressed the question of whether *Heller*'s safe-harbor language is dictum or necessary to the result.¹⁸² This question is mostly irrelevant since courts will give deference to the language regardless of the answer.¹⁸³ Giving deference to this portion of *Heller*, however, does not invariably lead to the conclusion that § 922(g)(1) has no possible constitutional deficiencies whatsoever.

The safe-harbor language should not be taken to mean that all felons, under all circumstances, are subject to any type of regulation that implicates the right to bear arms. The opinion creates some confusion on this matter. The Court first stated that "nothing in our opinion should be taken to cast doubt" on the identified regulations.¹⁸⁴ The Court, however, in the footnote following that statement identified the listed regulatory measures as "*presumptively* lawful."¹⁸⁵ The proper reading of these passages is that the Court was simultaneously instructing lower courts that the listed measures are not threatened with invalidation in their entirety by *Heller*'s holding, but also leaving room for consideration of the laws in future cases by only creating a presumption of constitutionality.

The strong statement that nothing should be taken to cast doubt on such laws certainly provides a way for lower courts to dismiss challenges to § 922(g)(1) easily. The Court, however, qualified this statement with the word "presumptively." The Court, through Justice Scalia, is unlikely to have used this language in oversight; as discussed, the entire safe-harbor section of the

¹⁸² *United States v. Marzzarella*, 614 F.3d 85, 90 n.5 (3d Cir. 2010) (citing cases).

¹⁸³ *Id.*

¹⁸⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

¹⁸⁵ *Id.* at 627 n.26 (emphasis added).

opinion was deliberately included, despite lacking the extensive historical support prevalent throughout the rest of the opinion.¹⁸⁶ Because Justice Scalia went out of his way to include this language, the natural conclusion is that the words were chosen with care. The majority presumably had good reason to include this language in the opinion. Perhaps the safe harbor was designed to secure a fifth vote,¹⁸⁷ and perhaps just as important to prevent lower courts from taking the opinion too far and invalidating a number of important gun control laws.¹⁸⁸ Yet the language should not be pressed into service to do more than it purports to. The correct approach is one that recognizes the use of the word “presumptively” to indicate the possibility that a particular application of an enumerated regulatory measure might be found unconstitutional,¹⁸⁹ while precluding facial invalidation.¹⁹⁰ If Justice Scalia meant to say that the enumerated regulations were to be immune from all Second Amendment attacks, he certainly knew how to do so. There was simply no reason for him to go that far on the facts presented in *Heller*. Reading the passage in such a way renders irrelevant the use of the word “presumptively.”

In addition to a correct understanding of the Supreme Court’s choice of the word “presumptively,” other language used by the Court in *Heller* suggests that lower courts should engage in analysis of Second Amendment claims beyond mere recitation of the safe harbor. The Court also stated that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”¹⁹¹ This suggests that the Court expects these laws to come before it in the future, at which point, justifications for the laws, and thus any problems associated with them, will be considered.¹⁹² If the Supreme Court is to evaluate the justifications for the laws in the future, it will need a fully developed record to do so. Thus, lower courts will actually need to consider those justifications

¹⁸⁶ See *supra* note 47 and accompanying text.

¹⁸⁷ Tushnet, *supra* note 38, at 419-20.

¹⁸⁸ Wilkinson, *supra* note 38, at 281 (suggesting that the safe-harbor language may have been an attempt, similar to the inclusion of the trimester framework in *Roe v. Wade*, to forestall future cases); cf. Winkler, *supra* note 38, at 1574-75 (explaining that the language’s inclusion produced a moderate opinion denying victory to both extremes of the gun control debate and providing guidance to lower courts).

¹⁸⁹ *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (citing *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

¹⁹⁰ See *Moore v. United States*, 666 F.3d 313, 318 (4th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011) (finding petitioner’s facial challenge must fail in light of the fact that *Heller* instructed lower courts to presume most applications of § 922(g)(1) to be constitutional).

¹⁹¹ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹⁹² This statement also suggests these justifications will be historical in nature. This may mean that the Court expects to find justifications for the law in an original understanding of the Amendment. As discussed *infra* Part IV.B, scholars and courts have disagreed over that issue.

rather than simply citing *Heller*'s unsupported statement on the matter. As such, the Supreme Court's discussion of presumptively lawful regulations in *Heller* need not preclude lower courts from considering as-applied challenges, and the Court's other language suggests an expectation that lower courts *will* give careful consideration to the justifications offered. Both of these observations comport with the approach taken by the Third, Fourth, and Seventh Circuits.

