OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 38 FALL 2013 NUMBER 3

NOTES

IS YOUR SHOTGUN SPORTING?

Spencer Habluetzel*

I. INTRODUCTION

> The Attorney General shall authorize a firearm . . . to be imported . . . into the United States . . . if the firearm . . .
>
> . . . .
>
> (3) is of a type that . . . is *generally recognized as particularly suitable for or readily adaptable to sporting purposes* . . . .[1]

> "[D]estructive [D]evice" means . . . (2) any type of weapon . . . which will . . . expel a projectile . . . , the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . . which the [Attorney General[2]] finds is *generally*

* Spencer Habluetzel is a Resource Editor for the *Oklahoma City University Law Review*. He received his B.S. and M.S. degrees from Stephen F. Austin State University and expects completion of his J.D. in May of 2014. He thanks his supervising professor, Michael P. O'Shea, for suggestions and guidance, the past and present editors who selected his Note for publication and then provided excellence in editing, and most of all—his wonderful wife, Meagan, for her love and support.

1. 18 U.S.C. § 925(d)(3) (2006) (emphasis added).

2. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 4 (2005), *available at* http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf ("The cross references, bracketed notes, and Editor's notes seen in the laws and regulations are for guidance and assistance only and

recognized as particularly suitable for sporting purposes . . . .[3]

There are around 300 million privately owned firearms in the United States.[4] Of those, 21% are shotguns; this translates to around 62 million shotguns in the United States.[5] Reasons for owning shotguns vary greatly, including collection, recreation, and self-defense.[6] All shotguns coming into or already in the United States must comply with the National Firearms Act of 1934 and the Gun Control Act of 1968, both of which require shotguns to be sporting to be lawfully possessed[7] or imported.[8] According to the standards of the sporting purposes tests, a large number of the 62 million privately owned shotguns may be unregistered Destructive Devices and therefore illegally possessed. With that in mind, must most shotguns be generally recognized as suitable for sporting purposes to be legal? Before *District of Columbia v. Heller*,[9] the answer was likely "Yes." However, after *Heller*, the answer became less clear because the laws requiring shotguns to be sporting may be unconstitutional under the Second Amendment.[10]

This Note's two focal points involve the sporting purposes tests found in the Gun Control Act of 1968 and the National Firearms Act of

do not appear in the official United States Code and Code of Federal Regulations.").

> The National Firearms Act (NFA) is part of the Internal Revenue Code of 1986. The Internal Revenue Code, with the exception of the NFA, is administered and enforced by the Secretary of the Treasury. . . . In order to keep all the references throughout the Internal Revenue Code consistent, references to the Secretary of the Treasury in the NFA were left unchanged by the Homeland Security Act. However, section 7801(a)(2), Title 26, U.S.C., provides that references to the term "Secretary" or "Secretary of the Treasury" in the NFA shall mean the Attorney General.

Id. at 75.

3. 26 U.S.C. § 5845(f)(2) (2006) (emphasis added).

4. L. Hepburn et al., *The US Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 17 (2007), *available at* http://injuryprevention.bmj.com/content/13/1/15.full.pdf.

5. *Id.* at 16.

6. *Id.* at 17–18.

7. *See* 26 U.S.C. §§ 5861, 5845(f)(2) (2006).

8. *See* Gun Control Act of 1968, 18 U.S.C. §§ 922(l), 925(d)(3) (2006). Almost all shotguns have bores over one-half inch and therefore are subject to the Destructive Device definition. *See* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 370 (2012).

9. District of Columbia v. Heller, 554 U.S. 570 (2008).

10. U.S. CONST. amend. II.

1934.[11] This Note will also cover the history and development of the sporting purposes law as applied to shotguns, particularly in the areas of importation and Destructive Devices. Then it will provide a brief discussion about the sporting purposes law as it applies to shotguns under the Federal Sentencing Guidelines. Finally, after answering whether shotguns must be sporting, this Note will discuss the constitutionality of such a sporting requirement under *Heller*.

If the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) were to require registration of almost every modern shotgun as a Destructive Device, such a requirement would burden the ATF (the entity that must process the registrations), the parties who manufacture and transfer shotguns, and current and potential shotgun owners. Further, the current wait to register a regulated item under the National Firearms Act is about 10 months.[12] In light of *Heller*, the constitutionality of banning possession of an entire class of shotguns because they lack registration is highly suspect, especially in light of the extremely long approval process per shotgun.

II. A BRIEF HISTORY OF THE SHOTGUN

"The first true shot-gun . . . [was] the 'birding piece' of Prince Charles (Charles I), dated 1614 . . . ."[13] Shotguns in England became popular in the early 1600s and were dedicated to fowling and bird hunting.[14] Wingshooting (shooting at flying birds), while not initially a practical sport, became more popular over time as developing technology allowed for shorter barrels, which assisted in maneuverability.[15] By 1785, recommended shotgun barrel lengths ranged from 33 inches to 39

11. Gun Control Act of 1968, 18 U.S.C. § 925 (d)(3) (2006); 26 U.S.C. § 5845(f)(2) (2006).

12. *See Trend Graph*, NFA TRACKER, http://www.nfatracker.com/TrendGraphAll.aspx (last visited Jan. 8, 2014) (tracking the time period between the ATF cashing the applicant's check to the moment the applicant receives approval). The ATF recently started allowing electronic applications, and it is taking just over three months for approval. *See id.*

13. MAJOR HUGH B.C. POLLARD, SHOTGUNS: THEIR HISTORY AND DEVELOPMENT 3 (Read Country Books 2005) (1923).

14. Mike Yardley, *A Brief History of the Sporting Gun*, POSITIVE SHOOTING, http://www.positiveshooting.com/HistoryoftheSportingGun.html (last visited Jan. 8, 2014). At the time, shotguns were produced in both long and short versions with long versions sporting barrel lengths up to seven feet. *Id.*

15. *Id.*

inches.[16] Around the time that the side-by-side shotgun's popularity and mechanism became "firmly set" in Europe, repeating shotguns (pump shotguns) started to become popular in the United States.[17] In the United States during the late 19th century and early 20th century, John Moses Browning significantly improved pump shotguns as well as over-and-under shotguns.[18] Around that same time, Congress passed a protectionist tariff on sporting shotguns.[19]

While the shotgun originated for hunting and sporting purposes, "[it is] axiomatic that whatever the military forces of a nation use is what becomes popular with sportsmen: *all sporting guns are essentially derivatives of military designs*."[20] During the 1600s, at the same time birding pieces were developed in England, a short-barrel shotgun called the Blunderbuss was also developed throughout Great Britain.[21] By the time the American Revolution occurred, the Blunderbuss was well established as a combat arm even though American soldiers commonly fired shot from their muskets, essentially using them as shotguns.[22] The effectiveness of using muskets as shotguns, however, resulted in the end of the Blunderbuss in combat because muskets were twice as versatile.[23] After the Revolution, shotguns were developed in the United States for particular purposes, such as defense and hunting small and large game.[24] While the military did not formally adopt shotguns at the time, they remained popular with soldiers; for example, soldiers during the Civil War and Indian Wars used double-barrel shotguns even though they were not official military arms.[25]

In the late 19th Century, the United States military began evaluating shotguns, but it did not formally adopt a model until after the Spanish American War in 1898.[26] During the Philippine Insurrections, the United States Army provided Winchester Model 1897 pump-action shotguns to

16. *Id.*
17. *Id.*
18. *Id.*
19. Tariff Act of 1890, ch. 1244, 26 Stat. 567, 579–80 (1890).
20. BOLT ACTION SHOTGUNS, http://www.nrvoutdoors.com/UTILITY/BOLT%20ACTION%20SHOTGUNS.htm (last visited Nov. 19, 2013).
21. BRUCE N. CANFIELD, COMPLETE GUIDE TO U.S. MILITARY COMBAT SHOTGUNS 13 (2007).
22. *Id.*
23. *See id.* at 14.
24. *Id.*
25. *Id.*
26. *See id.* at 18–22.

troops,[27] and in World War I, the Army issued shotguns to troops for close-range trench warfare because of the effectiveness of shotguns at short distances.[28] Many of the original trench shotguns also had bayonets.[29] Since European militaries had primarily viewed the shotgun as a sporting gun, they neglected to utilize it in World War I for trench warfare despite the fact that United States Army officers had learned, during the Philippine Insurrections, how effective shotguns were for close-range combat.[30] Between World War I and the Vietnam War, shotgun use continued;[31] in fact, the government procured almost 200,000 shotguns for use in World War II.[32] After the Vietnam War, some interesting experimental shotguns were invented, including the CAWS, Remington M7188, USAS-12, and AA-12.[33] Interestingly, although the ATF considers a shotgun's ability to accept a bayonet to be a nonsporting feature,[34] it is not a useful military feature anymore.[35] The military continues to use pump-action and semiautomatic shotguns in various conflicts and will likely continue to use them for decades to come.[36]

III. THE SPORTING PURPOSES FIREARMS LAW

A. The Earliest Firearm Laws

Before 1968, the only instances where the law distinguished between sporting and nonsporting firearms were the Tariff Acts of 1890,[37] 1894,[38]

27. *Id.* at 23–24.
28. *Id.* at 29–30.
29. *See id.* at 30–44.
30. *Id.* at 29–30.
31. *See id.* at 61–67, 153–94.
32. *Id.* at 81.
33. *See id.* at 195–98. These shotguns were high capacity and select fire, but the military did not formally adopt any of them. *Id.*
34. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, STUDY ON THE IMPORTABILITY OF CERTAIN SHOTGUNS iv (2011) [hereinafter ATF 2011 STUDY], *available at* http://www.atf.gov/files/firearms/industry/january-2011-importability-of-certain-shotguns.pdf.
35. CANFIELD, *supra* note 21, at 216. A veteran of the recent conflicts in Afghanistan and Iraq remarked that he "[knew] a couple of guys [who] took the bayo lug/heat shield off [of their shotguns] first thing, regarding it as useless." *Id.*
36. *See id.* at 199–223.
37. Tariff Act of 1890, ch. 1244, 26 Stat. 567, 579 (1890).
38. Tariff Act of 1894, ch. 349, 28 Stat. 509, 518 (1894).

