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NOTE

SECOND CHANCES FOR SECOND AMENDMENT RIGHTS: PROHIBITED PERSONS, RESTORATION OF RIGHTS, AND LIFETIME BANS IN LIGHT OF *NEW YORK STATE RIFLE & PISTOL ASS'N V. BRUEN*

Ethan Tourtellotte*

I. Introduction

Any discussion amongst Americans about firearms and the Second Amendment is certain to contain a mix of the *who, what, when, where,* and *why*. The *what* refers to what type of firearms people should, or should not, be allowed to legally possess.[1] The *where* is self explanatory: firearms in the home, on the person (whether concealed or open carried), in the car,

* Juris Doctor candidate, Oklahoma City University School of Law, May 2024. I would like to thank my family and friends for their love and support during law school. I owe endless thanks to my faculty sponsor, Professor Michael O'Shea, for his feedback and guidance during the research and writing process. Finally, I would like to thank the members of the Oklahoma City Law Review for their efforts to make this publication possible.

1. The Journal., *The Fight Over Banning the AR-15*, WSJ PODCASTS, at 4:40 (May 26, 2022), https://www.wsj.com/podcasts/the-journal/the-fight-over-banning-the-ar-15/02b82dd5-7847-4b60-aa29-decf197a88d6; *see, e.g.,* Miller v. Bonta*,* 542 F. Supp. 3d 1009, 1014 (S.D. Cal. 2021).

at a church, and so forth.[2] The *who* and *when* is where things start to get interesting. *Who* should, or should not, be permitted to possess firearms: non-violent drug offenders, lawful permanent residents, people with mental illness, and those dishonorably discharged from the military? And when should people be allowed to possess various types of firearms—at age eighteen or twenty-one?[3] Perhaps more pressing than age is the question of when those deemed "prohibited persons" are eligible to have their Second Amendment rights restored—if at all.

The *why* is the philosophical underpinning of the debate about firearms in America and arguably the most polarizing. Some believe the Second Amendment is a farce and find gun ownership unfathomable, yet others consider it sacrosanct and any call to ban or restrict firearm ownership is, ironically enough, a call to arms.[4] Maybe the very origin of that expression illuminates why some feel so passionately about the sanctity of the Second Amendment.

No matter how fascinating the philosophical debate over the *why* might be, to further indulge in it would exceed the scope of this Note. Still, the *why* in the context of Second Amendment scholarship is inherent, and it is impossible to write about this topic without considering the *why*. Nevertheless, the focus of this Note is not on the *what* and *where*, rather, the complex intertwinement between the *who* and *when* against a backdrop of the *why*. More specifically, when can prohibited persons who have been stripped of the right to keep and bear arms, especially post-*Bruen*, get this right back—if at all?

First, this Note will provide a brief introduction and historical overview of the possession and regulation of arms and the Second Amendment, with a particular focus on arms forfeiture and restoration of rights. Second, this Note will examine the array of legislation from the twentieth century in the realm of arms regulation, particularly legislation

2. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

3. 18 U.S.C. §§ 922(g), (x)(2); *see* Robert Medley, *Oklahoma lawmaker wants to lower age to carry handguns to 18*, TIMES REC. (Dec. 1, 2022, 9:48 AM), https://www.swtimes.com/story/news/state/2022/12/01/okla-lawmaker-proposes-lowering-age-to-carry-gun-from-21-to-18/69691528007/; *see also* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 3:22-CV-410, 2023 WL 3355339, at *1 (E.D. Va. May 10, 2023).

4. *See* Michael Waldman, *How the NRA Rewrote the Second Amendment,* POLITICO (May 19, 2014), https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856/; *see also What Is The Second Amendment And How Is It Defined*, NRA-ILA, https://www.nraila.org/what-is-the-second-amendment-and-how-is-it-defined/ (last visited Oct. 7, 2023).

concerning prohibited persons and restoration of rights. Third, this Note will introduce the twenty-first century watershed impacts of *Heller* and *Bruen*, with a focus on the traditionalist methodology applied by the Court in *Bruen*. Fourth, this Note will look at the impact *Bruen* has already had on some "prohibited persons" laws set forth in 18 U.S.C. § 922 and the potential repercussions of *Bruen* on other "prohibited persons" laws.[5]

Part V will also look to the future by setting out a proposed approach for restoration of rights and will analyze the constitutionality of lifetime bans. This Note will conclude that lifetime bans on firearm ownership, without any *objective* criteria for restoring rights, are likely unconstitutional. This stems from the fact that history and tradition do not support absolute lifetime bans on firearm ownership, and the right to keep and bear arms is a fundamental right deserving the same respect as other enumerated rights. A less restrictive and constitutionally permissible solution to this issue will be offered by analogizing "shall issue" concealed carry permitting regimes to restoration of rights procedures.