B. *The Importance of History*

In addition to citing *Heller*'s safe harbor, lower courts might also conclude that § 922(g)(1) poses no constitutional problems because the law regulates conduct that historically fell outside the scope of the Second Amendment.¹⁹³ Although the Ninth Circuit concluded the law was constitutional based upon *Heller* and circuit precedent, the court attempted to bolster its conclusion by citing historical evidence of the constitutionality of felony dispossession.¹⁹⁴ Courts may eventually determine that all felons and misdemeanants covered by § 922(g)(1) may permissibly be barred from owning firearms based upon historical understandings of the Second Amendment.¹⁹⁵ Current understanding of the issue, however, makes resting a holding on that proposition, without searching inquiry, a questionable practice.

Some scholarship suggests that at the time of the nation's founding, the right to bear arms was not understood to extend to those convicted of a felony, either because they were not believed to be among "the people" whose right to bear arms was protected,¹⁹⁶ or because they lacked the requisite "virtue" necessary

¹⁹³ See Volokh, *supra* note 41, at 1497 (explaining that laws may be constitutional because some past authorities responsible for the drafting or understanding of the Second Amendment viewed certain groups as unfit for firearm possession).

¹⁹⁴ *United States v. Vongxay*, 594 F.3d 1111, 1117-18 (9th Cir. 2010) (finding that felons were historically barred from militia service and that the right to bear arms was tied to the idea of a "virtuous citizenry"). The court had no need to discuss this matter since it had already found the law constitutional. The court's analysis, however, leaves much to be desired. The court first discussed historical understandings of militia service which have little bearing after *Heller* and then stated that the historical question lacks a definitive resolution without pressing the inquiry further. *Id.* at 1118.

¹⁹⁵ Whether part or all of the law will be justified by historical understanding or means-ends justification is currently unclear. As noted, the *Heller* Court's language implies that the lawfulness of the safe-harbor regulations is premised on historical justifications. Professor Volokh suggests that historical justifications are the correct approach as they are less easily extended, although the question is still open. Volokh, *supra* note 41, at 1498. Professor Tushnet, however, suggests that lower courts are less likely to perform historical analysis and that a future Supreme Court may be less willing to adopt such methodology. Tushnet, *supra* note 178, at 1427-28, 1430.

¹⁹⁶ Kates, *supra* note 5, at 266 ("Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death.").

for firearm possession.¹⁹⁷ The Fifth Circuit held, prior to the decision in *Heller*, that the Second Amendment guaranteed an individual right to bear arms.¹⁹⁸ In doing so, the court specifically relied on historical scholarship to determine that felons may be prohibited from possessing firearms.¹⁹⁹ The Fifth Circuit has since continued to rely on this reasoning to dismiss challenges to gun control laws.²⁰⁰ Thus, these historical arguments continue to have relevance in dismissing challenges to § 922(g)(1) and other gun control regulations.

More recent scholarship, however, suggests that felons may not have been historically barred from possessing firearms. First, even if some felons were historically understood to be barred from possessing firearms, the common law term “felony” applied to only a few select categories of serious crimes at the time the Second Amendment was ratified, while in modern times, vast categories of “non-dangerous” activities qualify as felonious.²⁰¹ Thus, even if felons were historically barred from possessing firearms, that fact may tell us little about how many of today’s nonviolent felons would have fared historically. Second, the fact that, during the founding era, felons were typically stripped of their property and executed may say little about whether they were specifically barred from possessing firearms.²⁰² Scholarship is thus divided on the issue of whether felons (especially nonviolent felons) historically fell outside the scope of the Second Amendment.²⁰³

Several of the federal courts of appeals have examined this scholarship and determined that the historical evidence is, as of now, too inconclusive to rest the constitutionality of federal gun control laws on.²⁰⁴ Given the current

¹⁹⁷ Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986) (arguing that the right to bear arms was premised on the idea of a virtuous citizenry and, by implication, the right did not extend to those, such as felons, deemed incapable of virtue); Reynolds, *supra* note 25, at 480-81.

¹⁹⁸ *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001).

¹⁹⁹ *Id.* at 261.

²⁰⁰ *United States v. Darrington*, 351 F.3d 632, 633-34 (5th Cir. 2003).

²⁰¹ Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359-64 (2009) (arguing that the modern definition of felony is quite different from the historical common law definition and that it seems appropriate for the federal and state governments to enumerate by statute the types of crimes for which firearm dispossession is appropriate); *see also* Marshall, *supra* note 50, at 729-30 (explaining that the first federal felony dispossession laws applied only to a core group of crimes including “murder, manslaughter, rape, mayhem, aggravated assault . . . robbery, burglary, housebreaking, and attempt to commit any of these crimes”). Moreover, § 922(g)(1) also encompasses some misdemeanors. *See supra* Part III.B.

²⁰² Marshall, *supra* note 50, at 713-16.

