A BRIDGE OVER TROUBLED WATER: THE SECOND AMENDMENT GUARANTEE FOR THE PREVIOUSLY MENTALLY INSTITUTIONALIZED

INTRODUCTION

Shortly after midnight on August 31, 2015, Harvey Lembo successfully defended his one-bedroom apartment from an

intruder with the help of a firearm.[1] Harvey Lembo, a retired lobsterman, never thought he would need a gun. Lembo, who spent a large majority of his time in his motorized wheelchair, was also extremely tired of being victim to recent robberies—five times in the last six years.[2] This is when he decided to exercise his Second Amendment rights, and purchase a firearm. He purchased "a 1941 Russian-made revolver,"[3] which he kept under his pillow every night.

On the night of the incident, an awaken Lembo thought he saw his cat's shadow running from his kitchen to his living room.[4] Realizing the shadow was much too large to be his cat, Lembo reached under his pillow and pulled out his recently purchased firearm, got into his motorized wheelchair and came upon the intruder, Christopher Wildhaber.[5] After exchanging words and threats, Lembo successfully fended off his intruder, shot Wildhaber in the shoulder, and called the police.[6]

Now, imagine if Harvey Lembo, the physically challenged, aging man was denied his right to bear arms when he went to purchase a firearm. This is the reality for Clifford Tyler, who was denied the right to purchase a firearm due to a previous, short stint in a mental institution.[7] Tyler was committed to a mental institution in 1986 due to emotional instability after his wife of twenty-three years served him with divorce papers.[8] Tyler remained in the workforce for nineteen years after his treatment.[9] In 2011, twenty-eight years after his institutionalization, Tyler attempted to exercise his right to bear arms and was denied

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[1] David Hench, *Tired of Being a Burglary Victim, Maine Man Buys a Gun—and Uses It*, PORTLAND PRESS HERALD, Sept. 2, 2015, http://www.pressherald.com/2015/09/01/rockland-homeowner-shoots-intruder/ [https://perma.cc/99AV-Z9Y9].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 314 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015). Tyler was at Ypsilanti Regional Center for psychological treatment for a period of two to four weeks. *Id.*

[8] *Id.* at 313. Tyler also alleged that his wife ran off with another man and drained him of his finances, causing him to feel "overwhelmed" and depressed. *Id.* at 313-14.

[9] *Id.* at 314.

because a background check revealed that he had been previously institutionalized—a prohibited class under 18 U.S.C. § 922(g)(4).[10]

Clifford Tyler's story is but one example of the ban on previously institutionalized people protecting their family and home due to something that happened in the past. This restriction of the previously mentally institutionalized, along with other class prohibitions, has been the subject of much litigation and political activity. Many proponents for strict gun control laws are advocating for a legislative overhaul of the current gun laws, while those opposed to stricter gun laws believe the government is overstepping its boundaries and invading the Second Amendment rights of all Americans. Further, the prevalence of mass shootings has fueled the debate over guns and caused popular opinion to assume all those that have been previously institutionalized should be banned from owning guns. However, this is far from the truth, as many people who were once institutionalized are now productive members of society and should be granted the same fundamental rights as other Americans.

The battle over gun rights has been a long-debated subject, leading the government to enact the Gun Control Act of 1968 and the Brady Handgun Violence Act of 1993, which together created federal gun bans for certain classes of people.[11] Theses bans have the purpose of promoting public safety and the prevention of gun-related violence.[12] However, the broad class prohibition that lumps together the mentally ill and those who have been previously institutionalized is not effective and must be reformed.

This Comment is the first to analyze the constitutionality of the federal gun ownership prohibition under 18 U.S.C. § 922(g)(4) by applying the prohibition to all three levels of scrutiny and

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[10] *Id.* at 314-15. Tyler then appealed the denial, ultimately ending up in the Sixth Circuit. *Id.* at 315.

[11] *See* Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals With a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 330, 331 (2007). The Gun Control Act of 1968 was the first legislation passed that included the previously mentally institutionalized as a banned group of persons. *Id.* The Brady Act established the background check system and waiting period that all prospective owners must go through to purchase a firearm. *Id.*

[12] *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213-14 (1968) (codified as amended at 18 U.S.C. § 921 (2012)); Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-22 (2012)).

showing that neither history nor public policy lends support to the prohibition on the previously mentally institutionalized. This proposition has been echoed in a recent Sixth Circuit opinion, *Tyler v. Hillsdale County Sheriff's Department*.[13] This Comment does not argue that all broad bans on classes of people will fail judicial scrutiny, but rather brings to light the differences between the previously mentally institutionalized and that of other classes, such as felons and the mentally ill. This Comment further proposes to re-fund the federal relief-from-disabilities program.

Part I of this Comment will explore the recognition of the Second Amendment right and the judicial interpretations that have established the judicial framework for the right to bear arms. Part II of this Comment will explore the Congressional actions that have led to the current prohibition on the previously mentally institutionalized. Part III will discuss one circuit's attack on the prohibition on the previously mentally institutionalized and explain the reasoning behind their decision. Part IV will use history and public policy to show why the previously mentally institutionalized prohibition is different from other categorical bans under 18 U.S.C § 922. Part V of this Comment will apply the previously mentally institutionalized prohibition to all three of the traditionally recognized levels of scrutiny. By subjecting the ban to all levels of judicial scrutiny and showing the lack of historical and legislative practices, this Comment will establish that the categorical prohibition on the previously mentally institutionalized is not currently constitutional and must be reformed. Part VI of this Comment will consider one solution—re-funding the federal relief-from-disabilities program.

I. ESTABLISHMENT OF THE RIGHT TO KEEP AND BEAR ARMS

The right to keep and bear arms was first established in *District of Columbia v. Heller*, which guaranteed that all Americans have a right to keep and bear arms for self-protection.[14] Further, the Supreme Court solidified this right in *McDonald v. City of Chicago,* which incorporated the right to keep

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[13] *See Tyler*, 775 F.3d at 322, 332-33, 342-43.

[14] 554 U.S. 570, 635 (2008).

and bear arms using the Fourteenth Amendment.[15] This section will examine the judicial foundation of the right to bear arms and explain the reasoning behind the Court's decisions.

A. Heller*: Establishing the Second Amendment Right and Creating New Questions*

The Supreme Court's holding in *District of Columbia v. Heller* established that the Second Amendment guarantees all United States citizens the right to keep and bear arms for self-protection, regardless of military affiliation.[16] The Court noted that its holding was not without limitations,[17] but it never clearly established an analytical framework to test Second Amendment constitutional challenges. This section will examine the establishment of the right to bear arms, the limitations set forth, and the Supreme Court's lack of analytical clarity.

1. Establishing the Second Amendment Right

On June 26, 2008, the Supreme Court delivered its opinion in *Heller,* establishing that the Second Amendment guarantees the right to keep and bear arms for self-protection inside the home.[18] This case arose when Dick Heller, a District of Columbia special police officer, challenged a group of D.C. laws that combined to prohibit the possession of a handgun inside the home.[19] Heller argued that his Second Amendment rights were violated because the laws "prohibit[ed] the use of functional firearms within the home."[20] The Court in a 5-4 decision, held the laws

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[15] 561 U.S. 742, 791 (2010).

[16] *Heller*, 554 U.S. at 635 (holding that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment").

[17] *Id.* at 595 ("[T]he right [to keep and bear arms] was not unlimited, just as the First Amendment's right of free speech was not.").

[18] *Id.* at 635; *see also* U.S. CONST. amend. II.

[19] *Heller*, 554 U.S. at 575-76. The District of Columbia's laws made it illegal "to carry an unregistered firearm, and the registration of handguns [was] prohibited." *Id.* at 574-75. The District of Columbia also passed laws that "require[d] residents to keep . . . lawfully owned firearms . . . unloaded and dissembled or bound by a trigger lock." *Id.* at 575.

[20] *Id.* at 576. Heller's original argument was that the laws, when combined, made firearms non-functional in the home. *Id.* The Court of Appeals equated Heller's argument to mean that he was seeking the right to carry and use his firearm in self-defense. *Id.*

unconstitutional, describing them as a "severe restriction" on Heller's Second Amendment rights.[21]

Majority opinion author Justice Scalia, famous for his textualist approach,[22] began the opinion with an in-depth analysis of the textual meaning of the Second Amendment.[23] Using this textual approach and historical evidence, the majority opinion defined the meaning and contours of the Second Amendment. First, the majority defined the phrase "right of the people" finding it referred to individual rights rather than rights that are only exercised "through participation in some corporate body."[24] Next the majority moved on to the "the substance of the right"—"to keep and bear [a]rms," —explaining that the phrase throughout history has meant, "to possess and carry weapons in case of confrontation."[25] The majority then defined the Prefatory Clause of the Second Amendment, establishing that the Second Amendment applies to "all able-bodied men," regardless of military affiliation. The Court further supported its individual right interpretation of the Second Amendment by looking to the founders' reasoning for securing the right to bear arms in the Constitution.[26]

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[21] *Id.* at 629-30.

[22] *See* Elizabeth B. Wydra, *Scalia's "Textualism" is Really "The Text According to Scalia,"* CONST. ACCOUNTABILITY CTR. BLOG (June 7, 2010), http://theusconstitution.org/text-history/1710 [https://perma.cc/TRQ6-ER9C] ("Justice Scalia is famous for his oft-professed commitment to a strict textualist approach to judging . . . .").