II. A Brief History of Arms Dispossession and Regulation

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6] Twenty-seven words rooted in over a thousand years of history going at least as far back as King Alfred—far too much history to cover in a single Note.[7] However, it would be remiss to not introduce a brief backdrop of the road to the ratification of the Second Amendment as well as disarmament practices throughout history. This will allow the reader to better understand the modern issues presented later on in this Note. Guided by *Bruen*, the time periods necessary to survey for an adequate backdrop of the issues in this Note are early modern England, Colonial America and the Founding Era, Antebellum America, and the Reconstruction Era.[8] Later, this Note will look to the twentieth and twenty-first centuries for an analysis of the issues in modernity.

5. 18 U.S.C. § 922.

6. U.S. CONST. amend. II.

7. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT (2d ed. 2018).

8. *See Bruen,* 142 S. Ct. at 2135-36.

A. Early Modern England

Important to understand in tracing the English common law is that "not all history is created equal" and "[a] long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be a part of our law than a short-lived, 14th century English practice."[9] The hallmark of the historical English common law justification for arms ownership (subject to reasonable limitations) is found in Blackstone's *Commentaries*, which states that the

> last auxiliary right of the subject . . . is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law . . . . [A]nd it is indeed a public allowance *under due restrictions*, of the natural right of resistance and self-preservation.[10]

Blackstone here can best be read as recognizing a natural right to armed self-defense—laying a historical foundation for the understanding that "the Second Amendment . . . codified a *pre-existing* right."[11] The other side of this coin, however, is Blackstone's recognition of *due restrictions* that supports the conclusion "the right secured by the Second Amendment is not unlimited."[12]

The case of *Wingfield v. Stratford & Osman*, a response to a violation of an English game law, helps illustrate the scope of arms regulation in eighteenth century England.[13] Such game laws were enacted to supposedly prevent the killing of game, but these laws also served as a "pretext for disarming the disfavored."[14] However, it was noted by the King's Bench in *Wingfield* that "[i]t is not to be imagined, that it was the intention of the Legislature in making the 5. Ann. c. 14, to disarm all the people of England" and "a gun may be kept for the defence of a man's house."[15] And

9. *Id.* at 2136.

10. JOHNSON ET AL., *supra* note 7, at 158 (quoting Blackstone) (emphasis added); *see also* D.C. v. Heller*,* 554 U.S. 570, 599 (2008).

11. *Bruen*, 142 S. Ct. at 2127 (citing *Heller*, 554 U.S. at 592).

12. *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626) (emphasis added).

13. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 1, 695, 723 (2009); *see also* Wingfield v. Stratford & Osman, Sayer, Reports 15-17, 96 Eng. Rep. 787 (K.B. 1752).

14. Marshall, *supra* note 13, at 720; *see also Heller*, 554 U.S. at 593.

15. *Wingfield*, 96 Eng. Rep. at 787.

while such laws may have resulted in the confiscation of the specific arms involved in game law violations, no such part of the law "as with the common law" called for a bar on future gun ownership.[16]

A crucial historical facet of such due restrictions involved the disarmament of "violent and other dangerous persons."[17] These individuals "were often those involved in or sympathetic to rebellions and insurrections . . . . [T]hose willing to swear an oath of allegiance to the king, however, were often exempted."[18] Interesting in this history is the oath of allegiance exemption, suggesting a path to restoration of the right to possess arms.

Moreover, despite the disarmament of Roman Catholics in seventeenth-century England, a Catholic "still could have or keep . . . such necessary weapons . . . for the defence of his house or person."[19] Critically, "such necessary weapons for self-defense were distinguished from the home arsenals that seem to have been the real concern."[20] The exemptions and exceptions above suggest that disarmaments in English history were not necessarily permanent; given the influence of the English common law, Colonial America would follow suit.

B. Colonial America and the Founding Era

There can be no discussion about the influences of the English common law on Colonial America and the founding-era without reference to St. George Tucker's *Blackstone*.[21] This edition "contained numerous annotations and other material suggesting that the English legal tradition had developed in new directions . . . [which was] generally in the direction

16. Marshall*, supra* note 13, at 719.

17. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 2, 249, 258 (2020).