²⁰³ For a detailed consideration of historical sources on the matter, *see generally* Marshall, *supra* note 50.

²⁰⁴ *United States v. Chester*, 628 F.3d 673, 680-81 (4th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (citing *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting)); *United States v. McCane*, 573 F.3d 1037, 1048

dispute over the historical understanding on this matter and the sparse historical support for a total prohibition on felon firearm possession,²⁰⁵ these arguments should not preclude lower courts from considering challenges to § 922(g)(1). This is not to say that the law will or should not continue to be upheld against challenges brought by nonviolent felons, but rather that more convincing historical scholarship or some other justification may be necessary.

C. *The Strength of Means-Ends Justifications*

Section 922(g)(1) may also be upheld because it satisfies whatever level of scrutiny the Supreme Court eventually holds applicable to laws restricting exercise of the right to bear arms. Because only either violent offenders or otherwise unsympathetic defendants have brought challenges to the law,²⁰⁶ the courts that have bothered to consider the matter have had no difficulty resting the constitutionality of the law – as well as the constitutionality of other provisions of § 922(g) – on this basis. This Note does not attempt to predict what level of scrutiny will eventually apply to regulations of the right to bear arms, but the level of scrutiny will impact how extensively governments can restrict the right.²⁰⁷ Assuming, however, that some level of heightened scrutiny applies (which is the assumption most of the courts of appeals are operating under), some observations are possible.

The first problem is the difficulty of obtaining empirical evidence of the efficacy of gun control laws in reducing violence and other undesirable consequences associated with firearms.²⁰⁸ On the other hand, the rationale

(10th Cir. 2009) (Tymkovich, J., concurring). Additionally, the Third Circuit seems to suggest that felony dispossession laws are sufficiently longstanding with regard to violent offenders but may be overbroad as applied to nonviolent offenders. *United States v. Barton*, 633 F.3d 168, 173-74 (3d Cir. 2011).

²⁰⁵ See Larson, *supra* note 58, at 1374 (“[T]he actual sources Kates relied upon . . . are surprisingly thin. Indeed, so far as I can determine, no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms. . . . The same three sources recur again and again in the literature, yet none are especially probative.”); Marshall, *supra* note 50, at 709-10 (pointing out the lack of support for Kates’ assertion that felons clearly fell outside the scope of the Second Amendment).

²⁰⁶ See *supra* Part II.B-C.

²⁰⁷ Tushnet, *supra* note 178, at 1427-30 (explaining the importance of the choice in level of scrutiny and predicting courts will apply something akin to rational basis with a bite); see also *supra* Part I.A.3.

²⁰⁸ Kates & Cramer, *supra* note 201, at 1344-45 (discussing the fact that Washington D.C.’s murder rate actually drastically increased under the handgun ban at issue in *Heller*); Tushnet, *supra* note 38, at 431 (explaining that gun control laws typically achieve small reductions in crime); Tushnet, *supra* note 178, at 1427 (“[I]t is quite difficult to show with any moderately persuasive social-science evidence that discrete and moderate gun regulations . . . do much if anything to advance public policies favoring reduction in violence, reduction in gun violence, reduction in accidents associated with guns, or pretty much anything else the public thinks the regulations might accomplish.”); Volokh, *supra*

behind § 922(g)(1), reducing violence by keeping guns away from individuals whose firearm ownership would pose a risk to society, is unquestionably an important or substantial government interest.²⁰⁹ Thus, the law serves an important government interest and comports with public fears regarding firearms, although empirical support of the law's reasonable relationship to that objective is notoriously difficult to produce. Depending on just what level of scrutiny applies and how courts go about evaluating Second Amendment challenges, however, the dearth of empirical support may not be fatal.²¹⁰

Although the lack of empirical support for the efficacy of gun control laws may not be problematic for the continued application of § 922(g)(1) generally, the question becomes more contestable when the law is applied to nonviolent offenders. The presumptive rationale is that felons have proven themselves a risk to society and the government is justified in keeping firearms out of their hands to prevent violent recidivism. This is a serious concern²¹¹ and in many circumstances plainly justifies regulations such as § 922(g)(1). Common sense, however, begs the question of the extent to which this rationale can justify the same application of the law to individuals convicted of crimes such as perjury, tax evasion, fraud, or any number of other crimes as it does to serious violent offenses. When an individual's offense has little to no bearing on his or her

note 41, at 1465-67 (describing the difficulties in producing the empirical evidence necessary to show narrow tailoring).

²⁰⁹ Several courts have taken this as a given in upholding § 922(g)(9) against Second Amendment challenges. *United States v. Chester*, 628 F.3d 673, 691 (4th Cir. 2010) (Davis, J., concurring) (“[W]ho could possibly dispute the importance of the governmental interest in keeping firearms away from individuals with a demonstrated history of actual or attempted assaultive violence?”); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (“[N]o one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.”). The same reasoning plainly applies to the importance of § 922(g)(1), at least with respect to violent offenders.