[23] *Heller*, 554 U.S. at 576. Scalia broke the Second Amendment down into two clauses: its "prefatory clause"—"[a] well regulated Militia, being necessary to the security of a free State"—and its "operative clause"—"the right of the people to keep and bear [a]rms." *Id.* Scalia further established that the prefatory clause is not a limit to the operative clause, but rather only states the purpose of the amendment. *Id.* at 577 ("The former does not limit the latter grammatically, but rather announces a purpose.").

[24] *Id.* at 579. Here, the majority rejected the District of Columbia's argument that the Second Amendment right to carry a firearm is only for those who are connected with the militia. *Id.* at 577, 579-81.

[25] *Id.* at 581, 592. The majority opinion found that the term "bear arms" was used in many instances "to refer to the carrying of weapons outside of an organized militia," specifically considering nine state constitutional provisions written around the Second Amendment's ratification giving citizens the right to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." *Id.* at 584-85.

[26] *Id.* at 598-99. The Court explained that the reason for codifying the right to bear arms in the Constitution was not only for the preservation of the militia but, "more

The majority opinion stressed the importance of self-defense many times throughout its historical analysis. The majority made it clear that the right to keep and bear arms is intrinsically tied to the individual need to protect one's self.[27] The majority noted that the laws prohibiting the ownership of handguns, the "quintessential self-defense weapon,"[28] violated "the core lawful purpose of self-defense."[29] However, while the majority opinion established the right to keep and bear arms for self-defense in the home, the opinion was bound to the facts of the case and therefore did not expound upon all the limits of the Second Amendment.[30]

2. "Longstanding" and "Presumptively Lawful" Limitations

While the majority opinion in *Heller* did not fully explore the contours of the Second Amendment or establish all of its limits, it did justify certain prohibitions as "longstanding" and "presumptively lawful."[31] This section will explore the Court's justification of these prohibitions.

After establishing the constitutional right to keep and bear arms, the majority opinion explained that history provides that the right "is not unlimited."[32] Perhaps more importantly, especially to this Comment, the Court acknowledged a list of

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important[ly] for self-defense and hunting." *Id.* at 599. Hunting was not at issue in the present case; therefore, the Court did not further explore the discussion of hunting.

[27] *Id.* The Court, discussing self-defense, stated that "it was the *central component* of the right itself." *Id.* Further, the Court, in explaining that it did not examine the whole field of the Second Amendment, stated "whatever else it leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

[28] *Id.* at 629. The Court noted that the American public prefers a handgun for self-defense in the home because it is easy to store, can be wielded with one hand, and is easy to use. *Id.*

[29] *Id.* at 630.

[30] The Court noted that this was its first in-depth look at the Second Amendment and it should not be expected to clarify the entire field. *Id.* at 635.

[31] *Id.* at 626, 627 n.26.

[32] *Id.* at 626. The Court noted, "[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* The Court further expounded upon this explaining that nineteenth century courts have upheld the constitutionality of laws prohibiting the concealed carry of firearms. *Id.* Providing more support for these limitations, the Court also justified the prohibitions on weapons that are not "in common use at the time" because they are historically supported by a prohibition on "dangerous and unusual weapons." *Id.* at 627.

prohibitions that are "longstanding" and "presumptively lawful," while also explaining that this opinion does not fully explore the extent of the Second Amendment.[33] These longstanding and presumptively lawful prohibitions included: the prohibition on felons and the mentally ill, laws prohibiting firearms in schools and government buildings, and laws that place qualifications on the commercial sale of firearms.[34] However, the majority opinion did not explain why these regulations are presumptively lawful.[35] Further, the Court rebutted Justice Breyer's assertion that there is no historical support for these prohibitions, stating that "there will be time enough to expound upon the historical justifications for the exceptions . . . if and when those exceptions come before us."[36]

3. The Murkiness of *Heller*'s Standard of Scrutiny

With the majority opinion's establishment of the right to bear arms and the expressed limitations on such a right, one would think that the Court would articulate a standard of review for lower courts to apply to test laws burdening the established right. However, the majority opinion in *Heller* did not do so, merely stating that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, . . . [the District of Columbia's prohibitions] would fail constitutional muster."[37]

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[33] *Id.* at 626-27 ("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 commercial sale of arms.").

[34] *Id.*

[35] The Court acknowledged these prohibitions and stated they are not an exhaustive list but did not explain the rationale behind them. *Id.* at 627 n.26; *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1561 (2009) (discussing that *Heller* does not cite a single historical source for these existing prohibitions and concluding that there is probably no evidence to support these exceptions).

[36] *Heller*, 554 U.S. at 635. Justice Breyer expressed his concern as to whether these exceptions would hold up to constitutional scrutiny. *Id.* at 721 (Breyer, J., dissenting) ("I am . . . 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.").

[37] *Id.* at 628-29 (majority opinion).

The majority opinion's first mention of any level of scrutiny came in response to Justice Breyer's assertion that "this law, like most laws, would pass rational-basis scrutiny."[38] While the Court agreed with this assertion, the Court also stated that rational-basis review cannot apply to the laws in question because rational-basis review is not the correct standard for an "enumerated right."[39] Moreover, the Court also disregarded Justice Breyer's assertion of an "interest-balancing" standard, because no other enumerated right was subject to that test and a "case-by-case" analysis was at odds with the "constitutional guarantee" of such a right.[40]

The above instances are the only mention of constitutional scrutiny in the majority's opinion, shedding very little light on the subject. While the majority's opinion disregarded both a rational-basis review and interest-balancing test for laws burdening the Second Amendment, it did not reject intermediate or strict scrutiny. As discussed later, the lack of Supreme Court guidance on this matter has left lower courts with the enormous and still very unclear task of deciding what standard to apply.

B. McDonald*: Fortifying the Second Amendment Right and Its Limits*

In *McDonald v. City of Chicago,* the Supreme Court fortified the right to keep and bear arms, using the Fourteenth Amendment to incorporate "the Second Amendment right recognized in *Heller*" to all states.[41] Further, and more importantly, the Court affirmed *Heller*'s "assurances."[42] This section of the Comment will explore the Court's use of the Fourteenth Amendment and reassurances of *Heller*'s holding.

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[38] *Id.* at 628 n.27.

[39] *Id.* ("[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 . . . a specific, enumerated right . . . .").

[40] *Id.* at 634. The Court noted that the pure enumeration of the right "takes [the power] out of the hands of the government . . . to decide on a case-by-case basis whether the right is really worth insisting upon." *Id.* (emphasis omitted).

[41] 561 U.S. 742, 791 (2010).

[42] *Id.* at 786.

1. Fortifying a Right Through Incorporation

After its decision in *Heller,* the Supreme Court was called to revisit the Second Amendment and decide its applicability to the states.[43] In *McDonald,* a group of Chicago and Oak Park residents challenged the City of Chicago's gun laws, which essentially banned the possession of handguns in the home.[44] The group of residents challenged Chicago's laws on two different bases: primarily, that the right to keep and bear arms was a right that falls under the Privileges and Immunities Clause of the Fourteenth Amendment and secondly, that the right is incorporated through the Due Process Clause.[45] In another 5-4 decision, the *McDonald* Court held that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment right.[46]

Justice Alito, writing for the plurality, only focused on the Due Process Clause of the Fourteenth Amendment.[47] The plurality opinion began with a brief history of selective incorporation and then moved on to answering the issue of the case—whether the "right to keep and bear arms is incorporated in the concept of due process."[48] The Court believed the answer to this question turned on two other questions.[49] After reviewing its holding in *Heller,* the Court concluded that the Second

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[43] *See id.* at 742. *McDonald* occurred two years after *Heller*, and essentially asked the same question in a different context. *Id.* at 749-50.

[44] *Id.* at 750. The City of Chicago's gun laws stated that no one could own an unregistered firearm and banned the registration of most handguns. *Id.* Thus, collectively they banned handguns for use in the home. *Id.*

[45] *Id.* at 753.

[46] *Id.* at 791.

[47] *Id.* at 767. Alito stated that there was no need to consider the petitioner's Privileges and Immunities argument because the *Slaughterhouse* cases are well established and "[f]or many decades, the question of the rights protected by the Fourteenth Amendment . . . ha[ve] been analyzed under the Due Process Clause." *Id.* at 758.

[48] *Id.* at 767; *see generally id.* at 758-66 (giving a brief history of the incorporation doctrine).

[49] *Id.* at 767. The Court concluded that the two central questions to the issue at hand were "whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or . . . whether the right is 'deeply rooted in this Nation's history and tradition.'" *Id.* (emphasis omitted) (citation omitted) (first citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968); and then quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

Amendment was "deeply rooted in this Nation's history and tradition."[50] The Court then examined the post-Civil War history of the Second Amendment, concluding that the framers of the Fourteenth Amendment believed the Second Amendment to be a "fundamental right[] necessary to our system of ordered liberty."[51] With an affirmative answer to both questions, the Court concluded that the Due Process Clause incorporated the right to bear arms.[52]

2. *Heller*'s "Assurances" Reaffirmed

As the *McDonald* Court incorporated the Second Amendment to the states, it also re-affirmed the "longstanding" and "presumptively lawful" prohibitions established in *Heller*. The City of Chicago and its suburb argued that enforcing the Second Amendment against states was against the "principles of federalism and w[ould] stifle experimentation" on a state-to-state basis.[53] The Court rejected this argument, stating that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."[54] The Court also upheld its decision in *Heller* that Second Amendment rights are not subject to an "interest-balancing" test.[55] The Court then continued to further its reaffirmation of *Heller* stating "[w]e repeat those assurances here," in reference to *Heller*'s "longstanding" prohibitions on gun ownership.[56]

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[50] *Id.* at 768 (quoting *Glucksberg*, 521 U.S. at 721).