18. *Id.*; *see also id.* at 258 n.44 ("'gentlemen' who swore an oath of allegiance to the king could possess a sword, case of pistols, and a long gun for fowling or home defense." (quoting 7 William III ch. 5 (1695))).

19. Marshall, *supra* note 13, at 723 (quoting An Act for the better securing the Government by disarming Papists and reputed Papists, 1 W. & M., Sess.1, c. 15, § 4 (1688) (Eng.)) (internal quotations omitted).

20. *Id.* (internal quotations omitted).

21. JOHNSON ET AL., *supra* note 7, at 354 ("The most influential and widely used law textbook of the Early Republic was the five-volume, 1803 American edition of William Blackstone's *Commentaries* . . . edited and annotated by the Virginia jurist St. George Tucker.").

of greater individual liberty."[22]

Regarding what would become the basis for the Second Amendment, Tucker commented "this [right to keep and bear arms] may be considered as the true palladium of liberty . . . the right of self defence is the first law of nature."[23] Given Blackstone's prominence in tracing the history of the English common law and the subsequent influence of Tucker's edition on the Framers, it is reasonable to conclude that the belief in the natural right of armed self-defense survived across the Atlantic to become part of our Founder's law—perhaps with even more fervor—but nevertheless with due restrictions. The history from Blackstone, to Tucker, to the Framers "shows that medieval law [of the right to armed self-defense with due restrictions] survived to become our Founders' law."[24]

This is also evident considering the fact that there were nine state constitutions in the eighteenth and early nineteenth centuries that "enshrined a right of citizens to bear arms in defense *of themselves* and the state or bear arms in defense *of himself* and the state."[25] The emphasis on "*themselves*" and "*himself*" in these state constitutions logically endorses the "hybrid right" viewpoint that has largely been accepted by many within the realm of Second Amendment scholarship.[26] It also rejects the collective right viewpoint just like both sides of the five-to-four *Heller* Court.[27]

Laws regulating arms throughout Colonial America were mostly a general codification of "the existing common-law offense of bearing arms to terrorize the people, as had the [1328] Statute of Northampton itself."[28] However, as in England, there were laws in the realm of disarmament—these too with exceptions and the potential for restoration of rights.[29]

22. *Id.* at 355.

23. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44, app. 300 (1803)).

24. *Bruen*, 142 S. Ct. at 2136; *see also* Funk v. United States, 290 U.S. 371, 382 (1933).

25. *Heller*, 554 U.S. at 585; *see also id.* at 584-85 n.8 (internal quotations omitted).

26. *See* Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 Tenn. L. Rev. 597 (2014) (discerning the relationship between the militia clause and the individual right clause).

27. *Heller*, 554 U.S. at 636 ("The question presented by this case is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals.") (Steven, J., dissenting).

28. *Bruen*, 142 S. Ct. at 2143.

29. *See* Marshall, *supra* note 13; Greenlee, *supra* note 17; *see also* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 DUKE L. & CONTEMP. PROBS. 55, 72 (2017); *see also* Brief of Plaintiff-Appellant at *23, Vincent v.

One of the earliest disarmament and restoration examples stems from the sedition case of Anne Hutchinson and her supporters who criticized the Massachusetts Bay Colonial clergy's interpretation of the Bible; some were banished while others disarmed.[30] However, those who "confessed their sins were welcomed back into the community and able to retain their arms" because "the very law that disarmed her supporters contained a provision allowing gun rights to be restored."[31] Another example of rights restoration in this era arises from a 1759 New Hampshire law that imprisoned individuals who went "armed offensively . . . *until* he or she finds . . . sureties of the peace and [of] good behavior."[32]

There are a multitude of laws around the time of the Revolutionary War concerning disarmament (namely for Tories and those who refused to take oaths of allegiance to the American cause) and restoration of rights.[33] Most notably, a Connecticut law from 1775 provided for disarmament of an "inimical" person only "until such time as he could prove his friendliness to the liberal cause."[34] Another law from Massachusetts in 1776 "provided that persons who may have been heretofore disarmed by any of the committees of correspondence, inspection, or safety may receive their arms again . . . by the order of such committee or the general court."[35] However,

> one must proceed with caution in using these . . . Revolutionary laws as evidence of the scope of the Second Amendment . . . [because] the arms disabilities cannot be isolated from their context as part of a wholesale stripping of a distrusted group's civil liberties.

Garland, 2022 WL 5140598 (No. 2:20-cv-00883) (D. Utah, Sept. 29, 2022).

30. *See* Greenlee, *supra* note 17, at 264; *see also* BRADLEY CHAPLIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 103 (1983).