²¹⁰ See Tushnet, *supra* note 178, at 1429-30 (arguing that federal courts may look to state court decisions involving gun control laws in which state courts exercise a “relatively casual acceptance . . . of the proposition that legislative policies have some decent chance of accomplishing worthwhile policy goals”); Volokh, *supra* note 41, at 1469-70 (explaining that courts might rely on intuition-based reasoning as they do in First Amendment cases, although there is little to recommend such an approach).

²¹¹ Recidivism rates can be difficult to compare between jurisdictions and vary among the states, but data indicates that the number of released prison inmates reincarcerated within three years of release for either a new conviction or a violation of their release terms is around forty percent nationally. THE PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2, 10-11 (2011), available at http://www.pewstate.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf. This, of course, does not tell us the number of nonviolent offenders subsequently re-incarcerated for a *violent* offense. Such statistics would be crucial in evaluating the validity of § 922(g)(1) against nonviolent offenders under means-ends scrutiny.

propensity for future violent behavior, the means-ends justifications supporting § 922(g)(1) are significantly weakened.²¹²

Given the serious questions that exist concerning the means-ends justifications supporting application of the law to certain classes of nonviolent felons and misdemeanants, perfunctory reliance on reasoning that supports the law's application to violent offenders would be as unsatisfying as mere reliance on the questionable historical evidence outlined above. The courts that have carefully distinguished the position of violent offenders challenging the law from that of potential future challengers with nonviolent offenses²¹³ have taken the correct approach. Should other courts be faced with the issue on a clean slate or have the opportunity to revisit a contrary position, they should carefully consider the reasoning applied in the Third, Fourth, and Seventh Circuits. The government may rely on the aforementioned justifications or some other reasoning to support application of the law to nonviolent felons in the future. Foreclosing the possibility of a successful as-applied challenge merely due to the strength of the justifications in the cases of dangerous felons, however, forecloses much-needed argument and debate in this area.

CONCLUSION

District of Columbia v. Heller closed one chapter on the debate over the nature of the Second Amendment by making clear that the Constitution secures an individual right to bear arms. The decision, however, paved the way for a number of new debates to begin. Most significantly, lower courts must now wrangle with difficult questions of the extent to which governments may permissibly regulate the right and the proper scope of review to apply to such regulations.²¹⁴ These issues are new, controversial, and, most important, deserving of reasoned consideration by lower courts. *Heller* may not bring about sweeping changes in current gun control law, but the decision certainly presents an opportunity to carefully scrutinize historical justifications for and the efficacy of gun control laws.²¹⁵

Section 922(g)(1) substantially burdens²¹⁶ the right to bear arms of many individuals who pose no credible threat of violence. Given that the challenges

²¹² See Kates & Cramer, *supra* note 201, at 1363 (“Equally absurd would be any claim that income tax evasion, antitrust law violations, or (however appropriately punishable it might be in a military situation), calling George W. Bush a jackass should disqualify anyone from owning a firearm.”).

²¹³ See *supra* Part II.B.

²¹⁴ Rosenthal, *supra* note 155, at 2 (characterizing the applicable standard of scrutiny as one of the most important questions left open by *Heller*).

²¹⁵ See Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1245-46 (2009) (displaying skepticism toward the effect of *Heller* in lower court decisions but arguing that “it would be a mistake to conclude that *Heller* changed nothing”).

²¹⁶ See *supra* note 156 and accompanying text.

to the law have thus far been brought by violent or otherwise unsympathetic petitioners seeking to avoid jail time, the results reached by the lower federal courts are largely unsurprising. On the other hand, the same justifications supporting loss of the right to bear arms for such felons may not apply to future litigants and courts need not foreclose the possibility that the law goes too far in regulating the possession of firearms by nonviolent felons.

This Note has argued that the Supreme Court's choice of language in *Heller* should not be read to render constitutional all restrictions on the right to bear arms of all felons under all circumstances. Moreover, current understanding of historical views on felon firearm dispossession laws is inconclusive and the means-ends justifications supporting the constitutionality of the law as applied to violent felons appear far weaker in the case of many nonviolent felons. In light of the relatively recent recognition of an individual right to bear arms and the need for further development in this area, the Third, Fourth, and Seventh Circuits have taken the better approach in withholding judgment on the constitutionality of § 922(g)(1) in the case of a nonviolent felon for an appropriate case. Other lower courts should follow the reasoning in the opinions of those courts and avoid a per se rule of felon dispossession without giving serious consideration to whether the government's proffered justifications actually support the law.