[51] *Id.* at 777-78; *see also id.* at 770-78 (examining the right to bear arms from the 1850s up to the ratification of the Fourteenth Amendment).

[52] *Id.* at 791. Justice Thomas agreed with the majority but wrote a separate concurrence because he concluded that the right was incorporated to the states through the Privileges and Immunities Clause. *Id.* at 858 (Thomas, J., concurring).

[53] *Id.* at 783. To further their claim, the respondents pointed out that every state has different beliefs regarding gun control and that every state is vastly different and therefore the Court should allow each state to decide for itself. *Id.* The Court had no trouble rejecting this argument, pointing out that throughout various court cases this notion was rejected. *Id.* at 784.

[54] *Id.* at 785 (alteration in original).

[55] *Id.* at 785-86; *see also* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008); *supra* note 39 and accompanying text.

[56] *McDonald*, 561 U.S. at 786; *see also Heller*, 554 U.S. at 626, 627 n.26; *supra* note 32 and accompanying text.

II. CONGRESS, FIREARMS, AND THE PREVIOUSLY MENTALLY INSTITUTIONALIZED

Prior to the Supreme Court's interpretation of the Second Amendment, Congress had begun to regulate firearms extensively through various legislative acts. One such act, the Gun Control Act of 1968, established the current class-based prohibitions and a federal relief-from-disabilities program to restore Second Amendment rights for those suffering from a prohibition. Due to budgetary concerns, this relief program was federally defunded and an optional state program was enacted, leaving many without any relief. This section will explore the Gun Control Act and the reasoning and repercussions of defunding a federal relief-from-disabilities program.

A. The Gun Control Act of 1968: Regulating the Second Amendment

After three decades of silence on gun control legislation, the turbulent decade of the 1960s brought gun control politics to a forefront.[57] The assassinations of Robert F. Kennedy and Martin Luther King, Jr. combined with racial tension created public outrage that demanded congressional attention.[58] Congress responded by passing the Gun Control Act of 1968 (GCA), which was designed "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence . . . ."[59]

The GCA was essentially a regulatory scheme that served three major purposes.[60] The first and perhaps most central purpose was to regulate the interstate transportation and sale of

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[57] One of the first major gun control acts was the National Firearms Act of 1934, which was in response to the mob and gang-related activity of the time. *See* JAMES B. JACOBS, CAN GUN CONTROL WORK? 19-32 (2002) (surveying a brief history of federal gun control laws). The next major gun control act was the Federal Firearms Act of 1938. *Id.*

[58] *Id.* at 23; *see also* Jana R. McCreary, *"Mentally Defective" Language in the Gun Control Act*, 45 CONN. L. REV. 813, 831 (2013) ("After these shootings, the public outcry for change has been loud.").

[59] Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. § 921 (2012)).

[60] *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975).

firearms and ammunition.[61] The GCA accomplished this by reinforcing earlier laws that required all firearms dealers to obtain a Federal Firearm License (FFL), essentially eliminating the ability of consumers to mail-order firearms.[62] Further, the GCA made it illegal for any unlicensed individual to sell, deal, or import any firearm or ammunition.[63]

The next major purpose of the GCA was to regulate the importation of firearms into the United States.[64] The GCA accomplished this by prohibiting the importation of any firearms that were not being used for "scientific or research purposes" or were not used for "sporting purposes."[65] However, the statute did not define "sporting purposes," leaving it to the discretion of the Secretary of the Treasury.[66]

The final and most highly contested purpose of the GCA was to "curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."[67] To accomplish this purpose, the GCA expanded the list of categories of dangerous persons prohibited from purchasing firearms to include those who were unlawful users of illegal narcotics, and anyone "adjudicated as a mental defective" or previously "committed to any mental institution."[68] The GCA also expounded upon a previous felony

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[61] *Id.*

[62] Gun Control Act of 1968, Pub. L. No. 90-618, § 923, 82 Stat. 1213, 1221-23 (1968) (codified at 18 U.S.C. § 923 (2012)). This was done in part because the killer of John F. Kennedy, Lee Harvey Oswald, purchased the firearm used during the assassination through mail order. *See* Steven Rosenfeld, *The NRA Once Supported Gun Control*, SALON (Jan. 14, 2013, 9:00 AM), http://www.salon.com/2013/01/14/the_nra_once_supported_gun_control/ [https://perma.cc/NQJ4-F743] (quoting the NRA president at congressional hearings saying: "We do think that any sane American, who calls himself an American, can object to placing into this bill the instrument which killed the president of the United States.").

[63] Gun Control Act of 1968, Pub. L. No. 90-618, § 922, 82 Stat. 1213, 1216-17 (1968) (codified at 18 U.S.C. § 922 (2012)).

[64] *See* Zimring, *supra* note 60, at 149.

[65] Gun Control Act of 1968, Pub. L. No. 90-618, § 925(d), 82 Stat. 1213, 1224-25 (1968) (codified as amended at 18 U.S.C. § 925(d) (2012)).

[66] *See* Zimring, *supra* note 60, at 155 ("The term 'sporting purposes' is not defined in the statute, making it difficult to give a meaning to the phrase 'particularly suitable to sporting purposes.'").

[67] Huddleston v. United States, 415 U.S. 814, 824 (1974).

[68] Gun Control Act of 1968, Pub. L. No. 90-618, § 922(d), 82 Stat. 1213, 1220 (1968) (codified as amended at 18 U.S.C. § 922(g)(4) (2012)). The prohibitions on felons, illegal

prohibition, making the penalty for felon-in-possession much more severe.[69]

B. From a Regulation to a De Facto Prohibition: The 1992 Defunding of Relief Programs

While the GCA expanded the list of "dangerous persons" prohibited from owning a firearm, it also upheld and reinforced a federal relief-from-disabilities program.[70] Combining these regulatory class-based prohibitions with a federal relief-from-disabilities program essentially made the class-based prohibitions a regulatory measure that allowed for the restoration of a person's right to bear arms. However, the federal relief-from-disabilities program was defunded in 1992, causing this presumptive regulatory measure to become a de facto prohibition.[71]

The federal relief-from-disabilities program, currently codified as 18 U.S.C. § 925(c), was first established in 1965, upheld by the GCA in 1968, and then further amended in 1986.[72] Under the federal relief-from-disabilities program, those prohibited from possessing a firearm could apply to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF) for relief from

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aliens, and the mentally incompetent were previously established by the Omnibus Crime Control and Safe Streets Act of 1968. *See* Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (1968).

[69] *See* JACOBS, *supra* note 57, at 25 (explaining that the law established a $10,000 penalty and/or up to two years imprisonment).

[70] Gun Control Act of 1968, Pub. L. No. 90-618, § 925, 82 Stat. 1213, 1224-26 (1968) (codified as amended 18 U.S.C. § 925 (2012)).

[71] *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

[72] The federal relief-from-disabilities program was originally enacted as a 1965 amendment to the Federal Firearms Act of 1938 and was only for felonious corporations. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 598 n.73 (1987) (explaining that the amendment is in place as a favor to Olin-Mathieson). In 1986, the relief-from-disabilities program was expanded to cover individuals as part of the Firearms Owners' Protection Act. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 105, 100 Stat 449, 459 (1986) (codified at 18 U.S.C. § 925 (2012)). The GCA made minor changes to the previously established relief-from-disabilities program. Gun Control Act of 1968, Pub. L. No. 90-618, § 925, 82 Stat. 1213, 1224-26 (1968) (codified at 18 U.S.C. § 925 (2012)).

their "disability," reestablishing their right to possess firearms.[73] Upon receipt of these applications for relief, the ATF would only grant relief if they found that the applicant "[would] not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[74] Further, any person denied relief by the ATF could petition a federal court for judicial review.[75] This unique statutory program was heavily used throughout the late 1980s and early 1990s until its untimely defunding in 1992.[76]

In 1992, Congress became worried about the amount of money being spent on the relief-from-disabilities program.[77] This concern led Congress to essentially eliminate the relief-from-disabilities program, causing prohibited persons to suffer a permanent ban on gun ownership. While Congress did not repeal § 925(c) of the United States Code, Congress denied the ATF funding to process § 925(c) applications, making it practically impossible for anyone to seek relief from their disability.[78] This denial of funding and its impact on the relief-from-disabilities program caused the once regulatory presumptive ban on dangerous persons to become an actual permanent prohibition, leaving those who potentially could restore their rights, such as the previously mentally institutionalized, with no course of action.

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[73] *See* 18 U.S.C. § 925(c) (2012). Originally, applicants applied to the Attorney General for relief. However, the Attorney General has delegated this power to the ATF. 28 C.F.R. § 0.130(a)(1) (2015).

[74] 18 U.S.C. § 925(c) (2012).