31. Greenlee, *supra* note 17, at 263; Brief of Plaintiff-Appellant at *25, Vincent v. Garland, 2022 WL 5140598 (No. 2:20-cv-00883) (D. Utah, Sept. 29, 2022).

32. Brief of Amici Curiae Firearms Policy Coalition and FPC Action Foundation in Support of Appellant and Reversal, Vincent v. Garland, 2022 WL 6750078 (No. 2:20-cv-00883) (D. Utah, Oct. 6, 2022); NEW HAMPSHIRE, ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE IN NEW ENGLAND 2 (1759).

33. *See* Greenlee, *supra* note 17, at 264.

34. G. A. Gilbert, *The American Historical Review*, 4 OXFORD J. 273, 282 (1899).

35. Brief of Amici Curiae Firearms Policy Coalition, Firearms Policy Foundation, California Gun Rights Foundation, Madison Society Foundation, and Second Amendment Foundation in Support of Petitioner at 14, Torres v. United States, 141 S. Ct. 960 (2020) (No. 20-5579) (cert. denied) (quoting 1776 Mass. Laws 484) (internal quotations omitted).

> The American laws in particular were enacted in the darkest days of an existential domestic war.[36]

Still, it is noteworthy that even in these "darkest days of an existential domestic war" there were still actions that could potentially be taken by those disarmed or facing disarmament for the restoration of their rights against outright indefinite restrictions on firearm ownership, and "[t]he laws did not technically prohibit recusants from acquiring new arms."[37]

Another example is the fallout from Shay's Rebellion in the late eighteenth century, which established penalties for treasonous behavior such as "the temporary forfeiture of many civil rights, including a three-year prohibition on bearing arms."[38] Around the same time as Shay's Rebellion, it was proposed in New Hampshire during a ratification convention that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[39] Just as in early modern England, history from the Colonial and Founding Eras demonstrates that restoration of rights provisions and procedures did exist throughout these turbulent times.[40]

In sum, general themes from early American law suggest a blessing of the individual right to keep and bear arms as well as disarmament for violent individuals. And while these individuals may have lost specific firearms involved in specific offenses, there is no evidence of lifetime bans or restrictions on future acquisition of firearms. This conclusion is supported by the fact that there were set durations for the loss of the right to keep and bear arms—it was not indefinite—and there were feasible measures available for those to restore their firearm ownership rights.[41]

C. Post-Ratification, Antebellum America, and Reconstruction

Bruen recognized that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional

36. Marshall, *supra* note 13, at 725.
37. *Id.* at 724-25.
38. Greenlee, *supra* note 17, at 268.
39. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326, Amend. XII (Jonathan Elliot ed., 2d ed. 1836).
40. *See* Greenlee, *supra* note 17, at 269.
41. *Id.*

provision."[42] Saluting back to *Heller*, the Court in *Bruen* noted,

> evidence of "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation" [and] [w]e therefore examined a "variety of legal and other sources to determine *the public understanding* of the [Second Amendment] after its ratification."[43]

These sources include a highly influential treatise published by William Rawle, "a prominent lawyer who had been a member of the Pennsylvania Assembly [which] ratified the Bill of Rights" that analyzed the understanding of the Second Amendment around this time.[44] Rawle's treatise provided that

> [t]he first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent . . . . The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed. . . The prohibition is general. *No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people*. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[45]

The emphasis that the Court in *Bruen* placed on the public understanding is especially important to recognize because "[f]ew nineteenth and early twentieth century cases implicated the Second Amendment directly, and thus the small number of references in early cases were glancing and largely unilluminating as to the nature and scope

42. *Bruen*, 142 S. Ct. at 2137 (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring)).

43. *Id.* at 2136 (quoting *Heller* at 605) (emphasis added).

44. *Heller*, 554 U.S. at 2805.

45. *See id.* at 2806 n.20.

of the right protected by the Amendment."[46] The public understanding is also of critical importance in comprehending the traditionalist framework applied by the majority opinion in *Bruen*.[47]

Although it is perhaps surprising to some, a case that indirectly illuminated the nature and scope of the Second Amendment was the infamously repugnant case of *Dred Scott v. Sandford*.[48] The Court in *Bruen* noted the incidental reference to the Second Amendment in *Dred Scott*, stating that

> [e]ven before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott v. Sandford*, Chief Justice Taney offered what he thought was a parade of horribles that would result from recognizing that free blacks were citizens of the United States. If blacks were citizens, Taney fretted, they would be entitled to the privileges and immunities of citizens, including the right "to keep and carry arms *wherever they went*." (emphasis added). Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America.[49]

Unfortunately, the case also indirectly showed the reality that "[n]ineteenth-century prohibitions on arms possession were mostly discriminatory bans on slaves and freedmen."[50] These prohibitions also woefully showcase the understanding at the time that "neither slaves nor Indians were understood to be a part of the political community of persons

46. *Amdt2.3 Early Second Amendment Jurisprudence*; CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt2-3/ALDE_00013263/ (last visited Oct. 9, 2023).