1897,[39] and 1909.[40] However, in 1922, the 67th Congress removed the sporting and nonsporting distinction when it decided to impose a higher tariff on imported firearms.[41] One of the reasons Congress eliminated the distinction was because of the difficulty posed in telling the difference between sporting and nonsporting firearms.[42] Senator Reed Smoot said,

> [I]t is next to impossible, if not impossible, to tell what a sporting . . . shotgun or rifle is. . . .
>
> . . . .
>
> [I]t was right and proper to strike out the word sporting because of the fact, in the first place, that no human being can tell whether a [shotgun] is a sporting [shotgun] or is to be used for some other purpose.[43]

Additionally, Senator Smoot said the distinction was unworkable and that it created many conflicts in shotgun and rifle importation.[44] After these Acts, Congress did not make another legal distinction between the two types of shotguns until 1968.

In the 1930s, Congress enacted the first major federal firearms laws after a campaign by the Justice Department.[45] Before then, Congress had passed a prohibition on mail orders of handguns in 1927,[46] but the public interest in firearms at that time was minor because of intense public focus on crime control, of which firearms was only a small factor.[47] The campaign by the Justice Department in the 1930s resulted in two Acts regulating firearms: the National Firearms Act of 1934 and the Federal Firearms Act of 1938.[48] In response to the perception of gangster weapons, the National Firearms Act restricted possession by imposing a $200 tax on transfers of machine guns, short-barreled rifles, and short-

39. Tariff Act of 1897, ch. 11, 30 Stat. 151, 164 (1897).

40. Tariff Act of 1909, ch. 6, 36 Stat. 11, 27–28 (1909). The Author searched for many key words, such as "sporting" and "shotgun," within the "Statutes at Large" database on HeinOnline; the Acts within notes 37–40 were the only relevant results.

41. 62 CONG. REC. 8313 (1922) (statement of Assistant Secretary, Henry M. Rose).

42. *Id.* at 8303.

43. *Id.* (statement of Sen. Reed Smoot).

44. *Id.*

45. *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 138 (1975) (footnotes omitted).

46. *Id.* at 136 (citing 18 U.S.C. § 1715 (1970)).

47. *Id.* (footnotes omitted).

48. *Id.* at 138.

barreled shotguns.[49] The escape of John Dillinger, a notorious bank robber, helped expedite the National Firearms Act's passage.[50] While the original National Firearms Act did not cover explosives or large-bore firearms, the Federal Firearms Act applied to all firearms.[51] The Federal Firearms Act forbade felons from purchasing, shipping, or receiving weapons, and required anyone engaged in interstate trade of firearms to have a federal license.[52] However, the Federal Firearms Act was ineffective in practice[53] because the federal license was cheap,[54] licensing standards were lax, and felons could still easily purchase rifles and shotguns, especially through the mail.[55]

B. Firearms Law Changes in the 1960s

The next three decades were relatively void of major firearms legislation except for an update to the firearms laws in 1957.[56] A major overhaul of federal firearms controls began in 1958 with a protectionist bill introduced by then-Senator John F. Kennedy to restrict importation of surplus military firearms.[57] In response, Senator Thomas Dodd requested a study on mail-order firearms sales; he then introduced a bill requiring mail-order handgun purchasers to certify their eligibility.[58] After President Kennedy's assassination in 1963, Senator Dodd amended his bill to include rifle and shotgun mail-order sales.[59] While this bill never became law, it generated interest in gun control, and in 1965, President Lyndon B. Johnson proposed a federal firearms-control overhaul.[60] Senator Dodd obliged by introducing Senate Bill 1592 in 1965.[61] When Senate Bill 1592 did not pass, Senator Dodd reintroduced

49. *See id.* This tax did not apply to weapons owned by the government, which constituted the bulk of all registered weapons. *Id.*
50. *Id.* at 137.
51. Note, *Firearms: Problems of Control*, 80 HARV. L. REV. 1328, 1329–30 (1967).
52. *Id.* at 1329.
53. William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999).
54. Zimring, *supra* note 45, at 140–41.
55. *Firearms: Problems of Control*, *supra* note 51, at 1332–33.
56. Zimring, *supra* note 45, at 143–44.
57. Vizzard, *supra* note 53, at 79.
58. *Id.* at 80.
59. *Id.*
60. Zimring, *supra* note 45, at 146.
61. *See* Vizzard, *supra* note 53, at 80.

it in 1967 as Senate Bill 1.[62] Senator Dodd later amended Senate Bill 1 to completely replace the Federal Firearms Act instead of merely amending it.[63] After that proposal, numerous tragedies occurred—such as the assassinations of Martin Luther King, Jr. and Medgar Evers, and the University of Texas Bell Tower Massacre—all of which contributed to gun control picking up steam.[64] Senator Dodd's amended Senate Bill 1 (without an exception for interstate long-gun sales) became Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.[65] In it, Congress recognized the ineffectual nature of the Federal Firearms Act and decided to replace it to "set out more rigid standards."[66] Congress also hastily added Title VII to the Crime Control Act of 1968 to address "simple firearm possession for the first time."[67] The Crime Control Act included a sporting purposes exception to the import restrictions on firearms, but it excluded *all* shotguns (except short-barreled shotguns) from the definition of Destructive Devices.[68]

Apparently unsatisfied with the Crime Control Act of 1968's Title IV, Congress passed the Gun Control Act of 1968 to replace Title IV of the Crime Control Act.[69] Title II of the Gun Control Act added a new category to the National Firearms Act of 1934: the Destructive Device.[70] Congress had already defined Destructive Device in the Crime Control Act of 1968,[71] but the Gun Control Act modified the definition by adding a sporting purposes exception.[72] Curiously, the Importation Sporting Purposes Exception[73] is not exactly the same as the Destructive Device

62. *Id.* at 82.

63. *Id.*

64. *See* H.R. REP. NO. 90-1577, at 7 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4413.

65. Vizzard, *supra* note 53, at 83 (footnote omitted); *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 925, 82 Stat. 197, 233 (1968) (codified at 18 U.S.C. § 922(g)(1) (2006)) [hereinafter Crime Control Act of 1968].

66. *See* Century Arms, Inc. v. Kennedy, 323 F. Supp. 1002, 1007 (D. Vt. 1971).

67. Vizzard, *supra* note 53, at 84 (footnote omitted).

68. Crime Control Act of 1968, Pub. L. No. 90-351, § 921(b)(2), 82 Stat. 197, 228 (1968).

69. Vizzard, *supra* note 53, at 86 (footnote omitted).

70. *Id.* (footnote omitted); *see also* National Firearms Act, Pub. L. No. 90-618, § 5845(f)(2), 82 Stat. 1227, 1231 (1968).

71. Crime Control Act of 1968, Pub. L. No. 90-351, § 921(a)(4), 82 Stat. 197, 227 (1968).

72. Gun Control Act of 1968, Pub. L. No. 90-618, § 921(a)(4), 82 Stat. 1213, 1214–15 (1968).

73. *Id.*

Sporting Purposes Exception,[74] even though both of these exceptions were implemented by the Gun Control Act of 1968.[75] In any event, the Gun Control Act was the culmination of the first modern push for gun control, and it is no coincidence that it became law soon after Robert Kennedy's assassination.[76]

IV. THE IMPORTATION SPORTING PURPOSES TEST

The nonsporting shotgun importation ban finds its origin in the Crime Control Act of 1968's Title IV where it was codified as 18 U.S.C. § 922(j) and § 925(d)(3).[77] The original language banned importation of any firearm[78] except as permitted by § 925(d).[79] The Importation Sporting Purposes Exception—found in § 925(d)(3)—was originally drafted to read as follows:

> The [Attorney General] may authorize a firearm to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm establishes to the satisfaction of the [Attorney General] that the firearm—
>
> . . . .
>
> (3) . . . is generally recognized as particularly suitable for or readily adaptable to sporting purposes . . . .[80]

Although the nonsporting shotgun importation ban on firearms has been tweaked many times over the years, the exception's substance has not changed.[81]

74. National Firearms Act, Pub. L. No. 90-618, § 5845(f)(2), 82 Stat. 1227, 1231 (1968).

75. The Crime Control Act of 1968 became law on June 19, 1968. Crime Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). The Gun Control Act became law on October 22, 1968. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

76. *See* Zimring, *supra* note 45, at 148.

77. Crime Control Act of 1968, Pub. L. No. 90-351, §§ 922(j), 925(d)(3), 82 Stat. 197, 231, 233–34 (1968).

78. *Id.* § 922(j), 82 Stat. 197, 231.

79. *Id.* § 925(d), 82 Stat. 197, 233–34.

80. *Id.*

81. The statutory changes can be found in the Gun Control Act, the Firearm Owners' Protection Act of 1986, the Crime Control Act of 1990, and the Homeland Security Act of 2002. The interpretive changes can be found in ATF studies, the most recent of which was in 2011. As an administrative matter, the Homeland Security Act of 2002 changed the authority over § 925(d) from the Secretary of the Treasury to the United States

A. Gun Control Act of 1968

The first change to the nonsporting shotgun importation ban occurred in 1968 when Congress amended the Crime Control Act of 1968 with the Gun Control Act of 1968.[82] The Gun Control Act changed the operative provision from § 922(j) to § 922(l) and this provision remains the same today.[83] The nonsporting shotgun importation ban simply states that it is illegal to knowingly import firearms except as provided in § 925(d).[84] A 1968 Senate Report stated that § 925(d)(3)'s purpose is to allow "importation of quality made, sporting firearms, including pistols, rifles, and shotguns, such as those manufactured and imported by Browning and other such manufacturers and importers of firearms."[85] Further indications of the legislative intent come from the statements of Senator Dodd, one of the main proponents of gun control during the 1960s.[86] In a conversation with Senator Clifford Hansen, Senator Dodd stated that Olympic shooting competitions, trap or skeet shooting, and Camp Perry National Matches[87] were all sporting purposes.[88]

However, when asked about whether the *firearms* used in Camp Perry National matches were sporting, Senator Dodd reasoned the firearms were not sporting because those firearms were not "generally described as . . . sporting" despite their wide use in sporting competitions.[89] In other words, his position was that using a military-style weapon in a sporting competition does not "change the nature of the weapon from a military to a sporting one."[90] In response to a question

Attorney General. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1112(e), 116 Stat. 2135, 2276 (2002).

82. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

83. 18 U.S.C. § 922(l) (2006).

84. *Id.*

85. 114 CONG. REC. 27,461 (1968).

86. *See* Vizzard, *supra* note 53, at 79–86.

87. *The National Matches History*, CIVILIAN MARKSMANSHIP PROGRAM, http://www.thecmp.org/NM/History.htm (last visited Nov. 18, 2013). The Federal Government created the National Matches more than 100 years ago, and the event remains one of the most popular marksmanship competitions in the nation. *Id.* In the National Trophy Rifle Matches, participants may use either an M1, M14, or M16, and "[t]he rifle must be a rifle that was issued by the U.S. Armed Forces or a commercial" equivalent. CIVILIAN MARKSMANSHIP PROGRAM, CMP COMPETITION RULES FOR SERVICE RIFLE AND SERVICE PISTOL 27–29 (17th ed. 2013), *available at* http://www.odcmp.com/Competitions/Rulebook.pdf.

88. 114 CONG. REC. 27,461 (1968).

89. *Id.*

90. *Id.*

from Senator Hansen, Senator Dodd also remarked that the firearm's cost was not the decisive factor when determining whether the firearm is sporting.[91] Rather, Senator Dodd stated that "no firearms [would] be [imported] . . . unless they [were] *genuine* sporting weapons."[92] He later suggested, in reference to handguns, that "[o]bviously, a 40- or 50-year-old military surplus . . . gun is not [sporting]; neither [are] . . . [smaller] caliber" handguns.[93] At the same time, he suggested that higher-quality handguns that are "generally suited for targetshooting, skeetshooting, . . . trapshooting[,] and hunting" would be sporting.[94]

In any event, one significant reason behind the importation ban was to stem the flow of cheap handguns, like starter pistols and military surplus pistols also known as Saturday Night Specials.[95] Senator Roman Hruska supported an amendment to the Importation Sporting Purposes Exception to include lawful uses because the "generally recognized as particularly suitable for or readily adaptable" standard was too narrow.[96] However, this amendment did not pass,[97] suggesting that perhaps Congress intended the Importation Sporting Purposes Exception to be narrow. The Senate Report also stated that "the Secretary of the Treasury ha[d] been given fairly broad discretion in defining and administering the import prohibition" because of the difficulty in determining which weapons would pass the Importation Sporting Purposes Test.[98] Once the Gun Control Act passed, the Secretary of the Treasury created a panel to implement the Test.[99] The panel focused on handguns, but they did not create comparable tests for rifles or shotguns because the rifles and shotguns that were "being imported [at the time] were generally conventional rifles and shotguns specifically intended for sporting purposes."[100] No rifles or shotguns, except those otherwise excluded

91. *Id.* at 27,462.
92. *Id.* (emphasis added).
93. *Id.*
94. *Id.*
95. *Id*; *see also* Zimring, *supra* note 45, at 156.
96. 114 CONG. REC. 27,463 (1968) (internal quotation marks omitted).
97. *See generally* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (the final version did not include the amendment to § 925(d)(3) including lawful purposes in the import exceptions).
98. 114 CONG. REC. 27,461 (1968) (statement of Sen. Dodd).
99. *See* Memorandum from Daniel R. Black, Assoc. Dir., Bureau of Alcohol, Tobacco, and Firearms, to Stephen E. Higgins, Dir., Bureau of Alcohol, Tobacco, and Firearms 1 (July 6, 1989) [hereinafter ATF 1989 Memo], *available at* http:www.atf.gov/files/firearms/industry/july-1989-%20importability-of-certain-semiautomatic-rifles.pdf.
100. *Id.* at 4.

(such as surplus or National Firearms Act firearms), were denied importation until the Striker-12 in 1984.[101]

1. The Striker-12

Prior to 1984, the general criteria for the Importation Sporting Purposes Test focused on the firearm's caliber or gauge, the firearm's type, and whether the firearm was of good workmanship or design.[102] Specifically for shotguns, the most important consideration was whether the shotgun could be converted to fire fully automatic and whether the barrel and overall lengths were long enough.[103] In 1982, in addition to the traditional shooting sports, the ATF stated "that police combat games did in fact constitute a sport."[104] But, consistent with Senator Dodd's comments that only the traditional shooting sports are protected, the ATF reversed its position in 1984 when it was confronted with a "new breed" of shotgun: the Striker-12.[105]

The Striker-12 is a military/police shotgun with a revolver-style magazine "initially designed . . . for riot control,"[106] and "all 12 rounds [can] be fired . . . in 3 seconds or less."[107] Faced with this menacing weapon, the ATF reversed its position on whether a police combat competition could be considered a sporting purpose and developed a new Importation Sporting Purposes Test shortly thereafter—the test that stands today.[108]

B. Firearm Owners' Protection Act of 1986

On May 19, 1986, Congress passed the Firearm Owners' Protection Act (FOPA).[109] FOPA modified the Importation Sporting Purposes Test

101. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, DEPARTMENT OF THE TREASURY STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES 7 (1998) [hereinafter ATF 1998 REPORT], *available at* http://www.atf.gov/files/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf.

102. *See* Gilbert Equip. Co. v. Higgins, 709 F. Supp. 1071, 1083 (S.D. Ala. 1989).

103. *Id.*

104. *Id.* at 1077 (internal quotation marks omitted).

105. ATF 1998 REPORT, *supra* note 101, at 7.

106. *Id.*

107. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF RULING 94-2, at 1 (1994), *available at* http://www.preventtyranny.com/Sources/Guns/ATF_Ruling_94-2.PDF.

108. *See* ATF 1998 REPORT, *supra* note 101, at 7–8.

109. Firearm Owners' Protection Act, Pub L. No. 99-308, 100 Stat. 449 (1986).

of § 925(d)(3) in the following three ways: first, it changed the Secretary's authorization from discretionary to mandatory; second, it eliminated the burden on importers to establish that the firearm met the Importation Sporting Purposes Test; and third, it criminalized the importation of any firearm's frame, receiver, or barrel that had not been authorized for importation pursuant to the Importation Sporting Purposes Test.[110] In effect, however, all of these changes have had little impact on the status of the law as executed.

1. The USAS-12

In 1986, the ATF rejected an importation permit for the USAS-12 because the ATF determined that the shotgun was unsuitable for traditional shooting sports based on the fact that it was a semiautomatic version of a fully automatic firearm and based on "its weight, size, bulk, designed magazine capacity, configuration, and other factors."[111] In fact, the USAS-12 could accept a detachable drum magazine capable of holding up to 28 rounds,[112] adding considerable weight and bulk to the firearm. The potential importer of the USAS-12 challenged the ATF's decision in *Gilbert Equipment Co. v. Higgins*.[113] The importer lost because the court deferred to the ATF's interpretation and found that "there [were] no facts to indicate that [the factors used by the ATF] were not proper factors . . . to consider in reaching [a] decision."[114] The importer in *Gilbert* "argue[d] that a deferen[tial] rule [was] inconsistent with the intent of" FOPA, but the court found nothing to support the importer's claim.[115]

2. The Steyr AUG Rifle

An importer of Steyr AUG rifles also attempted to appeal to the modifications made by FOPA.[116] The district court in *Gun South, Inc. v. Brady* agreed that the new language allowed the importation of the Steyr

110. *Id.* at 459.
111. ATF 1989 Memo, *supra* note 99, at 5.
112. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF RULING 94-1, at 1 (1994).
113. *See* Gilbert Equip. Co. v. Higgins, 709 F. Supp. 1071, 1074 (S.D. Ala. 1989).
114. *Id.*
115. *Id.*
116. *See* Gun S., Inc. v. Brady (*Gun S. I*), 711 F. Supp. 1054 (N.D. Ala. 1989), *rev'd*, Gun S., Inc. v. Brady (*Gun S. II*), 877 F.2d 858, 859 (11th Cir. 1989).

AUG rifles.[117] This case arose when the ATF imposed a temporary suspension of certain imported rifles while it determined if those rifles were sporting.[118] The district court found that FOPA's legislative history showed that the Importation Sporting Purposes Exception had been greatly broadened.[119] In fact, the House Judiciary Committee concluded that FOPA "[o]pen[ed] up the importation of firearms by [requiring] importation of a firearm *if there is a sporting purpose* and eliminat[ed] the [burden on the importer to] satisf[y] the Secretary of the sporting purpose."[120] Thus, the district court denied the temporary suspension of the Steyr AUG rifle and permitted importation.[121]

However, the government appealed to the Eleventh Circuit,[122] and the Eleventh Circuit reversed the district court's ruling.[123] The Eleventh Circuit found that the Importation Sporting Purposes Exception's mandatory language did not prevent the ATF from suspending importation of a particular firearm pending a review of the firearm's sporting purpose.[124] The court also looked to legislative history to support its position, and found that a Senate Report recognized "that in the vast majority of cases, [the substitution of 'shall' for 'may' in the authorization section] [would] not result in any change in current practices."[125]

There has been one case, *Firearms Import/Export Roundtable Trade Group v. Jones*, that pertains to FOPA's third amendment made to the Importation Sporting Purposes Exception.[126] In *Jones*, the court found that the ATF's denial of the importers' applications for importation was reasonable; it stated that "the FOPA amendment prevents an importer from circumventing the import restrictions on assembled firearms by disassembling a firearm into its component pieces for import and

117. *Id.* at 1064–65.
118. *Gun S. II*, 877 F.2d at 859.
119. *Gun S. I*, 711 F. Supp. at 1064.
120. *Id.* (quoting H.R. REP. NO. 99-495, at 14 (1986), *reprinted in* 1968 U.S.C.C.A.N. 1327, 1340) (emphasis added).
121. *Id.* at 1065.
122. *Gun S. II*, 877 F.2d at 860.
123. *Id.* at 869.
124. *See id.* at 862.
125. *Id.* (first alteration in original) (quoting S. REP. NO. 98-583 (1984)) (internal quotation marks omitted).
126. *See* Firearms Imp./Exp. Roundtable Trade Grp. v. Jones, 854 F. Supp. 2d 1 (D.D.C. 2012), *aff'd*, 498 F. App'x 50 (D.C. Cir. 2013).