[75] *Id.*

[76] Adeliza Olivero & Debra A. Pinals, *The Right of Individuals with Mental Illness to Keep and Bear* Arms, 43 J. AM. ACAD. OF PSYCHOL. & LAW, 379, 379 (2015). In 1992, Congress reported that approximately 3,000 to 4,000 applications were received each year. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the S. Comm. on Appropriations*, 102d Cong. 71 (1993) (statement of Mr. Steve Higgins, Director, Bureau of Alcohol, Tobacco, and Firearms).

[77] *See* Ryan Laurence Nelson, *Rearming Felons: Federal Jurisdiction under 18 USC § 925(c)*, 2001 U. CHI. LEGAL F. 551, 556 (2001) (explaining that "[o]ne of the primary motivations for this withdrawal of funding was the belief of some members of Congress that too much money was being spent to rearm felons").

[78] *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992); *see, e.g.*, United States v. Bean, 537 U.S. 71, 75 (2002) (explaining that "[s]ince October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities").

C. A Shift of Power: Congress's Faulty Shift to State-Led Relief Programs

From 1992 to 2008, the GCA's relief-from-disabilities program remained dead.[79] In 2008, in the wake of the Virginia Tech shootings, Congress realized the importance of a well-maintained and accurate National Instant Check System (NICS).[80] To improve the NICS, Congress enacted the NICS Improvement Amendments Act of 2007 (NIAA), which authorized federal grants to assist states in submitting more accurate and reliable records.[81] To be eligible for these grants, states were required to implement a relief-from-disabilities program.[82] Under these state-led relief-from-disabilities programs, anyone who "pursuant to [s]tate law" was found to be "adjudicated as a mental defective" or had been "committed to a mental institution" could apply for relief from the disability.[83] However, as of 2015, only twenty-six states have implemented such programs, leaving many of the previously mentally institutionalized without relief.[84]

III. SIXTH CIRCUIT STRIKES DOWN THE PROHIBITION ON FIREARM POSSESSION BY THE PREVIOUSLY MENTALLY INSTITUTIONALIZED

The Sixth Circuit, in *Tyler v. Hillsdale County Sheriff's Department,* reversed and remanded a district court's dismissal of a Second Amendment challenge based on a federal gun prohibition, stating that "[the petitioner's] complaint validly states a violation of the Second Amendment."[85] More interestingly, the

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[79] *See Bean*, 537 U.S. at 75 n.3 (listing appropriation acts from 1994-2002).

[80] *See* McCreary, *supra* note 58, at 836-37. The National Instant Check System was the product of the Brady Act of 1993. *Id.* This required that a background check be performed before any legal firearm dealer could sell a firearm to a person. *See* JACOBS, *supra* note 57, at 30-31 (explaining the background check process).

[81] NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103, 121 Stat. 2559, 2567-68 (2008) (codified at 18 U.S.C. § 922 (2012)).

[82] *Id.* § 103(c), 121 Stat. at 2568.

[83] *Id.* § 105, 121 Stat. at 2569-70; 18 U.S.C. § 922(g)(4) (2012).

[84] *NICS Act Record Improvement Program (NARIP) Awards FY 2009-2015*, BUREAU OF JUSTICE STATISTICS (last visited Nov. 4, 2015), http://www.bjs.gov/index.cfm?ty=tp&tid=491#summary [https://perma.cc/XL64-8MKF].

[85] 775 F.3d 308, 311 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

Sixth Circuit analyzed the constitutional challenge using strict scrutiny, marking a deviation from the court system's usual application of intermediate scrutiny.[86] This section of the Comment will examine the reasoning behind the court's decision and explain the court's reasoning for using a higher level of scrutiny than any court has used before.

A. Strictly Speaking: The Second Amendment and the Previously Institutionalized

On December 18, 2014, a Sixth Circuit three-judge panel decided an unprecedented outcome[87] that essentially struck down the federal gun control prohibition on persons who had been previously mentally institutionalized.[88] The case arose when Clifford Tyler, mentioned above,[89] was denied the ability to purchase a firearm because of a brief stay in a mental institution.[90] As a result of this denial, Tyler filed suit, alleging that 18 U.S.C. § 922(g)(4)[91] was an "overbroad infringement on his right to keep and bear arms," a right that was granted to him under the Second and Fourteenth Amendments.[92] Ultimately, the court decided the case in favor of Tyler, ruling that the prohibition placed on Tyler due to his previous mental institutionalization was unconstitutional.[93]

Judge Boggs, writing for the panel, began the opinion with a factual and statutory background, explaining Tyler's predicament

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[86] *Id.* at 328. The court acknowledged this deviation, stating, "In choosing strict scrutiny, we join a significant, increasingly emergent though, as yet, minority view . . . ." *Id.*

[87] The court noted that applying strict scrutiny is not the normal path and predicted that the choice of strict scrutiny will not affect many other circuit's decisions. *Id.* at 329.

[88] *Id.* at 344. The court reversed and remanded the case, stating that "Tyler's complaint validly state[d] a claim for a violation of the Second Amendment." *Id.*

[89] *See supra* Introduction.

[90] Tyler was in the mental institution for two to four weeks and did not take any of his prescribed medication, afraid the medicine would alter his mind. *Tyler*, 775 F.3d at 314.

[91] 18 U.S.C § 922(g)(4) created a prohibition on firearm ownership for those who "ha[ve] been committed to a mental institution." 18 U.S.C. § 922(g)(4) (2012).

[92] *Tyler,* 775 F.3d at 315.

[93] *Id.* at 344. The court stated, "The government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights." *Id.*

and the development of the prohibition against the previously mentally institutionalized.[94] Next, the court acknowledged *Heller*'s precedent but decided that *Heller* alone could not resolve the current issue.[95] Further, the court, applying a two-step analysis, concluded that strict scrutiny was the correct level of scrutiny to apply to gun prohibitions that were outside of *Heller*'s assurances.[96] Ultimately the court came to the conclusion that the government's interest was not sufficient to deprive Tyler of his constitutional right to keep and bear arms.[97]

B. Gibbons's Concurrence: Different Scrutiny, Same Result

Circuit Judge Gibbons agreed with the outcome of the majority's opinion, but wrote a separate concurrence concluding that the majority's application of strict scrutiny was not necessary.[98] Judge Gibbons, relying on other circuits' approaches, believed that the proper test to apply was intermediate scrutiny.[99] Judge Gibbons concluded that the government failed to establish that the prohibition on the previously mentally institutionalized

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[94] *Id.* at 311-15.

[95] *Id.* at 317. The court acknowledged that the statements in *Heller* indicated that "at least . . . the state may at times limit [the Second Amendment] right for certain groups of individuals consistent with the Constitution." *Id.*; *see also* District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008). However, the court also noted that *Heller*'s "assurance[s]" are "insufficient . . . to support the restriction as to individuals who have been involuntarily committed at some time in the past." *Tyler*, 775 F.3d at 317.

[96] *Tyler*, 775 F.3d at 318-34. The court used a two-step approach adopted in *United States v. Greeno*, which first asks "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." *Id.* at 318 (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)). If the challenged law does not fall within the historical Second Amendment, then a second step must be conducted, "appl[ying] the appropriate level of scrutiny." *Id.* (quoting *Greeno*, 679 F.3d at 518) (alteration in original).

[97] *Id.* at 344.

[98] *Id.* (Gibbons, J., concurring) ("I write separately to express my view that we should avoid extensive discussion of the degree of scrutiny to be applied and the ultimate application of strict scrutiny.").

[99] *Id.* Gibbons expressed serious doubts about "whether strict scrutiny applies . . . especially considering the general trend of our sister circuits." *Id.* Gibbons further concluded that under either standard Tyler had a valid claim, so she assumed, without deciding, intermediate scrutiny applied. *Id.*

"'reasonab[ly] fit'" the government's objectives of "public safety and suicide prevention."[100]

C. Federal Law's Accidental Catch-22

Both the majority opinion and Gibbons's concurrence stressed that Tyler was in a unique predicament due to the defunding of the federal relief-from-disabilities program, with the majority calling it a "catch-22."[101] As previously noted, the federal relief-from-disabilities program was established under 18 U.S.C. § 925(c) and provided persons prohibited from possessing firearms a way to regain that right.[102] However, this program was federally defunded in 1992 and is now left to the discretion of the states.[103] Tyler, a Michigan resident, was in a state that does not have a state-funded relief-from-disability program.[104] This was central to the Sixth Circuit's opinion because without this relief program, Tyler was permanently banned from owning a firearm, a violation of his Second Amendment right.[105] Gibbons's concurrence used the establishment of the relief-from-disabilities program to show that Congress understood and provided for "instances in which the ban of § 922(g) should not continue."[106]

IV. WHY THE PROHIBITION ON THE PREVIOUSLY MENTALLY INSTITUTIONALIZED IS DIFFERENT FROM OTHER CATEGORICAL PROHIBITIONS

Heller and *McDonald* both made it clear that the right to keep and bear arms is not without it limits.[107] However, the

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[100] *Id.* at 345 (quoting United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010)).

[101] *Id.* at 334 (majority opinion).

[102] *Id.* at 312. The process of the federal relief-from-disabilities program allowed prohibited individuals to seek relief from the attorney general, which he may grant after reviewing the circumstances and the applicant's record and reputation. *Id.*

[103] *Id.* Not until 2008 were states granted money to allow for a state-by-state relief-from-disabilities program. *Id.* at 313.

[104] *Id.*

[105] The court explained that Congress "went further," stating that the prohibition is "effectively conditioned . . . on whether [the petitioner] reside[s] in a state that has chosen to participate in joint federal-state administrative scheme." *Id.* at 342.