47. *See* Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. OF L. & POL. 105 (2022); *see also* Marc O. DeGirolami, *Traditionalism Rising*, J. OF CONTEMP. LEGAL ISSUES (2022).

48. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. AMEND. XIV.

49. *Bruen*, 142 S. Ct. at 2150-51 (internal citations omitted).

50. Greenlee, *supra* note 17, at 269; *see also id.* at 269 n.133.

protected by the Second Amendment."[51] However, once formerly enslaved persons were made a part of the political community after the second founding in 1868, they too received the fundamental right to keep and bear arms (a point that will be explored further later on in this Note).

Furthermore, while "[o]ur Nation did not initially live up to the equality principle [found in the Declaration of Independence] . . . The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise."[52] And "[a]s [President] Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding."[53]

In a different yet similar vein, a multitude of states around this period also restricted firearms rights for so-called "tramps."[54] Tramps were "typically defined as males begging for charity outside their home county."[55] Since tramps were considered "vicious persons" by the Ohio Supreme Court and therefore dangerous—the prohibition preventing them from owning firearms was upheld as constitutional under state law.[56] This ruling from the Ohio Supreme Court would be harkened back to well over a century later within then-Judge Barrett's *Kanter v. Barr* dissent. Justice Barrett stated that "in 1791—and well for more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect public safety."[57]

But regarding this tramp law, "[s]ince by definition, bans on tramps did not apply inside their home [if they had one] (or even their county), they were less restrictive than the current federal ban on felons, which applies everywhere."[58] Thus, the tramp law can best be read as a restriction on the *carrying* of arms in public, but not necessarily the *keeping* of arms

51. United States v. Harrison, No. CR-22-00328-PRW, 2023 WL 1771138, at *20 (W.D. Okla. Feb. 3, 2023) (internal quotations omitted).

52. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2194 (2023) (Thomas, J., concurring).

53. *Id.*

54. Greenlee, *supra* note 17, at 271.

55. *Id.*

56. Brief of Amici Curiae Firearms Policy Coalition and FPC Action Foundation in Support of Appellant and Reversal, *supra* note 32, at *21; *see* State v. Hogan, 63 Ohio St. 202, 219 (1900).

57. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *see also* Greenlee, *supra* note 17, at 271.

58. Greenlee, *supra* note 17, at 271.

for self-defense in the home nor the acquisition of them for this purpose.

Surety laws represent an interesting area of firearm regulation during the nineteenth century. As the Fifth Circuit recently explained in *United States v. Rahimi*,

> At common law, an individual who could show that he had "just cause to fear" that another would injure him or destroy his property could "demand surety of the peace against such person." The surety "was intended merely for prevention, without any crime actually committed by the party; but arising only from probable suspicion, that some crime [wa]s intended or likely to happen." If the party of whom the surety was demanded refused to post surety, he would be forbidden from carrying a weapon in public absent special need. Many jurisdictions codified this tradition, either before ratification of the Bill of Rights or in early decades thereafter.[59]

The Court recognized in *Bruen*, "[t]hese laws were not bans on the public carry, and they typically targeted only those threatening to do harm."[60] Further, people were not stripped of their firearms, rather "an accused arms bearer could go on carrying without criminal penalty so long as he post[ed] money that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if he needed self-defense."[61] Money would be forfeited, but not a right to firearm ownership.

The major distinguishing factor between surety laws and laws that could disarm an individual lies in the fact that "the surety laws required only a *civil proceeding, not a criminal conviction*."[62] However, the similarity between the causes for the imposition of a surety bond and the sort of crimes that would lead to one losing their right to keep and bear arms were the same—actions considered dangerous or violent.[63] Ultimately though, the historical record indicates that these laws were

59. United States v. Rahimi, 61 F.4th 443, 460 (5th Cir. 2023) (first quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *252; then citing *Bruen*, 142 S. Ct. at 2148-49); *see id.* n.9.

60. *Bruen*, 142 S. Ct. at 2148.

61. *Id.* (internal quotations omitted).

62. *Rahimi*, 61 F.4th at 460 (emphasis added).