subsequent reassembly."[127]

C. The ATF 1989 Memo

The temporary suspension in *Gun South I* resulted from an order by former President George H.W. Bush.[128] President Bush ordered an importation suspension and a review of the Importation Sporting Purposes Exception as a result of increasing pressure after a school shooting in Stockton, California.[129] Initially, he refused to do anything, but later he recanted stating that he did not reverse his position, but that he merely had a "pulse change."[130] He also stated that the administration was not "trying to have a different interpretation of the law" when he ordered a review.[131] By the President's order, the ATF reviewed the Importation Sporting Purposes Exception and released its review on July 6, 1989, in the Report and Recommendation on the Importability of Certain Semiautomatic Rifles (ATF 1989 Memo).[132]

The ATF 1989 Memo created a test to determine whether an imported rifle is of a type "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[133] Since the Importation Sporting Purposes Test under § 925(d)(3) refers to the firearm type, the ATF first discussed the type of rifles the Bush Administration had ordered suspended from importation.[134] The ATF determined that the rifles suspended from importation were "semiautomatic assault rifles," a category represented by rifles with characteristics common to modern military-assault rifles.[135] The ATF then distinguished semiautomatic assault rifles from traditional sporting rifles using characteristics typical of modern military-assault rifles: (1) whether the firearm can accept a detachable magazine (particularly large magazines), folding or telescoping stocks, pistol grips, bayonets, flash suppressors, bipods, grenade launchers, or night sights; "(2) [w]hether the [firearm] is a semiautomatic version of a machinegun"; and "(3) [w]hether the

127. *Id.* at 8, 18–19.
128. Statement by Press Secretary Fitzwater on the Suspension of Semiautomatic Weapons Imports, 1 PUB. PAPERS 263, 373 (Apr. 15, 1989).
129. The President's News Conference, 1 PUB. PAPERS 256, 259 (Mar. 17, 1989).
130. *Id.*
131. *Id.*
132. *See* ATF 1989 Memo, *supra* note 99, at 1.
133. *See id.* at 1, 6–8 (internal quotation marks omitted).
134. *See id.* at 5–6.
135. *Id.* at 6 (internal quotation marks omitted).

[firearm] is chambered to accept" cartridges shorter than 2.25 inches.[136] While the ATF 1989 Memo specifically created a test for rifles, the ATF has used a substantially similar test for shotguns.[137]

Next, the ATF discussed the scope of "sporting purpose" and whether the "semiautomatic assault rifles" category was suitable for sporting purposes.[138] In determining what activities were to be included under the ambit of sporting purposes, the ATF consulted the statute's legislative history and found that a broad interpretation would render the statute meaningless because the Importation Sporting Purposes Exception is just that—an exception.[139] Thus, the ATF gave the Importation Sporting Purposes Exception a narrow meaning and included only traditional sporting activities such as hunting, organized target shooting, and trap or skeet shooting.[140] The ATF then considered "technical and marketing data, expert opinions, the recommended uses of the firearms, and data on the actual uses" of firearms to "determin[e] whether [semiautomatic assault rifles were] generally recognized as particularly suitable for[, or readily adaptable to,] sporting purposes."[141] The ATF conducted a survey and found that those rifles were not generally marketed, recommended, or used for sporting purposes.[142] As such, the ATF recommended that semiautomatic assault rifles be banned from importation since they did not meet the criteria for the Importation Sporting Purposes Exception.[143]

D. The Unsoeld Amendment

The next addition to the importation ban was the Unsoeld Amendment to the Crime Control Act of 1990, codified as 18 U.S.C. § 922(r), which Congress passed on November 29, 1990.[144] This amendment added the words "from imported parts" to a proposed law that would have banned domestic manufacture of firearms deemed

136. *Id.* at 6–8.
137. *See* ATF 2011 STUDY, *supra* note 34, at 7–13.
138. *Id.* at 8–10.
139. *Id.* at 8.
140. *Id.* at 8–9.
141. *Id.* at 9.
142. *Id.* at 11–12.
143. *Id.* at 12.
144. Crime Control Act of 1990, Pub. L. No. 101-647, § 2204, 104 Stat. 4789, 4857 (1990).

identical to imported, restricted firearms.[145] Up until this point, it was still legally possible to import a nonsporting firearm into the United States prior to the importation ban; an importer could simply import a parts kit that could be used to assemble a nonsporting firearm in the United States.[146] While it might seem as though the amendment imposed more restrictions, it actually lessened the restrictions that would have been imposed by the Crime Control Act of 1990.[147] Representative John Dingell pointed out that the "Unsoeld [A]mendment . . . correct[ed] a blatant flaw in" the proposed law, which, had the proposed law passed unamended by the Unsoeld Amendment, "would [have] authorize[d] the Treasury Secretary to prohibit the domestic manufacture of any semiautomatic rifle or shotgun—simply by declaring it identical to a foreign-made, nonimportable model."[148] Representative Ron Marlenee noted that the Unsoeld Amendment "prevent[ed] unelected bureaucrats from telling [people] which gun[s they] can own."[149]

The Secretary of the Treasury delegated power in this area to the ATF[150] and courts generally defer to enforcement bodies' interpretations.[151] Indeed, had the Unsoeld Amendment not passed, the ATF could, of its own accord or at the request of the President (as has happened before), ban any domestic firearm by stating that it was identical to a nonimportable firearm. Moreover, in executing the Unsoeld Amendment, the Treasury Department clarified the meaning of the phrase assembled "from imported parts."[152] By doing so, the Treasury Department determined that a rifle or shotgun was assembled "from imported parts" if it contained more than ten imported parts.[153] This

145. 136 CONG. REC. 27,533 (1990) (statement of Rep. John D. Dingell, Jr.); *see also* CHARLOTTE A. CARTER-YAMAUCHI & JENSEN UCHIDA, A CLASH OF ARMS: THE GREAT AMERICAN DEBATE, S. 16-1, 1st Sess., at 82–83 (Haw. 1991), *available at* lrbhawaii.info/lrbrpts/91/91gunclash.pdf.

146. 136 CONG. REC. 27,535 (1990) (statement of Rep. Brooks).

147. *Id.* at 27,533. Representative Hughes complained that no distinction should be made between firearms made from imported or domestic parts as long as they resembled firearms banned from importation. *Id.*

148. *Id.*

149. *Id.* at 27,535.

150. Springfield, Inc. v. Buckles, 292 F.3d 813, 815 (D.C. Cir. 2002).

151. *Id.* at 818 (citing Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

152. Domestic Assembly of Nonimportable Firearms, 58 Fed. Reg. 40,587, 40,588 (July 29, 1993) (codified at 27 C.F.R § 478.39 (2012)) (internal quotation marks omitted).

153. *Id.*

ruling has not changed since its codification.[154]

E. The ATF 1998 Report

In 1997, President Clinton ordered another review of the Importation Sporting Purposes Exception to the importation ban because "manufacturers ha[d] modified many of those weapons banned in 1989 to remove certain military features without changing their essential operational mechanism" and "[m]embers of Congress ha[d] . . . urged that it [was] again necessary to review the manner in which the Department [was] applying the sporting purposes test, in order to ensure that the agency's practice [was] consistent with the statute and current patterns of gun use."[155] Once again, the President ordered a temporary suspension of certain rifles' importation pending a review of their importability.[156] This order resulted in the Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles (ATF 1998 Report), which the ATF released in April of 1998.[157]

At the time the ATF issued the ATF 1998 Report, the most significant change in the law since 1989 had been the Federal Assault Weapons Ban of 1994, which banned certain semiautomatic weapons and magazines with a capacity over a certain amount.[158] The ATF interpreted the ban as a signal that firearms with the capability of quickly shooting many rounds were not sporting.[159] "Accordingly, [the ATF] found that the ability to accept . . . a [large-capacity military] magazine [was] a critical factor in the sporting purposes test . . . ."[160] Once again, in its analysis, the ATF began by defining the type of weapon in the study.[161] The ATF found that all rifles under consideration were modified versions of the rifles made unimportable by the ATF 1989 Memo; further, all of the rifles under consideration, except one, had the ability to accept a "large capacity military magazine."[162] Just as before, the ATF found that only traditional shooting sports, like hunting, organized target

154. *See* 27 C.F.R. § 478.39 (2012).
155. Memorandum on Importation of Modified Semiautomatic Assault-Type Rifles, 2 PUB. PAPERS 1575, 1575–56 (Nov. 14, 1997).
156. *Id.* at 1576.
157. ATF 1998 REPORT, *supra* note 101, at 1.
158. *See id.* at 2–3.
159. *Id.* at 3.
160. *Id.*
161. *Id.* at 16.
162. *Id.*

shooting, and skeet or trap shooting, counted as sporting purposes.[163] The ATF noted that in 1989, the ability to accept a large-capacity military magazine was not dispositive, but new developments (namely the Federal Assault Weapons Ban of 1994) made that characteristic much more significant.[164] After it had conducted another survey, the ATF found that large-capacity military magazines were not generally recognized as particularly suitable for, or readily adaptable to, sporting purposes.[165]

F. The ATF 2011 Study

In January of 2011, the ATF conducted another study, the Study on the Importability of Certain Shotguns (ATF 2011 Study).[166] Before this study, the ATF had only specifically studied rifles.[167] Recognizing the lack of a shotgun-specific study, the ATF created a working group to fulfill this need.[168] In this study, the working group "made an effort to consider other shooting activities" that qualify as sporting purposes.[169] If the working group noted any sporting purpose changes to shotguns, such would affect rifles and pistols too, because all three types of firearms (rifles, pistols, and shotguns) are used in practical shooting competitions.[170] Because there would be a significant effect if practical shooting were construed to be a sporting purpose, the working group declined to consider the issue until a more thorough assessment could be performed.[171] Therefore, the traditional shooting sports of hunting, organized target shooting, and skeet or trap shooting remained the only sporting purposes.[172]

"[T]he [ATF 2011 S]tudy did not benefit from a mandate to focus upon and review a particular type of firearm" as in previous studies,

163. *Id.* at 18.
164. *Id.* at 22.
165. *Id.* at 30.
166. ATF 2011 STUDY, *supra* note 34.
167. *Id.* at ii–iii.
168. *Id.*
169. *Id.* at iii.
170. *Id.*; *see also* ATF 1998 REPORT, *supra* note 101, at 17 n.48 ("Practical shooting involves moving, identifying, and engaging multiple targets and delivering a number of shots rapidly. In doing this, practical shooting participants test their defensive skills as they encounter props, including walls and barricades, with full or partial targets, 'no-shoots,' steel reaction targets, movers, and others to challenge them.").
171. ATF 2011 STUDY, *supra* note 34, at iii.
172. *Id.* at iv.