[106] *Id.* at 345 (Gibbons, J., concurring).

[107] *See supra* Part I.A., I.B. Beyond establishing the longstanding prohibitions, the Court in *Heller* concluded that only weapons "'in common use at the time'" were protected by the right and that carrying "dangerous and unusual weapons" was

Supreme Court also made it clear that these holdings did not explore all of the Second Amendment right.[108] The prohibition under 18 U.S.C. § 922(g)(4) is one such prohibition on the right to bear arms that the Supreme Court has yet to discuss. For this reason, this section will discuss the prohibition from two aspects that the Supreme Court has repeatedly used in determining whether a challenged law is constitutional: history and public policy. First, this section will explore the historical tradition of the prohibition on the previously mentally institutionalized and compare it with that of other prohibitions included in 18 U.S.C. § 922. Second, this section will discuss the public policy considerations surrounding the prohibitions on the previously mentally institutionalized and explain why they are vastly different than similarly situated prohibitions.

A. Tradition: Not a Longstanding Prohibition

Class-based prohibitions, such as the ban on felons, the previously mentally institutionalized, the mentally ill, and minors, have all been established at various points throughout our nation's history.[109] While most of these of prohibitions can be supported with a "longstanding" and well-established history, the prohibition on the previously mentally institutionalized is the young "gun" of the group and does not have such a "longstanding" history.[110]

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prohibited. District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[108] *Heller*, 554 U.S. at 626. ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . ."). This statement combined with "whatever else [the Second Amendment] leaves to future evaluation" shows that the Court acknowledged the fact that the *Heller* holding did not explore the full scope of the Second Amendment. *Id.* at 635; *see also* Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 185 n.155 (2013) (explaining that the right to bear arms may be broader than the holding established in *Heller*).

[109] *See* ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 39-64 (2015) (summarizing early American gun control laws among states up to 1934); JACOBS, *supra* note 57, at 19-32 (examining the major federal gun control acts in chronological order).

[110] *See Tyler*, 775 F.3d at 321 ("This law does not appear to rest on much historical foundation."); *see* 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, 1376 (2009) ("One searches in vain . . . to find any laws specifically excluding the mentally ill from firearms ownership.").

1. Previously Mentally Institutionalized: A Recent Prohibition Created by Accident

The federal prohibition barring those "who ha[d] been committed to a mental institution"[111] from owning a gun cannot be supported using the "longstanding" justifications made apparent in *Heller*.[112] Although this prohibition was established in 1968, it was not until 1992 that it actually became a permanent prohibition on the previously mentally institutionalized.[113] This makes the prohibition less than thirty years old, a far cry from "longstanding."[114] Moreover, it is not clear that Congress ever wanted this to be a permanent prohibition, rather than a regulatory measure to keep guns of the hand of dangerous persons.

At its inception, the prohibition on the previously mentally institutionalized was nothing more than a regulatory measure to keep firearms out of the hands of those presumed to be "dangerous."[115] Accompanying this regulation was a process to restore the Second Amendment rights for those who could overcome this presumption and show that they would not "act in a manner dangerous to public safety."[116] However, this all ended in 1992, causing this presumptive regulatory measure to become a de facto prohibition.[117] Given that gun control has been an intricate

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[111] 18 U.S.C. § 922(g)(4) (2012).

[112] *See Heller*, 554 U.S. at 626. The *Heller* Court stated that there were longstanding prohibitions but did not explain their reasoning for the longstanding prohibitions. *Id.* at 626-27 & n.26.

[113] *See supra* Part II (explaining the history of the federal relief-from-disabilities program).

[114] United States v. Skoien (*Skoien II*), 614 F.3d 638, 641 (7th Cir. 2010) ("[The] legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage . . . ."). The Seventh Circuit has also noted that the "exclusions need not mirror limits that were on the books in 1791." *Id.* However, given that there is no previous mention of the previously mentally institutionalized before 1968, there is no historical grounds for the prohibition.

[115] *See* JACOBS, *supra* note 57, at 24 (explaining that one of the primary goals of the GCA was to prohibit "sales to an expanded list of dangerous categories of people").

[116] 18 U.S.C. § 925(c) (2012).

[117] By defunding the federal relief-from-disabilities program, Congress left those prohibited from firearm ownership without any course of action, creating a permanent ban. *See supra* Part II; *see also* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 334 (6th Cir. 2014) (explaining that the regulatory scheme in place leaves many, like Tyler,

part of this nation's history dating back to its founding, it is hard to say that a prohibition effectively created in 1992 is "longstanding."[118]

Further, it is not clear that Congress fully understood the implications of defunding the relief-from-disabilities program. In Senate hearings on the relief-from-disabilities program, the only concern voiced was that too much money was being spent on rearming felons, but there was no mention of the previously mentally institutionalized.[119] Moreover, Congress in 2008 recognized their accidental, permanent restriction on the previously mentally institutionalized and reestablished the relief-from-disabilities program for the "mentally defective" and previously mentally institutionalized.[120]

2. Felons: A Well-Rooted Prohibition

The federal "felon" prohibition—prohibiting anyone who is under indictment, or convicted of a *crime* punishable by more than a year in prison from possessing a firearm[121]—is one prohibition that can be supported using the "longstanding" rationale in *Heller*. This prohibition may not have been codified until 1938, but its roots trace as far back as the founding of our nation and it has been upheld numerous times.[122]

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without a course of action), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

[118] The *Heller* Court did not establish a way to conclude whether a prohibition is longstanding, but because of the Court's insistence on historical analysis, I believe a longer history than thirty years is necessary. *See* District of Columbia v. Heller, 554 U.S. 570, 600-03 (2008) (examining late eighteenth century state constitutions); *see also* SPITZER, *supra* note 109, at 29 (explaining that the first gun control laws were enacted in 1619, by the then Virginia colony).

[119] *See* Nelson, *supra* note 77, at 556; 142 CONG. REC. 27,066 (1996) (statement of Sen. Simon) ("The goal of this provision has always been to prohibit convicted felons from getting their guns back . . . .").

[120] *See supra* Part II.C. In 2008, Congress enacted funding for relief-from-disabilities programs as part of the NIAA. *Id.* The state-led relief programs only allowed for relief for those who had lost their firearm possession rights due to "mental defect or a prior commitment to a mental institution." *Tyler*, 775 F.3d at 313 n.2.

[121] Gun Control Act of 1968, Pub. L. No. 90-618, § 922(g)(1)-(2), 82 Stat. 1213, 1220 (1968) (codified as amended 18 U.S.C. § 922(g)(1)-(2) (2012)).

[122] *See* SPITZER, *supra* note 109, at 52. While not explicitly codified until 1938, the early American colonies were aware of the danger posed by those deemed as criminals and established gun control laws to prohibit them from gun ownership. *Id.*

Beginning in early America, the founders made it evident that they did not consider felons to be members of society that were protected by the Second Amendment.[123] Further, this prohibition on felons can be seen in the laws of colonial America. Early colonial laws were concerned with the "felons" of the time, banning gun ownership for those sympathetic to Native Americans and acting out in rebellion.[124] Moreover, this prohibition on "felons" was broadened in the 1900s, when many states enacted laws aimed at keeping guns from criminals, including felons.[125]

Beginning in 1938, the federal government, faced with increasing issues of crime and violence, enacted the Federal Firearms Act of 1938, establishing the first prohibition against felon gun possession.[126] This prohibition was further expanded in 1961, to include those that were convicted of a crime punishable by imprisonment for a term exceeding one year.[127] Again, in 1968, Congress further fortified this prohibition, by increasing the penalty for being a felon in possession of firearms.[128]

3. Age-Based Restrictions: From the Colonies to Today

The age-based restrictions, which restrict handgun ownership for persons under twenty-one, and long gun ownership under the age of eighteen, are not new to the American gun control scheme.[129] These prohibitions have been around since the

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[123] *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983) ("Nor [did] it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them.").

[124] *See* SPITZER, *supra* note 109, at 52.

[125] *Id.*

[126] The Federal Firearms Act was in response to "gangster" and mob related activity of the 1920s, and limited the prohibition to those convicted of a "crime of violence." Federal Firearms Act, ch. 850, § 1(6), 52 Stat 1250, 1250 (1938); *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 699 (2009) (explaining the Federal Firearms Act of 1938 definitions).

[127] An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

[128] *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (1968). This 1968 Act made a felon-in-possession violation carry a maximum fine of $10,000 and/or two years of imprisonment. *Id.*; *see also* Lewis v. United States, 445 U.S. 55, 56 n.1 (1980).

[129] 18 U.S.C. § 922(b)(1) (2012).

mid-1800s, becoming more popular in the early 1900s.[130] While these prohibitions each differed on the age requirement to purchase a firearm, there was a general consensus that minors were "deemed irresponsible" to possess firearms.[131] The first age-based prohibition was enacted in 1856 by the State of Alabama, stating that it was unlawful to "sell, or give, or lend to any male minor, a pistol."[132]

Age-based prohibitions continued into the early 1900s, with twenty-one other states enacting the same or similar laws to protect their youth after the turn of the century.[133] With this early precedent, it is easy to see why Congress, in 1968, added the provision barring possession of firearms by minors, which is still in effect today. Moreover, the fact that this prohibition was so widely accepted by many early American states and colonies further solidifies it as perhaps the most "longstanding" prohibition there is.