63. *See Harrison*, 2023 WL 1771138 at *15.

hardly enforced, as "[t]he only recorded case that we know of involved a justice of the peace *declining* to require a surety."[64]

Some postbellum laws help to indirectly shed light on who could be dispossessed of firearms, and it is thus possible to deduct inferences of restoration from such laws. For example, "[i]n 1868, Kansas prohibited '[a]ny person who is not engaged in any legitimate business, any person *under the influence of intoxicating drink*, and any person *who has ever borne arms against the government of the United States*' from publicly carrying 'any pistol . . . or other deadly weapon.'"[65] This statute aligns well with the theme found in England and the Founding Era of disarming those with a history of rebellion or insurrection[66] but with a key distinction—the Kansas statute did not disarm such individuals. Rather, it only prohibited public carry for them. It was also one of the first statutes that disarmed individuals based on a current mental state, namely, being "under the influence of intoxicating drink."[67]

This point regarding intoxication would be explored further over one hundred fifty years later in the case of *United States v. Harrison*, which dealt with the constitutionality of 18 U.S.C. § 922(g)(3) (prohibiting unlawful users and people addicted to substances from owning firearms).[68] Ultimately, it was found by the district court that just because one can be prevented from carrying firearms during a state of intoxication does not mean they can be disarmed outright because they use substances at times.[69]

A Texas statute dealing with arms forfeiture was held unconstitutional by the Court of Appeals of Texas in 1878.[70] The statute dictated that

> any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slungshot, sword-cane, spear, brass knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person . . . shall forfeit to the county the weapon or weapons so found on

64. *Bruen*, 142 S. Ct. at 2149.

65. Greenlee, *supra* note 17, at 271 (quoting 2 GENERAL STATUTES OF THE STATE OF KANSAS 353 (1897)) (emphasis added).

66. *See id.* at 258-59.

67. *Id.* at 271.

68. *Harrison*, 2023 WL 1771138, at *3; *see* State v. Shelby, 90 Mo. 302 (1886).

69. *See Harrison*, 2023 WL 1771138.

70. Jennings v. State, 5 Tex. Ct. App. 298, 300-01 (1878).

or about his person.[71]

In holding this statute unconstitutional, the Texas court noted that "[w]hile [the legislature] has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own defence and that of the State."[72]

When analyzing postbellum laws geared toward former Confederate soldiers, a Janus face of disarmament emerges. These men were disarmed, but they also were not. Illustrative of this confusing proposition are the terms of surrender agreed upon by General Grant and General Lee at Appomattox, "[t]he arms, artillery, and public property to be parked and stacked and turned over . . . . *This will not embrace the side-arms of the officers*."[73] Naturally, arms and artillery used in the war were turned over, but Confederate officers were able to return home with their personal sidearms.

Former Confederate soldiers may also have been briefly barred from voting or holding office, but aside from the initial forfeiture of arms as a term of surrender (notwithstanding the personal sidearms of the officers), nothing in the Reconstruction Acts appears to have ever barred former Confederate soldiers from owning firearms.[74] Historical accounts also indicate ex-Confederates were still armed after their rebellious actions, "local police forces were often hostile towards black migrants, and Confederate veterans did not hesitate to put their weapons and uniforms back into service."[75] Also, "[w]hites . . . had long enjoyed access to their own guns and to training in riflery, but now they also had access to arms that Confederate veterans had brought home from the war."[76]

Congress passed legislation in "'respon[se] to the southern militias'

71. An Act to Regulate the Keeping and Bearing of Deadly Weapons, 2 GEORGE W. PASCHAL DIGEST, ch. 3, art. 6512, at 1322.

72. *Jennings*, 5 Tex. Ct. App. at 300-01.

73. *Surrender Documents*, APPOMATTOX CT. HOUSE NAT'L HIST. PARK (June 7, 2022), https://www.nps.gov/apco/learn/historyculture/surrender-documents.html (emphasis added).

74. First Reconstruction Act, § 5 (1867); *see* Second Reconstruction Act (1867)**;** *Reconstruction and Rights*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/civil-war-and-reconstruction-1861-1877/reconstruction-and-rights/ (last visited Oct. 11, 2023).

75. Gregory P. Downs & Kate Masur, *The Era of Reconstruction 1861-1900*, NAT'L HISTORIC LANDMARKS PROGRAM, 2017, 56, 59.