"[so] the . . . working group . . . consider[ed] a broad sampling of shotguns and shotgun features that may constitute a 'type.'"[173] Once again, the working group surveyed many sources to determine which features made shotguns nonsporting.[174] These features included folding, telescoping or collapsible stocks, bayonet lugs, flash suppressors, magazines over five rounds, drum magazines, grenade-launcher mounts, integrated rail systems, light-enhancing devices, excessive weight, excessive bulk, and forward pistol grips.[175] Finally, the working group conceded that even though

> a firearm or feature [may have] initially [been] designed for military or tactical applications, ... [that fact] may be overcome by evidence that the particular shotgun or feature has been so regularly used by sportsmen that it is generally recognized as particularly suitable for or readily adaptable to sporting purposes.[176]

G. The ATF 2012 Comments Report

After the publication of the ATF 2011 Study, there was a 90-day comment period, and then the working group released the Report on the Importability of Certain Shotguns (ATF 2012 Comments Report) on July 2, 2012.[177] The ATF noted that many commenters questioned the constitutionality of the Importation Sporting Purposes Test as well as the ATF's interpretation of it.[178] Oddly, the ATF addressed the constitutional concerns by providing a quote from *Heller* that stated individuals have a right to keep and bear arms.[179] The ATF seemed to use the quote to explain that concerns about the importation ban and the Importation Sporting Purposes Exception's constitutionality were without basis because § 925(d)(3) does not limit or pose an undue burden on shotgun

173. *Id.* at 8.
174. *Id.* at iv.
175. *Id.* at 9–12.
176. *Id.* at 13.
177. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, REPORT ON THE IMPORTABILITY OF CERTAIN SHOTGUNS 1 (2012) [hereinafter ATF 2012 COMMENTS REPORT], *available at* http://www.atf.gov/files/firearms/industry/july-2012-importability-of-certain-shotguns.pdf.
178. *Id.*
179. *Id.* at 2.

possession.[180] The ATF then conclusively stated that the ATF 2011 Study "results in no 'ban' on any shotguns, even those with nonsporting features."[181] Moreover, commenters also argued that many features, such as forward pistol grips, were indeed sporting.[182] Recognizing that the forward pistol grip has sporting applications and that the integrated rail system is necessary for the forward pistol grip, the ATF amended their previous study.[183] These two features are now generally recognized as particularly suitable for, or readily adaptable to, sporting purposes.[184]

An interesting development occurred between the release of the ATF 2011 Study and the ATF 2012 Comments Report that effectively nullified any determinations that the ATF had ever made on the Importation Sporting Purposes Exception. On November 18, 2011, Congress passed an appropriation restriction in the Consolidated and Further Continuing Appropriations Act of 2012; this effectively prohibited the ATF from denying or failing to act on applications for importing shotguns that otherwise failed the Importation Sporting Purposes Test.[185] While this specific prohibition applied only for the 2012 fiscal year, it has since been renewed through January 15, 2014,[186] and will likely continue to be renewed indefinitely.

V. THE DESTRUCTIVE DEVICE SPORTING PURPOSES TEST

With regard to the National Firearms Act in Title 26[187] and Title 18[188] of the U.S. Code, neither provision, nor their respective Destructive Device definitions, have substantively changed since the Gun Control Act of 1968. The Crime Control Act of 1968 had created Title 18's

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 3.
184. *Id.* at 3–4.
185. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. B, § 541, 125 Stat. 552, 639–40 (2011).
186. *See* Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, § 101, 126 Stat. 1313, 1313–14 (2012). Section 101(a)(2) continues the appropriations for division B under the same authority and conditions as the previous appropriations bills. Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. B, § 538, 127 Stat. 198, 278 (2013); Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 101(a)(2), 127 Stat. 558, 558 (2013).
187. 26 U.S.C. § 5845(f)(2) (2006).
188. 18 U.S.C. § 921(a)(4) (2006).

definition of Destructive Device,[189] however the Gun Control Act added the Destructive Device definition to Title 26[190] and also modified the Title 18 definition to be the same.[191] Further, the Gun Control Act of 1968 added the Destructive Device Sporting Purposes Exception to Title 26[192] and then made the Title 18 definition conform to it by providing a comparable sporting requirement within Title 18.[193] With regard to the operative provisions in each act, Title 26 requires a $200 tax on listed firearms,[194] requires listed firearms to be registered,[195] and prohibits any person from receiving or possessing a listed firearm if it is unregistered.[196] In comparison, Title 18's operative provision simply prohibits any person from transporting a Destructive Device in interstate or foreign commerce.[197]

The original definition in Title 26 stated that "'[D]estructive [D]evice' means . . . (2) any type of weapon . . . which will . . . expel a projectile . . . , the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . . which the [Attorney General[198]] . . . finds is generally recognized as particularly suitable for sporting purposes."[199] The purpose of the amendment that added the Destructive Device definition to Title 26 was to restrict "rockets, bazookas, antitank guns, . . . and the like."[200] Senator Roman Hruska

189. Crime Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 227 (1968) (defining Destructive Device under Title 18 so as to originally exclude *all* shotguns except short barrel shotguns).

190. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231 (1968).

191. *Id.* at 1214–15, 1231.

192. *Id.* at 1231.

193. *Id.* at 14–15.

194. 26 U.S.C. § 5821 (2006).

195. *Id.* § 5841(b).

196. *Id.* § 5861(d).

197. 18 U.S.C. § 922(a)(4) (2006).

198. FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, *supra* note 2, at 74.

199. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231 (1968). As an administrative matter, the Tax Reform Act of 1976 deleted the obsolete wording "of the Treasury or his delegate" from 26 U.S.C. § 5845(f). Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1835 (1976). Additionally, the Homeland Security Act of 2002 changed all of the references of "Treasury Secretary" in the Title 18 definition to "Attorney General." Homeland Security Act of 2002, Pub. L. No. 107-296, § 2, 116 Stat. 2135, 2276 (2002). The Homeland Security Act of 2002 also changed the references to the Treasury Secretary in the National Firearms Act provisions to actually mean the Attorney General, but they were left unchanged to keep the references throughout the Internal Revenue Code (Title 26) consistent. FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, *supra* note 2, at 74.

200. 114 CONG. REC. 26,896 (1968).

stated that "[t]here [was] universal agreement that rockets, bazookas, antitank guns, heavy field artillery, and the like should be strictly controlled [because] there [were] no legitimate sporting uses for [those] weapons."[201] Agreeing with this sentiment, Senator Dodd stated "that [D]estructive [D]evices such as bazookas, mortars, antitank guns, bombs, and the like, are primarily weapons of war and have no appropriate sporting use."[202] Additionally, when answering a question from Senator John Pastore about the Destructive Device Sporting Purposes Exception's inclusion, Senator Dodd confirmed that the Exception's inclusion had "nothing to do with . . . includ[ing] . . . shotguns" under the restrictions; Senator Dodd then stated that the purpose was "to exclude [shotguns] from the definition of [D]estructive [D]evices."[203] However, Senator Dodd also noted that sawed-off shotguns (short-barrel shotguns) are Destructive Devices.[204]

The Destructive Device Sporting Purposes Test has not been applied as often as the Importation Sporting Purposes Test. The ATF has only ruled twice on whether a shotgun is a Destructive Device.[205] The ATF made both rulings at the same time, and concluded that the USAS-12[206] and Striker-12[207] shotguns were Destructive Devices under Title 26. In both instances, the ATF applied the Destructive Device Sporting Purposes Test in such a way that it is now indistinguishable from the Importation Sporting Purposes Test,[208] even though the two are technically distinct from each other. Applying criteria from the Importation Sporting Purposes Test, the ATF ruled that because the "weight, size, bulk, designed magazine capacity, configuration, and other factors indicate that the USAS-12 [and Striker-12 shotguns are] semiautomatic version[s] of . . . military-type assault shotgun[s]," they are not generally recognized as particularly suitable for sporting purposes

201. *Id.*
202. *Id.* at 26,898.
203. *Id.* at 26,900.
204. *Id.* at 26,911.
205. *See* ATF RULING 94-1, *supra* note 112; *see also* ATF RULING 94-2, *supra* note 107.
206. ATF RULING 94-1, *supra* note 112.
207. ATF RULING 94-2, *supra* note 107.
208. *Id.*; ATF RULING 94-1, *supra* note 112. The ATF used the same criteria from the Importation Sporting Purposes Test when it applied the Destructive Device Sporting Purposes Test to determine whether the USAS-12 and the Striker-12 were generally recognized as particularly suitable for sporting purposes despite the lack of the phrase "readily adaptable" in Title 26.

and therefore these shotguns are Destructive Devices under § 5845(f)(2) of Title 26.[209] After these two rulings, the ATF provided an amnesty period for people to register their USAS-12 and Striker-12 shotguns without paying the $200 tax, which ended in 2001.[210]

In one case, a gun dealer and a purchaser contested the classification of a Striker-12 shotgun as a Destructive Device.[211] The plaintiffs paid the $200 tax and then filed suit seeking a refund of the tax.[212] The plaintiffs argued that the Importation Sporting Purposes Test should be different from the Destructive Device Sporting Purposes Test, but the court rejected their claim and held that the Destructive Device Sporting Purposes Test was a "proper exercise[] of the [ATF's] discretion."[213] In the end, the court rejected all of the plaintiffs' claims, and the Federal Circuit affirmed the decision on appeal.[214]