4. Mentally Ill: A Similar Prohibition with Its Own History

At first blush, the prohibition on the previously mentally institutionalized and the prohibition on the mentally ill appear to have very similar histories, suggesting that neither can be justified as a "longstanding" prohibition. This appearance of a "longstanding" prohibition led one scholar, Carlton F.W. Larson, to conclude that "[o]ne searches in vain . . . to find any laws specifically excluding the mentally ill from firearms ownership."[134] While Larson's statement may have been true in 2009, a more recent and in-depth look into early American state laws reveals that the mentally ill may have been included in some of the categorical bans on firearms in the late 1800s.[135]

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[130] *See* SPITZER, *supra* note 109, at 55.

[131] *Id.*; *see generally* Mark Anthony Frassetto, Firearms and Weapons Legislation up to the Early Twentieth Century, (Jan. 15, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991 [https://perma.cc/JE69-YQHM] (summarizing the laws of early America).

[132] Frassetto, *supra* note 131, at 75; *see also* Coleman v. State, 32 Ala. 581, 582-83 (1858) (upholding conviction of lending pistol to a minor).

[133] *See* SPITZER, *supra* note 109, at 200-01.

[134] Larson, *supra* note 110, at 1376.

[135] *See* Frassetto, *supra* note 131.

While there may not be wide consensus among early states to include the mentally ill, two states, Florida and Kansas, both enacted laws that prohibited gun ownership by persons with an "unsound mind."[136] Some may argue that if unsound mind included the mentally ill it must include the previously mentally institutionalized. However, the definition of "unsound mind" refers to a permanent condition, which is different from the mind of person who has been rehabilitated in a mental institution and is now a productive member of society.[137]

B. Public Policy: Weighing the Government's Interest Against the Right to Bear Arms

With there being no clear historical support for the prohibition, this Comment now turns to the public policy considerations for the prohibition on the previously mentally institutionalized to further explain why the prohibition is ill-founded. Weighing the government's interest in public safety against an individual's right to keep and bear arms has been a well-established part of American jurisprudence.[138] However, this concern for public safety does not always outweigh the individual's right.[139] In *McDonald*, the Supreme Court acknowledged that the right to keep and bear arms has "controversial public safety implications."[140] While this may be true, finding that the public safety interest trumps an individual's right to bear arms, but only where certain disfavored groups are involved, seems to be at odds with the goal of promoting public safety.

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[136] *Id.* at 76-77. Florida's 1881 law made it unlawful for such person to have any weapon except for an ordinary pocket knife. *Id.*

[137] According to *Black's Law Dictionary*, "unsound mind" is defined as "an adult who from infirmity of mind is incapable of managing himself or his affairs." *Unsound Mind*, BLACK'S LAW DICTIONARY (2d ed. 1910). This definition indicates a permanent unstable mind frame, which is not what the previously mentally institutionalized suffer from once they have been rehabilitated.

[138] *See* Matthew R. Kite, State v. Radan*: Upsetting the Balance of Public Safety and the Right to Bear Arms*, 37 GONZ. L. REV. 201, 203 (2001).

[139] *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that city hand gun ordinance violated the Second Amendment); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that city gun ban on handgun ownership in the home violated the Second Amendment).

[140] *McDonald*, 561 U.S. at 783.

1. Previously Mentally Institutionalized: The Potentially Non-Violent and Law-Abiding

The prohibition on the previously mentally institutionalized established under § 922(g)(4) is one such disfavored group. While the government's interests in "protecting the community from crime" and "preventing suicide" are legitimate, the prohibition on the previously mentally institutionalized fails to satisfy this purpose because it results in a permanent prohibition that "targets a class that is potentially non-violent and law-abiding."[141]

First, the government's legitimate dual interests cannot outweigh the prohibition on the previously mentally institutionalized because the prohibition applies equally to a class of persons regardless of whether they are violent. While the government is concerned about violence and suicide prevention, a stronger indicator of violence is a history of violence—not past treatment for a mental condition.[142] It is true that the previously institutionalized are not at a zero percent chance of committing gun-related violent acts, but this can be said for any class of persons regardless of past history.[143] Further, the prohibition does not consider that the previously mentally institutionalized are now rehabilitated and productive members of society who may have jobs and live fulfilling lives.

Next, the government's legitimate interests cannot outweigh the prohibition because it places a prohibition on potentially law-abiding citizens. Courts have always held that the Second Amendment protects law-abiding citizens, yet the prohibition on the previously mentally institutionalized does not account for the fact that a person's institutionalization may not have been the

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[141] *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331, 342 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

[142] *See* Maria Konnikova, *Is There a Link Between Mental Health and Gun Violence?*, NEW YORKER, Nov. 19, 2014, http://www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence [https://perma.cc/Y4PJ-KQGH] ("Any history of violent behavior is a much stronger predictor of future violence than mental-health diagnosis"); *see also* Steven W. Dulan, *State of Madness: Mental Health and Gun Regulations*, 31 T.M. COOLEY L. REV. 1, 9 (2014) ("The strongest predictor of violent acts among people with a history of mental illness is a prior history of violent crime.").

[143] *See Tyler*, 775 F.3d at 342 (acknowledging that violent tendencies are present amongst all classes of people).

result of breaking the law.[144] While there are people who have been released from an institution and committed unlawful acts, there are also those like Clifford Tyler, a person who went through a rough patch in life, but did nothing to break the law.[145]

Finally, the government's interest cannot out weight the prohibition on the previously mentally institutionalized because the prohibition creates a permanent deprivation of the right to bear arms. This prohibition is unlike other prohibitions in § 922 because it does not have a uniform process for restoring gun rights.[146] For example, unlawful drug users and addicts, both of whom are prohibited from possessing guns under § 922(g)(3), are relieved of their prohibition when the person ceases using unlawful drugs.[147] This is not the case for the previously mentally institutionalized, who "[are] *not* so dangerous that all members must be permanently deprived of firearms,"[148] but may be subject to a permanent deprivation of their Second Amendment rights depending on their state of residence.[149]

2. Felons: The Punishment Fits the Crime

While the legitimate government interest does not outweigh the prohibition on the previously mentally institutionalized, the same cannot be said for the prohibition on felony ownership. The prohibition on felons was established to protect society from those "who have demonstrated that they may not be trusted to possess a

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[144] *See Heller*, 554 U.S. at 635 (explaining that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms"); *see also McDonald*, 561 U.S. at 886 (Stevens, J., dissenting) (reiterating *Heller*'s assurances to law-abiding citizens).

[145] *See Tyler*, 775 F.3d at 313-14 (explaining that Tyler was institutionalized due to a depressive episode related to a divorce and had no prior criminal history). *But see* McCreary, *supra* note 58, at 820-24 (telling the story of two mentally ill persons who committed violent crimes).

[146] *See Tyler*, 775 F.3d at 337 (noting that the federal gun prohibition on those convicted of domestic violence can be lifted through the expungement process).

[147] *See* United States v. Yancey, 621 F.3d 681, 687 (7th Cir. 2010) (holding "the gun ban [would] extend[] only so long as [the defendant] abuses drugs").

[148] *See Tyler*, 775 F.3d at 333.

[149] *Id.* at 334 (explaining that Congress's current relief scheme conditions Second Amendment rights on whether a person lives in a state that has adopted the relief program).

firearm without becoming a threat to society."[150] The prohibition on felons is different from the prohibition on the previously mentally institutionalized because felons, through the commission of their crime, have a level of culpability that may not be present for those who were previously mentally institutionalized. Further, the felony prohibition has a punitive aspect, that through their felony conviction, a felon forfeits his right to keep and bear arms.

A felon, through conviction, has been shown to have the level of culpability associated with the crime and shows a propensity for committing future crime.[151] To be convicted of a felony, it must be proven that the specific unlawful act occurred and that the actor had the requisite mental state.[152] Therefore, both aspects of the conviction show a capacity to commit crime and a willingness to harm others. This is simply not the case for the previously mentally institutionalized, who may have broken no laws, but were briefly institutionalized as a result of an involuntary mental state. This finding has led one court to state, ". . . [I]f anything, the bar would be more logically applied to convicts than to former mental patients . . . ."[153]

3. Age-Based Restrictions: A Transitive Group in Need of Protection

Admittedly, the age-based restrictions on firearm ownership are more difficult to distinguish from the prohibition on the previously mentally institutionalized. This is because both apply to law-abiding citizens who are presumably not violent.[154] However, the two differ in one distinguishing way. The age-based restrictions on firearm ownership are to protect a transitive class

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[150] *See* Scarborough v. United States, 431 U.S. 563, 572 (1977).

[151] *See* Don B. Kates, Jr., *Gun Control Restricts Those Least Likely to Commit Violent Crimes*, INDEPENDENT INSTITUTE (Apr. 6, 2009), http://www.independent.org/newsroom/article.asp?id=2472 [https://perma.cc/3ZR4-PGMU] ("[M]ore than 90 percent of murder suspects have a history of crime."); *see also* Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 515 n.24 (1982) (noting a study that found that felons convicted of robbery were among those most likely to commit future crimes).

[152] *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 1.8 (2d ed. 2003) (explaining elements of a crime are a specific act and an accompanying mental state).

[153] Galioto v. U.S. Dep't of Treasury, 602 F. Supp. 682, 689 (D.N.J. 1985).