76. *Id.*

depredations against the free blacks" that *disbanded* said southern militias.[77] The keyword here is "disbanded," because "the bill's sponsor had agreed to strike disarmed after disbanded, in the face of opposition from several (northern) senators [who were concerned] that to *disarm* the citizens from whom the militia was drawn, rather than merely *disbanding* the militias, would violate the Second Amendment."[78]

Thus, there was no discussion about the restoration of firearm ownership rights for ex-Confederates because the right appeared to have never been lost in the first place. Tragically, access to such arms by former-Confederate soldiers (and the lack of access for freedmen)[79] no doubt contributed to the terror and violence reigned upon freedmen during this time.[80] But the question is necessarily raised—was the pre-existing right to keep and bear arms in postbellum America so well respected that even ex-Confederates were not permanently disarmed?[81]

The respect during this time for a person's right to keep and bear arms is illuminated not just by the apparent lack of disarmament of ex-Confederates, but even more so by the efforts taken to ensure freedmen the opportunity to exercise this *fundamental right*.[82] Section 14 of the Freedmen's Bureau Act of 1866 states,

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms,* shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or

77. Whether the Second Amendment Secures an Individual Right, 28 Op. O.L.C. 126, 226 (2004) https://www.justice.gov/file/18831/download.

78. *Id.* (emphasis added) (internal quotations omitted).

79. *Bruen*, 142 S. Ct. at 2151 ("see also S. Exec. Doc. No. 43, 39th Cong., 1st Sess., 8 (1866) ("Pistols, old muskets, and shotguns were taken away from [freed slaves] as such weapons would be wrested from the hands of lunatics[]").

80. *See* S. EXEC. DOC. NO. 39-43, at 12 (1886).

81. Whether the Second Amendment Secures an Individual Right, 28 Op. O.L.C. 126, 226, n. 422 (2004) https://www.justice.gov/file/18831/download ("Astonishingly, while still waving the bloody shirt and depriving Southerners of suffrage, Republicans were unwilling to deny the right to have arms to ex-Confederates.") (quoting Laws of Miss. ch. 23, § 1, at 165 (enacted Nov. 29, 1865), *reprinted in* Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, at 69 (1998)).

82. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 894 (2010) (Stevens, J., dissenting) (emphasis added).

previous condition of slavery.[83]

The Supreme Court in *McDonald v City of Chicago* also referenced the Civil Rights Act of 1866, which contained almost verbatim the same language found in the Freedmen's Bureau Act concerning "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[84] And of course, these pieces of legislation were eventually protected by the Fourteenth Amendment.[85] The steps taken to ensure Second Amendment rights for freedmen and the lack of steps taken to permanently disarm ex-Confederates lend support to the conclusion that the right to keep and bear arms was revered in the second half of the nineteenth century.[86] Evidence from the nineteenth century indicates that even insurrectionists, tramps, and drunkards were not traditionally prohibited for life from owning firearms—and sometimes they were not prohibited at all.

By no means was this historical overview in Part II of this Note exhaustive. However, the history presented above is intended to serve as a foundation for applying the traditionalist framework from *Bruen* to modern day prohibited persons laws, restoration of rights procedures, and lifetime bans on firearm ownership. The next part of this Note will look to discover whether any of the "old soil of the Second Amendment" was "buried under strata of statutory sediment, layers of laws that covered up constitutional demands" from the twentieth century.[87]

83. *Id.* at 773 (quoting Freedmen's Bureau Act of 1866 § 14 Stat. 176-77 (1866)); *Id.* at n.22 ("The Freedmen's Bureau bill was amended to include an express reference to the right to keep and bear arms, see 39th Cong. Globe 654 (Rep. Thomas Eliot), even though at least some Members believed that the unamended version alone would have protected the right, see *id*., at 743 (Sen. Lyman Trumbull)") (emphasis added because of the distinction between fundamental right and civic rights).

84. *Id.* at 774 (quoting Civil Rights Act of 1866, § 1); *Id.* at 775 ("Amar, Bill of Rights 264–265 (noting that one of the 'core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances' of freedmen who had been stripped of their arms and to 'affirm the full and equal right of every citizen to self-defense.')").

85. *Id.* at 776; *id.* n.24 ("For example, at least one Southern court had held the Civil Rights Act to be unconstitutional. That court did so, moreover, in the course of upholding the conviction of an African–American man for violating Mississippi's law against firearm possession by freedmen.").

86. *See Heller*, 554 U.S. at 616-17.

87. Brief of Plaintiff-Appellant at *1, Vincent v. Garland, 2022 WL 5140598 (No. 2:20-cv-00883) (D. Utah, Sept. 29, 2022).