VI. THE "LAWFUL SPORTING PURPOSE" DISTINCTION IN THE FEDERAL SENTENCING GUIDELINES

The United States Sentencing Commission, established by the Sentencing Reform Act as a part of the Comprehensive Crime Control Act of 1984, promulgates the sentencing guidelines.[215] The "original guideline," found in § 2k2.1, provides a sentence reduction if a "defendant obtained or possessed [a] firearm solely for sport or recreation."[216] In 1989, the Sentencing Commission amended § 2k2.1 so that the current version requires that a reduction would be warranted "if [a] defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection."[217] Additionally, this test is not dependent on interpretation by the ATF since the ATF does not enforce the sentencing guidelines. When not deferring to the ATF, courts have interpreted the definition of sporting purposes under the sentencing

209. ATF RULING 94-2, *supra* note 107; ATF RULING 94-1, *supra* note 112.
210. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF RULING 2001-1 (2001).
211. Demko v. United States, 44 Fed. Cl. 83, 84 (1999), *aff'd*, 216 F.3d 1049 (Fed. Cir. 2000).
212. *Id.* at 86.
213. *Id.* at 94.
214. *See id.* at 96–97.
215. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1987; U.S. SENTENCING GUIDELINES MANUAL § 1A2 (1987).
216. U.S. SENTENCING GUIDELINES MANUAL § 2k2.1(b)(2) (1987).
217. U.S. SENTENCING GUIDELINES MANUAL § 2k2.1(b)(2), app. C, amend. 189 (2012).

guidelines to include substantially more activities than under the Destructive Device and Importation Sporting Purposes Tests.

In fact, a few courts have found that plinking is a lawful sporting purpose under the sentencing guidelines. Back when the Secretary of the Treasury had created a panel to implement the Importation Sporting Purposes Test, that panel found that "'plinking' (shooting at randomly selected targets such as bottles and cans)" was *not* a sporting purpose since it was "primarily a pastime."[218] In its decision that plinking is, in fact, a sporting purpose under the sentencing guidelines, the Tenth Circuit cited *Webster's Dictionary* and stated that "[a] sporting purpose is an intent to engage in sport, something that is a source of pleasant diversion; a pleasing or amusing pastime or activity; recreation."[219] Since plinking "is a form of target shooting, and many people engage in target shooting for amusement and recreation," the court reasoned that plinking "is a sporting purpose under the [sentencing g]uidelines."[220] Similarly, in *United States v. Bossinger*, the Third Circuit found that plinking is a sporting purpose under the sentencing guidelines after recognizing that "[d]istinguishing sport from recreation would be a challenge for any scholastic—as we have noted, lexicographers define sport as recreation."[221] Moreover, several other courts have recognized that unorganized target shooting, including plinking, is a sporting purpose under the sentencing guidelines.[222]

218. ATF 1989 Memo, *supra* note 99, at 9.

219. United States v. Hanson, 534 F.3d 1315, 1317 (10th Cir. 2008) (internal quotation marks omitted).

220. *Id.*

221. United States v. Bossinger, 12 F.3d 28, 30 (3d Cir. 1993).

222. *Compare* United States v. Collins, 313 F.3d 1251, 1254–55 (10th Cir. 2002) (finding that the defendant's use of his firearm as collateral for two car repairs should not preclude application of § 2k2.1(b)(2) because "[m]omentary exploitation of a rifle's inherent monetary value . . . should not, ipso facto, preclude" it from being possessed solely for lawful sporting purposes), *and* United States v. Wixon, No. 1:06-CR-91-001, 2007 WL 2319815, at *7–9 (D. Me. Aug. 10, 2007) (applying the sporting purpose reduction under § 2k2.1(b)(2) of the U.S. Sentencing Guidelines because the defendant proved he possessed the firearms "solely for target practice and hunting, both of which are lawful sporting purposes under the guidelines"), *with* United States v. Caldwell, 431 F.3d 795, 799–800 (11th Cir. 2005) (rejecting a sentence reduction under § 2k2.1(b)(2) because "a defendant must possess the firearm *solely* for sporting purposes" and not for any other purpose, but declining to "address whether another person's possession for sporting purposes may be imputed on another"), *and* United States v. Lewitzke, 176 F.3d 1022, 1028 (7th Cir. 1999) (rejecting the "sporting use" reduction because the defendant's weapons were found in locations that did not suggest they were being used solely for sporting purposes), *and* United States v. Kielar, No. 96-3792, 1997 WL

VII. IS YOUR SHOTGUN SPORTING?

A. The Logic of the Current Framework

Must the majority of shotguns be sporting? Yes. Since most shotguns have bores over one-half inch,[223] they must be sporting to evade the Destructive Device possession prohibition under Title 26. Further, all shotguns must be sporting to be imported under the Importation Sporting Purposes Exception. Accordingly, there should not be any nonsporting shotguns imported into or possessed (unless registered) in the United States unless the shotgun's bore is less than one-half inch. Despite slightly different language, the ATF has interpreted the elements of the Destructive Device Sporting Purposes Test and the Importation Sporting Purposes Test to be the same.[224] The resulting, amorphous test has remained relatively unchanged since its first use in 1984 when the ATF rejected the importation of the Striker-12 shotgun.[225] The D.C. Circuit recognized in *Springfield, Inc. v. Buckles* that sporting purposes may change over time[226] while the Eleventh Circuit noted that "[t]he term 'generally recognized' in [the Importation Sporting Purposes Exception] suggests a community standard."[227] However, the ATF, in the ATF 2011 Study, proved itself unwilling to consider the question of whether there has been a change in what is considered to be a generally recognized sporting purpose.[228] Despite changing community standards, the ATF has stayed true to Senator Dodd's legislative intent from over 50 years ago—military-style firearms should not be sporting, even if used for sporting activities.[229] In doing so, the ATF has created contradictory interpretations of the law resulting in an importation ban on certain shotguns under the Importation Sporting Purposes Test even though their domestic counterparts are not banned from possession under the Destructive Device Sporting Purposes Test.

Are the two standards that are presented in the Destructive Device

135441, at *1 (6th Cir. Mar. 24, 1997) (affirming the defendant's conviction of felon in possession of a firearm and denying his claim that his firearm was possessed solely for lawful sporting purposes because, in part, it was "unsuitab[le] for 'plinking'").

223. JOHNSON, KOPEL, MOCSARY & O'SHEA, *supra* note 8, at 370.

224. *See* ATF RULING 94-2, *supra* note 107; ATF RULING 94-1, *supra* note 112.

225. *See* ATF 1989 Memo, *supra* note 99, at 5.

226. Springfield, Inc. v. Buckles, 292 F.3d 813, 818 (D.C. Cir. 2002).

227. *Gun S. II*, 877 F.2d 858, 866 (11th Cir. 1989).

228. *See* ATF 2011 STUDY, *supra* note 34, at iii.

229. 114 CONG. REC. 27,461 (1968) (statement of Sen. Dodd).

and importation provisions really the same? Logically speaking, they are not. The phrase "particularly suitable for or readily adaptable to" from the importation provision of Title 18[230] is clearly broader than just the phrase "particularly suitable for" from the Destructive Device provision of Title 26.[231] Therefore, it makes sense that a broader range of shotguns would meet the Importation Sporting Purposes Test[232] than the Destructive Device Sporting Purposes Test.[233] However, in practice the opposite is true. Only two models of shotguns have been declared Destructive Devices (the USAS-12 and the Striker-12)[234] while several more shotgun models have been denied importation because of their nonsporting nature.[235] For example, in addition to the USAS-12 and the Striker-12, the ATF has rejected import applications for the Franchi SPAS 12,[236] the Truvelo Neostead,[237] and the nonsporterized Saiga 12.[238] Moreover, the ATF has not declared some shotgun models to be Destructive Devices even though a similarity exists between them and models already deemed to be nonsporting. For example, the foreign Truvelo Neostead, a bullpup pump-action shotgun with two magazine tubes and a capacity to hold thirteen shotgun shells,[239] was ultimately denied importation.[240] The domestic Kel-Tec KSG is nearly identical—it is a bullpup pump-action shotgun with two magazine tubes giving it a capacity to hold thirteen shotgun shells—yet the ATF has not declared it a Destructive Device.[241] Therefore, in practice, the Importation Sporting

230. 18 U.S.C. § 925(d)(3) (2006).

231. 26 U.S.C. § 5845(f)(2) (2006).

232. 18 U.S.C. § 925(d)(3) (2006).

233. 26 U.S.C. § 5845(f)(2) (2006).

234. *See* ATF RULING 94-1, *supra* note 112; ATF RULING 94-2, *supra* note 107.

235. *See* ATF 2011 STUDY, *supra* note 34, at 9–14 (holding that shotguns with the features listed are not sporting).

236. *Why Is a SPAS a Sporting Purpose Automatic Shotgun in the USA?*, CHRIS'S FRANCHI SPAS12 SHOTGUN PAGES, http://spas12.com/spas.htm (last visited Jan. 14, 2014) [hereinafter *Why Is a SPAS a SPAS?*].

237. Homeinvader, Comment to *Destructive Device Dealer in Maryland*, AR15.COM (Mar. 14, 2008, 1:09 AM), www.ar15.com/archive/topic.html?b=6&f=21&t=238864.

238. The Saiga 12 is a shotgun based on the AK platform. *See* SAIGA-12, www.Saiga-12.com (last visited Jan. 14, 2014). Unmodified AK variants were banned from importation in 1998; *see also* ATF 1998 REPORT, *supra* note 101, at 2.

239. *Neostead Shotgun*, TRUVELO MANUFACTURERS, http://www.truvelo.co.za/armoury/content/neostead-shotgun (last visited Jan. 14, 2014).

240. Homeinvader, *supra* note 237, at Mar. 14, 2008, 12:37 PM (claiming that he had imported a Neostead shotgun only to have the ATF deny the importation after the fact and seize the weapon).

241. *Our Guns*, KEL-TEC, http://www.keltecweapons.com/our-guns/ksg/shotgun/ (last

Purposes Test is narrower than the Destructive Device Sporting Purposes Test.