[154] *Tyler*, 775 F.3d at 339.

of persons and are not permanent. This is in stark contrast to the prohibition on the previously mentally institutionalized who suffer a permanent ban as a result of a previous condition.

The age-based restrictions on firearms ownership do serve the government interest of public safety "by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."[155] The government's interest outweighs these age-based restrictions because the interest in public safety is a very important interest and the age-based restrictions do not permanently burden the right to bear arms. A person can overcome the age-based restriction simply by either coming of age or qualifying for one of the many exceptions.[156] This is vastly different from the prohibition on the previously mentally institutionalized, who cannot "outgrow" their previous conviction and do not have a consent process.

4. Mentally Ill: A Current State of Mind in Need of Protection

Another class-based prohibition closely related to the prohibition on the previously mentally institutionalized is the prohibition on the mentally ill or "mental[ly] defective."[157] While both of these groups are listed in § 922(g)(4), the government's legitimate interest in protecting society can only outweigh the prohibition on the mentally ill, not the previously mentally institutionalized.[158] This is because the term mentally defective, by definition, refers to a current state of mind that makes the person "a danger to himself or to others."[159] This is directly related

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[155] *See* Huddleston v. United States, 415 U.S. 814, 824 (1974).

[156] The current federal age restrictions are eighteen for shotgun and long rifles and twenty-one for handguns. 18 U.S.C. § 922(b)(1) (2012). These age-based restrictions have exceptions. *See* 18 U.S.C. § 922(x)(3) (2012); *see also* United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009) (noting a party's argument that despite these exceptions, the ban on juveniles "is even more complete" than the D.C. ban in *Heller*).

[157] 18 U.S.C. § 922(g)(4) (2012).

[158] It is interesting that the statute distinctly separates the two groups, given that statutes are to be read without redundancy. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."). This further suggests that the two groups are to be treated differently.

[159] 27 C.F.R. § 478.11 (2016).

to the government interest of public safety; therefore, the prohibition is good public policy.

However, the government interest in public safety does not have this direct relationship to the prohibition on the previously mentally institutionalized. The previously mentally institutionalized refers to a group that has a previous "formal commitment . . . to a mental institution by a court, board, commission, or other lawful authority."[160] Therefore, the previously mentally institutionalized, upon release from the institution, have been found to be "*not* so dangerous that all members must be permanently deprived of firearms."[161] Thus, the prohibitions on the previously mentally institutionalized and mentally ill seem very similar but refer to different time periods of a person's life. While one refers to a current dangerous state of mind in need of protection, the other refers to a past event that may not have any connection to the government's interest in public safety.

V. APPLYING LEVELS OF SCRUTINY PROVES THE PROHIBITION IS UNCONSTITUTIONAL

Given the Supreme Court's rulings in *Heller* and *McDonald*, the clear differences between the previously mentally institutionalized and other class-based prohibitions, and the Sixth Circuit's use of strict scrutiny, this Comment's focus now shifts to the application of all three levels of constitutional scrutiny. The three levels of constitutional scrutiny that can be applied to a challenged law are strict scrutiny, intermediate scrutiny, and rational basis review. In applying each level of scrutiny to the prohibition on the previously mentally institutionalized, this section will show that regardless of the level of scrutiny applied the prohibition is unconstitutional.

A. Strict Scrutiny: Narrowly Tailored to a Compelling Interest?

The most rigorous standard of scrutiny that can be applied to any challenged law is strict scrutiny. Strict scrutiny, often known

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[160] *Id.*

[161] Tyler v. Hillsdale Cty. Sherriff's Dep't., 775 F.3d 308, 333 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

as "strict in theory and fatal in fact,"[162] is often employed when a challenged law infringes upon fundamental rights or restricts a "suspect class."[163] Given that the Supreme Court in *Heller* and *McDonald* fortified that the right to keep and bear arms is a fundamental right, it can be argued that firearm regulations must be assessed using strict scrutiny.[164]

Strict scrutiny is essentially a two-prong "quintessential balancing inquir[y]"[165] which requires that the government show that the challenged law "furthers a compelling interest and is narrowly tailored to achieve that interest."[166] While there is no definite definition of the term "compelling interest", Hans Linde suggests "the Court uses *compelling* in the vernacular to describe societal importance."[167] If the government shows that the interest is compelling, the challenged law must survive the "narrowly-tailored" prong. Narrow tailoring can be described as a "means-end calculation" that does not require a perfect fit "between the government's objective and its means."[168] The fit between the government's means and its objective is the central component to narrowly tailoring.[169] For example, a challenged law can fail narrow tailoring if it is over-inclusive, meaning "[the government's] interests could be achieved by narrower ordinances that burden[] [the Second Amendment] to a far lesser degree."[170]

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[162] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006).

[163] *See* Roe v. Wade, 410 U.S. 113, 152-55, 164-65 (1973) (holding state's abortion law violated constitutional right to privacy); *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications must be analyzed under strict scrutiny).

[164] *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (holding that the Second Amendment guarantees the right to bear arms for self-protection); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Fourteenth Amendment incorporates the right to bear and keep arms to the states).

[165] *Tyler*, 775 F.3d at 323 (quoting Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1281 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

[166] Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

[167] Hans A. Linde, *Who Must Know What, When, and How: The Systematic Incoherence of "Interest" Scrutiny*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 221 (Stephen E. Gottlieb ed., 1993).

[168] *Tyler*, 775 F.3d at 331.

[169] *Id.*

[170] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

Likewise, a challenged law can fail narrow tailoring if it is under-inclusive, meaning "it fails to regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits."[171]

Applying strict scrutiny to the prohibition on the previously mentally institutionalized shows that the prohibition does not pass constitutional muster. Admittedly, the government's interests in public safety and suicide prevention are compelling interests, but the prohibition on the previously mentally institutionalized is too over-inclusive to satisfy the government's objectives.[172] While the prohibition on the mentally ill is presumably lawful and serves the government interest of public safety and suicide prevention, by grouping the previously mentally institutionalized with the mentally ill, the government assumes that those released from a mental institution cannot recover.[173]

While it may be true that a law will not fail strict scrutiny for being slightly over-inclusive, the prohibition on the previously mentally institutionalized "[has] cast a wider net than is necessary to perfectly remove the harm."[174] Therefore, under strict scrutiny, the prohibition on the previously mentally institutionalized is unconstitutional.

B. Intermediate Scrutiny: Substantially Related to an Important Governmental Objective?

Assuming that the prohibition on the previously mentally institutionalized is not subject to strict scrutiny, the next level of judicial review is intermediate scrutiny. Intermediate scrutiny is the most widely utilized standard of scrutiny applied to firearm regulations, but its application has been largely inconsistent

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[171] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1327 (2007).

[172] *See Tyler*, 775 F.3d at 332 ("A law that captures only a small subset of that group, or a law that captures the entire group but also a significant number of non-mentally ill persons, would fail narrow tailoring.").

[173] *Id.* ("Not all previously institutionalized persons are mentally ill at a later time . . . .").

[174] *Id.* The court noted some proactive laws prevent individual determinations, but the law in question is much too broad to justify the means. *Id.* at 332, 334.

amongst the lower courts.[175] Many of the lower courts acknowledge that the level of scrutiny that applies "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[176]

If it were found that the prohibition on the previously mentally institutionalized should be subject to intermediate scrutiny, the law would fail constitutional muster. Intermediate scrutiny, much like strict scrutiny is a "quintessential balancing inquir[y],"[177] but only requires the state demonstrate the challenged firearm law is "substantially related to an important governmental objective."[178] The application of intermediate scrutiny does not require that the government show "a close fit between the statute's means and its end, but it must at least establish a *reasonable* fit."[179] Essentially, intermediate scrutiny allows for the legislature "to paint with a broader brush" than would be allowed under strict scrutiny.[180]

One issue that arises under intermediate scrutiny is how much evidence the state must produce to support a challenged law. Courts have held that the amount of evidence varies

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[175] *See, e.g.*, United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to the firearm prohibition on domestic violence misdemeanants); United States v. Marzzarella, 614 F.3d 85, 97-99 (3d Cir. 2010) (applying intermediate scrutiny to a statute that prohibited the possession on a firearm with obliterated serial number); United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny to domestic violence misdemeanants).

[176] Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012) (quoting *Chester*, 628 F.3d at 682); *see also Chester*, 628 F.3d at 682 (stating that "[a] severe burden on the core Second Amendment right of armed self-defense should require strong justification"); Peruta v. Cty. of San Diego, 742 F.3d 1144, 1168 n.15 (9th Cir. 2014) (stating "[i]ntermediate scrutiny is not appropriate . . . for cases involving the destruction of a right at the core of the Second Amendment").

[177] *Tyler*, 775 F.3d at 323 (quoting Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1281 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

[178] Clark v. Jeter, 486 U.S. 456, 461 (1988); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985) (requiring that a classification be "substantially related to a sufficiently important government interest") (first citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 721-22 (1982); and then citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

[179] United States v. Skoien, 587 F.3d 803, 805-06 (7th Cir. 2009).

[180] *See* Heller v. District of Columbia (*Heller II*), 698 F. Supp. 2d 179, 191 (D.D.C. 2010) (quoting United States v. Miller, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009)).

depending on the importance of the state's interest. [181] However, the evidence must be more than "mere speculation or conjecture."[182] In *United States v. Skoien,* the Seventh Circuit relied on social studies that showed that firearms were likely to be used more often in domestic violence situations.[183]

Applying intermediate scrutiny to the current prohibition on the previously mentally institutionalized reveals that it does not reasonably fit the substantial government interest. While there is no question that the government's interests in public safety and suicide prevention are substantial, the government's prohibition is painted too broadly to be upheld using intermediate scrutiny. As mentioned before, the prohibition groups both the currently mentally ill with the previously mentally institutionalized treating them as the same, when in fact the two are very different.[184]

Although this fit might be too broad under strict scrutiny, the prohibition could still be found constitutional under intermediate scrutiny if there was evidence that the previously mentally institutionalized are a dangerous enough class that they still need protection. However, this is not the case. There is not any study that suggests that the previously mentally institutionalized are any more dangerous than society as a whole.[185] Further, there is evidence that Congress has believed the exact opposite, suggesting that the previously mentally institutionalized are "*not* so

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[181] *Id.* ("[T]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments [varies] up or down with the novelty and plausibility of the justification raised.") (alterations in original) (quoting Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 15 (D.C. Cir. 2009)).

[182] Silvester v. Harris, 41 F. Supp. 3d 927, 961 (E.D. Cal. 2014) (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)); *see also* United States v. Carter, 669 F.3d 411, 418 (4th Cir. 2012) ("[T]he government may not rely upon mere 'anecdote and supposition.'") (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000)).

[183] 614 F.3d 638, 643-44 (7th Cir. 2010).

[184] *See supra* Part III.C.

[185] *See supra* Part III.A.; Tyler v. Hillsdale Cty. Sherriff's Dep't, 775 F.3d. 308, 342 (6th Cir. 2014) (finding the government presented "not an iota of evidence that prohibiting the previously institutionalized from possessing guns serves its compelling interests"), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

dangerous that all members must be permanently deprived of firearms."[186]

C. Rational Basis Review: A Win for the Government?

Given that the prohibition on the previously mentally institutionalized does not pass strict or intermediate scrutiny, the third and final standard of review is rational basis review. Under rational basis review, a challenged law is only struck down if it lacks "a rational relationship" to a "legitimate government purpose," essentially granting a great deal of legislative deference.[187] However, in this instance the challenged law is still unconstitutional. This is because where a law is based on prejudice, rational basis review gains a whole new "bite."

This "rational basis review with a bite" test was first seen in *City of Cleburne v. Cleburne Living Center, Inc.*, when the Supreme Court struck down the requirement of a permit to build a home for the mentally disabled.[188] In making its decision, the Court meticulously went through all three of the city's justifications for the requiring a permit and found all three were insufficient for one of three reasons: illegitimacy, inconsistency, or insufficient demonstration.[189] Due to these insufficient justifications, the Court held that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[190]

Much like the permit requirement in *Cleburne*, the permanent prohibition on the previously mentally institutionalized is based on prejudice. The government states that its justification for the prohibition is preventing crime and

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[186] *Tyler*, 775 F.3d at 333. By instituting a relief-from-disabilities program that extends only to the previously mentally institutionalized, Congress has shown that they understand the previously mentally institutionalized are not as dangerous as some other groups prohibited from owning firearms.

[187] *See* Heller v. Doe, 509 U.S. 312, 319-20 (1993). The Court, in *District of Columbia v. Heller*, also noted that rational basis review is not the proper analysis for Second Amendment challenges. *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

[188] 473 U.S. 432, 448 (1985).

[189] *Id.* at 448-50.

[190] *Id.* at 450.

suicides, but these justifications, while legitimate, are not sufficient to permanently prohibit a whole class of persons from exercising their Second Amendment rights.[191] This is because the prohibition lacks sufficient demonstration that the previously mentally institutionalized are any more dangerous than any other person in society and is inconsistent with other class-based prohibitions.

First the prohibition on the previously mentally institutionalized cannot be justified because there is a lack of sufficient demonstration by the government to show that it satisfies its legitimate interest. The *Cleburne* Court stated, "[M]ere negative attitudes, or fear, unsubstantiated by factors . . . are not permissible bases for treating . . . the mentally retarded differently . . . ."[192] This is exactly what is happening to the previously mentally institutionalized. There is no evidence that shows the previously mentally institutionalized are any more dangerous than society as whole, but this prohibition is solely based on the public stigma that the previously mentally institutionalized cannot overcome their mental illness.[193]

Second, while the government's justifications may be legitimate, the prohibition is vastly different than other prohibitions that serve the same legitimate justification, leading to inconsistencies. Much like the *Cleburne* Court's analysis of the city's flood plain concern, the prohibition on the previously institutionalized is inconsistent with the other prohibitions that provide ways for a person to obtain relief from their disability.[194] For example, the process of expungement may remove the prohibition on domestic violence misdemeanants, the prohibition on felons may be removed by pardon, and the prohibition on illegal drug users can be removed once the person ceases to use the

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[191] *See Tyler*, 775 F.3d at 331 ("The government advances two interests: protecting the community from crime and preventing suicide.").

[192] *Cleburne*, 473 U.S. at 448.

[193] *See Tyler*, 775 F.3d at 345 (Gibbons, J., concurring) ("There is no indication in this record of the continued risk presented by people who were involuntarily committed twenty-eight years ago and who have no history of mental illness, criminal activity, or substance abuse.").

[194] *See Cleburne*, 473 U.S. at 449 (explaining that other buildings in the same location as the home for the mentally retarded require no permit).

illegal drugs.[195] This is not the case for the previously mentally institutionalized, who are left to the mercy of their state for relief.

VI. RESURRECTING A FEDERAL RELIEF-FROM-DISABILITIES PROGRAM

With the death or defunding of the federal relief-from-disability program came the death of the hopes and dreams of many of the previously mentally institutionalized who are now productive members of society. As this Comment shows, one of the major issues with the prohibition on the previously mentally institutionalized is that the relief-from-disabilities program originally included in the GCA was defunded, leaving relief up to the states. This has created an unconstitutional federal prohibition that deprives the previously mentally institutionalized of a fundamental right to bear arms in areas where there is not a restoration of rights program. For this reason, a relief program should not be left to the states discretion but rather guaranteed by the federal government. Thus, this Comment suggests re-funding a federal relief-from-disabilities program much like the state-run programs, but making the program universal across all fifty states.

Given that already twenty-six out of fifty states have adopted such programs and receive funding from the government, it seems to be a weak argument that this program is financially barred. At the peak of the federal relief-from-disabilities program, it cost the government $3,700 to process each application, which is a small amount of money for the government when weighed against protecting an individual's right guaranteed to him by the Constitution.[196] Further, there is clearly a need for this program as evidenced by the popularity of relief being granted by the states that have such a program.[197]

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[195] *See Tyler*, 775 F.3d at 337, 340, 341 (explaining that these prohibitions are not permanent); *see also* Veronica Rose, *OLR Research Report: Restoration of Right to Carry Firearms Under Federal Law*, CONN. GEN. ASSEMB. (Nov. 10, 2008), https://www.cga.ct.gov/2008/rpt/2008-R-0617.htm [https://perma.cc/AKY8-C9PQ].

[196] In 1992, the government processed around 3,000 to 4,000 applications and spent roughly $3.7 million. Nelson, *supra* note 77, at 554-55.

[197] *See* Michael Luo, *Some with Histories of Mental Illness Petition to Get Their Gun Rights Back*, N.Y. TIMES, July 2, 2011,

CONCLUSION

While the Supreme Court in *Heller* and *McDonald* recognized that the right to keep and bear arms is a fundamental right, these decisions did not fully explore the contours of this right. Due to this lack of clarity regarding the extent of the Second Amendment, a whole new era of litigation has occurred, centering on whether certain class-based prohibitions are constitutional. This litigation, while extremely important usually results in the same verdict, a ruling in favor of upholding these prohibitions. However, the prohibition on the previously mentally institutionalized, the subject of *Tyler*, is unconstitutional and cannot be upheld in its current form.

Using the *Tyler* opinion as a starting point, this Comment has argued that the prohibition on the previously mentally institutionalized is not constitutional. This is because the prohibition is very different than other prohibitions listed in 18 U.S.C. § 922.

This prohibition lacks the historical and public policy support that many of the other prohibitions have. Further, this prohibition is unlike other prohibitions because it is a permanent deprivation of the right to bear arms due to a previous event that has no bearing on a person's current mental state. For this reason, this Comment suggests that Congress reinstate the federal relief-from-disabilities program, guaranteeing that all previously mentally institutionalized persons have the same fundamental rights as society as a whole.

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http://www.nytimes.com/2011/07/03/us/03guns.html?_r=0 [https://perma.cc/K5XB-32HE].

[*] Staff Editor, Volume 85 of the *Mississippi Law Journal*. J.D. Candidate, The University of Mississippi School of Law, 2017. B.A. in Applied Sciences, The University of Mississippi, 2013. I would like to thank my mentor, Dean Jack Wade Nowlin for his expertise and guidance in the area of Constitutional Law. For without his support and guidance, this Comment would not have materialized. I would also like to thank my fellow Staff Editors for their invaluable feedback throughout the writing process. Further, I would like to thank C.J. Robison and Merry Johnson for their work as Executive Notes and Comments Editors of Volume 85 of the *Mississippi Law Journal*. Finally, I would like to thank my family and friends for their support throughout this process.