What is the plain meaning of the "generally recognized as particularly suitable for sporting purposes" standard? Generally recognized by whom? Must the sporting purpose in question be generally recognized by everyone? Or must the shotgun in question simply be generally recognized as particularly suitable for some predefined sporting purposes? In determining whether a firearm or sporting purpose is generally recognized, the ATF has consistently consulted state hunting laws, hunting guides, marketing materials, organized competition rules, competitors in organized competitions, and local and national laws. It makes sense to limit the scope of "generally recognized" to a population made up of not only those who own guns but also those who use guns. To do otherwise would result in an extremely narrow standard because, as of 2004, only 26% of individuals owned firearms,[242] meaning there could still be as many as 74% of adults in the United States who do not own a firearm and therefore are more likely to have limited knowledge of the subject.

In the ATF 2011 Study, the ATF acknowledged the possibility that the community can update what it considers to be a sporting purpose since the standard is defined in terms of what is generally recognized by the community.[243] By adhering to Senator Dodd's legislative intent for a narrow standard,[244] however, the ATF has contradicted the long and storied history of sporting firearms generally resulting from military and combat usage.[245] Also, the ATF has also failed to classify pump-action or semiautomatic shotguns as Destructive Devices even though they are commonly used by the military, which suggests that the ATF does not necessarily fully endorse a narrower standard.

Since the ATF has construed both the Importation and Destructive Device Sporting Purposes Tests to be effectively the same, it is only necessary to consider the "particularly suitable for sporting purposes"

visited Jan. 14, 2014).

242. Hepburn et al., *supra* note 4, at 15.

243. ATF 2011 STUDY, *supra* note 34, at iii; *see also* Springfield, Inc. v. Buckles, 292 F.3d 813, 819 (D.C. Cir. 2002) (citing *Gun S. II*, 877 F.2d 858, 864 (11th Cir. 1989)) ("While it may be that 'sporting purposes' is not a static concept, particularly in view of the 'generally recognized' requirement, neither BATF nor this court have received any information demonstrating that a rifle must accept large magazines of ammunition if it is to be used at a practical shooting competition.").

244. 114 CONG. REC. 27,461 (1968).

245. *See* BOLT ACTION SHOTGUNS, *supra* note 20.

standard (PSSP Standard) for our semantic analysis. The word "suitable" means "adapted to a use or purpose,"[246] and the word "particularly" means "to an unusual degree."[247] Therefore, for a shotgun to be "generally recognized" as "particularly suitable for sporting purposes," that shotgun must be generally recognized as adapted to a sporting purpose to an unusual degree. This suggests quite a narrow standard. Most shotguns with the minimum legal barrel length of 18 inches are not adapted to an unusual degree for trap or skeet shooting or bird hunting. A survey of bird hunting shotgun manufacturers showed that these shotguns generally have barrel lengths of 20 inches or more,[248] which suggests that shotguns with short barrel lengths are not suited for bird hunting. The same line of reasoning should apply for skeet or trap shooting because that is merely simulated bird hunting. Yet, the ATF has not banned shotguns with barrels shorter than 20 inches—shotguns that may not be particularly suitable but are easily and readily adaptable for traditional shooting sports.

While it seems that the ATF has approached a moderate interpretation of the PSSP Standard over time, its interpretation defies logic and the plain meaning of the words "readily adaptable" and "sporting." Sports are defined as recreation,[249] whether casual or not, which means that plinking is a sporting purpose. It necessarily follows that every shotgun is sporting since every shotgun is particularly suited for plinking or casual target practice. The ATF understands this conundrum, but it will not interpret the test so broadly as to defy Senator Dodd's legislative intent.[250] To complicate matters even further, the ATF has not been able to deny importations of nonsporting shotguns because of the recent appropriation restriction.[251] As a consequence of this restriction, two shotguns have been imported that likely would not otherwise have been imported under the Importation Sporting Purposes Test.[252] Moreover, the ATF has not declared these firearms to be

246. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1249 (11th ed. 2004).

247. *Id.* at 904.

248. *See, e.g.*, *Remington 2013 Product Catalog*, REMINGTON, 2013, at 62, 149–51 (demonstrating that 89 out of 105 shotguns listed in its catalog, most of which are advertised for hunting or trap and skeet shooting, have barrel lengths longer than 20 inches).

249. *See* United States v. Bossinger, 12 F.3d 28, 30 (3d Cir. 1993).

250. ATF 2011 STUDY, *supra* note 34, at iii–iv.

251. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 541, 125 Stat. 552, 639–40 (2011).

252. The Author believes that the Molot VEPR 12 and the Akdal MKA 1919 would

Destructive Devices. This contradictory result is exactly why Congress removed the sporting and nonsporting distinction from the law in 1922.[253] The Importation and Destructive Device Sporting Purposes Tests are convoluted standards that defy plain meaning and logic so that the average shotgun owner or dealer likely cannot properly comprehend the test. The result can best be explained by the following picture:[254]

not have been imported but for the appropriation restriction.

253. 62 CONG. REC. 8303 (1922) (statement of Sen. Smoot).

254. *See* ATF 2011 STUDY, *supra* note 34, at 12. Pistol grips on shotguns are now considered sporting, so it is likely that in the future, given the choice, the ATF would allow the importation of the Factory Saiga 12. *Id.* However, the Factory Saiga 12 can still accept a large capacity magazine over five rounds and a flash suppressor without making any modifications to the gun. One source reported that the Franchi SPAS 12 cannot be imported, but it is still not classified as a Destructive Device. *See Why Is a SPAS a SPAS?*, *supra* note 236.

The ATF's application of the Importation and Destructive Device Sporting Purposes Tests has resulted in the perplexing result seen above: similar shotguns receive different treatment under the law. This problem is exactly what Senator Smoot referred to when he successfully advocated for the removal of the sporting distinction in the firearms tariffs in 1922.[255] Afterward, he noted that

> it is next to impossible, if not impossible, to tell what a sporting . . . shotgun . . . is . . . .
>
> . . . .
>
> [I]t was right and proper to strike out the word sporting because of the fact, in the first place, that no human being can tell whether a [shotgun] is a sporting [shotgun] or is to be used for some other purpose.[256]

B. The "Circularity Problem"

The Importation and Destructive Device Sporting Purposes Tests, as implemented by the Gun Control Act of 1968, possess a "structural flaw"[257] that distorts their application and has created the ambiguous test that the ATF applies today. Rules subject to societal expectations will contain this flaw as seen in the common-use standard created by *District of Columbia v. Heller*[258] and the reasonable-expectation-of-privacy standard applied in the Fourth Amendment context.[259] Here, the structural flaw arises from the "generally recognized" language—what is generally recognized as particularly suitable depends on what a society (or the applicable part of society) recognizes as particularly suitable. However, laws preventing the use of certain types or configurations of shotguns will prevent society in general from recognizing those types or configurations of shotguns as suitable because of the threat of fines, confiscation, and prison time. In effect, laws "deter individuals from

255. *See* 62 CONG. REC. 8303 (1922).

256. *Id.*

257. Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 384 (2009). The Author would like to give credit to Professor O'Shea for coining the term "circularity problem."

258. District of Columbia v. Heller, 554 U.S. 570, 627 (2008); *see also* O'Shea, *supra* note 257, at 384–85.

259. *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring); *see also* O'Shea, *supra* note 257, at 384–85.

expressing the relevant attitudes."[260] Thus, the law itself likely discourages the conditions to satisfy the societal-expectations-based language that is needed to create change.

Furthermore, the ATF's interpretation of the Gun Control Act of 1968 creates the expectation that military-style firearms are not sporting and thus competitions using military-style firearms are also not sporting. The ATF also relied on state hunting laws to support the view that military-style shotguns are not sporting.[261] Yet, the inconsistent and infrequent enforcement of the Destructive Device Sporting Purposes Test has allowed the growth of combat-style competitions and the use of military-style firearms in those competitions.[262] The ATF has stubbornly refused to recognize the growth of modern practical shooting and combat-style competitions as sports, stating that "a more thorough and complete assessment is necessary before [the] ATF can consider practical shooting as a generally recognized sporting purpose."[263] In fact, the ATF believes practical shooting "competitions are clearly . . . the type of activity that Congress sought to exclude as sporting."[264] Put simply, it will be a herculean task to reconcile Senator Dodd's intent with the plain meaning of the statute's wording in the wake of the growing popularity of practical-shooting sports. While it is true that recognizing practical shooting as a legitimate sporting purpose may contravene Senator Dodd's intent, Congress would have enacted a provision banning firearms based on their capabilities or characteristics—not their recognized purpose—had Congress actually intended to permanently ban military-style shotguns.[265]

260. *Katz*, 389 U.S. at 384.

261. ATF 2011 STUDY, *supra* note 34, at 20.

262. *See, e.g.*, Tony Mandile, *The Exciting Sport of 3-Gun Shooting*, NAT'L SHOOTING SPORTS FOUND., http://www.nssf.org/events/featurette/2012/0712.cfm (last visited Dec. 12, 2013) (noting that 3-Gun is "one of the fastest growing shooting sports" and "simulates combat or self-defense situations"). This sport has spurred innovation and resulted in development of shotgun modifications designed to increase magazine capacity. *See, e.g.*, *RCI's XRAIL Systems*, XRAIL, http://www.xrailbyrci.com /xrailinfo.php (last visited Jan. 14, 2014) (explaining one of the innovations—the Xrail modification—that emerged from 3-Gun, which allows the shotgun to hold up to 23 shells at once).

263. ATF 2011 STUDY, *supra* note 34, at iii.

264. ATF 2012 COMMENTS REPORT, *supra* note 177, at 3 (internal quotation marks omitted).

265. Something more reflective of the intent to ban military-style firearms would be the Federal Assault Weapons Ban of 1994, which explicitly banned firearms with certain characteristics such as large-capacity magazines, bayonet lugs, and pistol grips; the ATF

VIII. THE SPORTING PURPOSES FRAMEWORK AFTER *HELLER*

The scope of the Second Amendment after *Heller* is still largely undefined.[266] This Note only discusses the constitutionality of the sporting purposes framework under the broad principles laid out in *Heller*, and it only considers whether a ban on possession (as opposed to registration) or importation of nonsporting purpose firearms is constitutional.

A. The Principles Expressed in Heller

"[T]he Second Amendment protects [an individual's] right to keep and bear arms for the purpose of self-defense."[267] In *McDonald v. City of Chicago*, five Justices on the Supreme Court agreed that *Heller* had held that the Second Amendment assures the right of individuals to keep and bear arms, particularly for self-defense, as "'the *central component*' of the Second Amendment right."[268] Essential to its holding, the Court in *Heller* declared the District of Columbia's ban on handguns unconstitutional "[u]nder any of the standards of scrutiny . . . applied to enumerated constitutional rights" because the ban was "a prohibition of an entire class of 'arms'" commonly used for self-defense even though other firearms such as rifles and shotguns were permitted for ownership.[269] Further, *Heller* invalidated the District of Columbia's requirement that firearms be kept inoperable in the home, stating that the requirement "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense."[270]

Less essential to the holding, the Court in *Heller* recognized that "the Second Amendment is not unlimited."[271] The Court then provided an incomplete list of "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,

has essentially implemented an assault-shotgun ban. *Compare* Assault Weapons Ban of 1994, Pub. L. No. 103-322, §§ 110102, 110103, 108 Stat. 1996, 1996-2000 (expired 2004), *with* ATF 2011 STUDY, *supra* note 34.

266. JOHNSON, KOPEL, MOCSARY & O'SHEA, *supra* note 8, at 783.

267. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (referencing District of Columbia v. Heller, 554 U.S. 570 (2008)).

268. *Id.* at 3036 (referencing *Heller*, 554 U.S. at 599).

269. *Heller*, 554 U.S. at 628.

270. *Id.* at 630.

271. *Id.* at 626.

[and] laws imposing conditions and qualifications on the commercial sale of arms," all of which remain presumptively lawful.[272] Further, the Court recognized that the common-use limitation on the scope of the Second Amendment was "supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[273] Finally, the Court rejected Justice Breyer's "freestanding 'interest-balancing' approach" as the test for constitutionality under the Second Amendment, noting that "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[274] The Court rejected the interest-balancing approach to the Second Amendment again in *McDonald*.[275]

B. The Sporting Purposes Framework Under Heller

Under the principles expressed in *Heller*, a ban on nonsporting shotgun possession is unconstitutional. At the same time, the answer to the constitutionality of an importation ban of nonsporting shotguns remains unclear. At this point, it is important to note that an importation ban is irrelevant to keeping and bearing arms if there is a possession ban. If shotguns are banned from possession, shotgun importation will have no influence on legally keeping and bearing arms.

The ban on nonsporting shotgun possession is not quite as longstanding as the federal ban on felons possessing firearms,[276] which first came into existence in federal law in 1938—30 years before the Gun Control Act created the Sporting Purposes Exceptions.[277] Further, the nonsporting shotgun possession ban has been applied with much less regularity and consistency than the felon-in-possession ban. According to Jay Dobyns, an ATF Special Agent who went undercover in the Hells Angels gang, the felon-in-possession ban has been the "bread and butter" charge for the ATF.[278] But, as covered by this Note, the ATF has rarely

272. *Id.* at 626–27 & n.26.
273. *Id.* at 627.
274. *Id.* at 634.
275. McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).
276. The Author uses the term "felon" to refer to those who have "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year," which is the language provided in 18 U.S.C. § 922(g)(1) (2006).
277. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731 (2012).
278. JAY DOBYNS & NILS JOHNSON-SHELTON, NO ANGEL: MY HARROWING UNDERCOVER JOURNEY TO THE INNER CIRCLE OF THE HELLS ANGELS 10 (2009).

enforced the nonsporting shotgun possession ban, and it has determined that very few shotguns fall within the definition of Destructive Device despite the fact that many of those same models would fail the Importation Sporting Purposes Test. In any event, the possession ban has hardly become a tradition because there have been few chances to test it, and an untested law cannot be judged to be constitutional simply as a result of its application.

Next, we must determine whether nonsporting shotguns are dangerous and unusual. The Court in *Heller* suggested that, historically, the types of weapons that were protected were those in common use.[279] However, semi-automatic shotguns have long been permitted.[280] Simply changing the form and not the function of such a firearm cannot make the weapon more dangerous or unusual; the danger is the same, and any unusualness stems solely from the look and not the function or purpose of the shotgun. Therefore, nonsporting, semi-automatic box-magazine shotguns are neither dangerous nor unusual notwithstanding their nonsporting designation because they are simply a different form of the permitted semi-automatic shotguns.

Finally, the Court's common-use standard, that nonsporting shotguns are commonly used for self-defense, must be examined with regard to the possession ban. It is irrelevant that sporting shotguns *may* be available for self-defense; the question is whether nonsporting shotguns are commonly used for self-defense.[281] This standard introduces a mind-boggling use-it-or-lose-it aspect to the Second Amendment, a characteristic that suffers from the same circularity problem as the Importation and Destructive Device Sporting Purposes Tests.[282] For example, it would have been constitutional to ban AR15s as dangerous and unusual before they became commonly used; but now, as one of the most popular firearms currently sold,[283] AR15s cease to be dangerous

279. *Heller*, 554 U.S. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

280. *See Products*, REMINGTON, http://www.remington.com/en/products/archived/shotguns/autoloading/model-11.aspx (last visited Dec. 18, 2013) (describing the Model 11 Autoloading Shotgun, also known as the Browning A5, as the first auto-loading shotgun produced in the United States in 1905—over 100 years ago).

281. *See Heller*, 554 U.S. at 627–28 (citations omitted) (explaining that "the sorts of weapons protected [are] those in common use at the time" and reiterating "the inherent right of self-defense has been central to the Second Amendment right" and remains a factor under a constitutional inquiry).

282. *See* O'Shea, *supra* note 257, at 384–85.

283. *Modern Sporting Rifle Facts*, NAT'L SHOOTING SPORTS FOUND., http://www.nssf

and unusual, and banning them transforms into an unconstitutional act. Whether a ban is constitutional depends on freestanding interest balancing by a legislature that might decide a certain type of uncommon (or new and therefore uncommon) weapon should be prohibited—exactly the type of rubric the Court rejected in both *Heller* and *McDonald*.[284] It is simply impossible for every type of every weapon to be in common use; therefore, the Second Amendment ought to reach more weapons than those favored by the current population. It hardly stands to reason that certain types of firearms can be constitutionally banned simply because they are less favored by society for self-defense or because they have not been invented yet.[285] Therefore, at the least, semi-automatic shotguns, similar in form and function to the popular AR15, which is in common use, are protected by the Second Amendment.

Next, the importation ban is similar to the possession ban, but the question of importation poses a distinct problem to constitutionality. Even with a complete importation ban, it may be possible for citizens to use nonsporting semi-automatic shotguns for self-defense so long as possession is not effectively banned[286] because of the availability of domestically produced shotguns. In assessing the District of Columbia's prohibition on operable firearms in the home, the *Heller* Court stated that such a prohibition would be unconstitutional because the prohibition "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense" in the home.[287] The Court implied that laws posing a minor inconvenience to the right of self-defense, an ancillary right to the Second Amendment, are constitutional. Thus, if the domestic nonsporting shotgun industry is thriving, and banning importation would

.org/msr/facts.cfm (last visited Dec. 18, 2013) ("AR-15-platform rifles are among the most popular firearms being sold. They are today's modern sporting rifle.").

284. *Heller*, 554 U.S. at 634–35; McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).

285. *See, e.g.*, Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (banning firearms composed completely of plastic, which were not even invented until very recently, when Cody Wilson used a 3D printer to make a functioning and almost completely plastic gun; 3D printers allow for these forms of firearms to be quickly printed, which could lead to their ultimate popularity); *see also* Andy Greenberg, *Meet the 'Liberator': Test-Firing the World's First Fully 3D-Printed Gun*, FORBES (May 5, 2013, 5:30 PM), http://www.forbes.com/sites/andygreenberg/2013/05/05/meet-the-liberator-test-firing-the-worlds-first-fully-3d-printed-gun/.

286. *See* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 99 (2009) ("Whatever such a right might mean, it must include the right to accomplish that core lawful purpose by acquiring the handgun.").

287. *Heller*, 554 U.S. at 630.

pose a minor inconvenience to the ancillary right to acquire nonsporting shotguns, then such an importation ban may be constitutional.

Another problem with applying the minor inconvenience standard to an importation ban is the issue of changing commercial markets. Legislatures do not always quickly react to changing world conditions, such as declining markets or international trade relations. Thus, whatever test is imposed for an importation ban should be highly critical of even the smallest inconveniences, even if the foreseeable future looks promising for domestic manufacturers, because a "minor" inconvenience is necessarily relative. While the constitutionality of the nonsporting shotgun importation ban will likely not be tested in the courts as long as the "temporary" appropriations restriction remains in effect,[288] the ban should not be presumed to be constitutional just because it remains untested and inconsistently enforced.

IX. CONCLUSION

Shotguns began as merely instruments to hunt birds, but many of the advancements in shotgun technology are the result of military research and development. When Congress enacted comprehensive gun controls in the 1960s, it created the Importation and Destructive Device Sporting Purposes Tests, which stifled innovation for shotguns. Senator Dodd clearly intended these tests to prevent shotguns, that were not being used by the traditional sportsman *at the time*, from being owned and used by the general American public. As a result, all shotguns (other than those with a bore of less than one-half inch) had to be sporting. However, inconsistent application of the Importation and Destructive Device Sporting Purposes Tests has allowed some innovation to take place, and the recent appropriations restriction by Congress may have opened the floodgates unless the ATF increases enforcement of the Destructive Device Sporting Purposes Test. Enforced or not, the sporting purposes possession and importation laws are unconstitutional under the Second Amendment. After all, the instruction in *Heller* could apply well into the future. To wit:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the [early 20th] century are protected by the Second Amendment. We do not interpret

288. *See supra* Part IV.G.

> constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time [the sporting purposes framework was created].[289]

289. *Heller*, 554 U.S. at 582 (citations omitted).