III. Legislative History Concerning Prohibited Persons and Restoration of Rights

The turn of the century brought many rapid changes into American society.[88] Images of the western cowboy with six-shooters on horseback were being replaced by news headlines of gangsters toting submachine guns in automobiles.[89] The times had changed, and "[h]aving been almost exclusively a Southern and race-based policy in the nineteenth century, gun control now appeared on the national stage."[90] Thus, the Uniform Firearms Act ("UFA") appeared at the behest of the National Conference of Commissioners on Uniform State Laws.[91]

Key provisions of the UFA were "[p]ersons convicted of a *crime of violence* may not possess a handgun" and "[t]he purchaser [of a firearm] must sign a form affirming that he or she has not been convicted of a *crime of violence*" as well as nobody being able to "transfer, even by lending, a firearm to a person whom he has reasonable cause to believe has been convicted of a *crime of violence*."[92] These provisions highlight the fact that "disarmament practices continued to focus on persons perceived as potentially violent in the twentieth century . . . [and] no previous law prohibited a category of people as broad as the current federal ban on felons."[93]

Thus, the phrase "crime of violence" is significant through the journey of twentieth century legislative developments as it relates to prohibited persons laws and restoration of rights.[94] However, a California law in 1931 provided that any person "addicted to the use of any narcotic drug" could not own firearms—language that is strikingly similar to what is found in 18 U.S.C. § 922(g)(3) today.[95] This outlier departed from the norm at the

88. *See America at the Turn of the Century: A Look at the Historical Context*, LIB. OF CONG., https://www.loc.gov/collections/early-films-of-new-york-1898-to-1906/articles-and-essays/america-at-the-turn-of-the-century-a-look-at-the-historical-context/ (last visited Oct. 11, 2023).

89. History.Com Editors, *St. Valentine's Day Massacre*, HISTORY (Feb. 4, 2021), https://www.history.com/topics/crime/saint-valentines-day-massacre.

90. JOHNSON ET AL., *supra* note 7, at 524.

91. *See id* at. 527.

92. *Id.* (emphasis added) (internal quotations omitted).

93. Greenlee, *supra* note 17, at 272.

94. *See* An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757 (1961).

95. Greenlee, *supra* note 17, at 273.

time, which was prohibiting firearm ownership for only violent persons.[96]

The first attempt by Congress to legislate for nationwide arms regulation (aside from the Mailing of Firearms Act) was the 1934 National Firearms Act ("NFA"), which imposed a tax generally on short-barreled shotguns, short-barreled rifles, suppressors, and machine guns.[97] There was no mention of prohibited persons in the NFA, let alone restoration of rights.[98] However, not too long after the enactment of the NFA, Congress passed the Federal Firearms Act of 1938 ("FFA") which regulated ordinary firearms in interstate commerce.[99] Some provisions of the FFA provided that

> it shall be unlawful . . . (d) to transport or ship in interstate or foreign commerce a firearm or ammunition to anyone under indictment, convicted of *a crime of violence*, or a fugitive; (e) for such individuals to transport or ship firearms in interstate or foreign commerce; (f) for persons in category (e) *to possess* firearms that have been shipped or transported in interstate or foreign commerce; possession of a firearm by such individuals is presumptive evidence of violation of this Act.[100]

The most relevant portion of the FFA is the ban for anyone convicted of a *crime of violence* to possess firearms shipped or transported in interstate or foreign commerce, as this was "the first time Congress restricted persons from possessing firearms due to a criminal conviction."[101] Specifically, "crimes of violence" included "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking and certain forms of aggravated assault.'"[102] This "crime of violence" standard was consistent with the historical tradition and understanding from both the English common law and throughout the course of American history—so much so

96. Marshall, *supra* note 13, at 701.

97. The use of the tax power to regulate firearms was later upheld in Sonzinsky v. United States, 300 U.S. 506, 511, 514 (1937); *see* JOHNSON ET AL., *supra* note 7, at 529-34.

98. JOHNSON ET AL., *supra* note 7, at 533-34.

99. *Id.* at 534.

100. *Id.* at 535 (emphasis added).

101. *Id.*; Ryan Laurence Nelson, *Rearming Felons: Federal Jurisdiction under 18 U.S.C. 925(c),* 2001 U. CHI. LEGAL F., 551, 553 (2000).

102. Marshall, *supra* note 13, at 699 (internal quotations omitted).

that only violent individuals could be prohibited from firearm ownership.[103]

Moreover, "the crime of violence disability in the original FFA had roots [in history and traditions] that the later across-the-board disability lacked."[104] The "across-the-board disability" refers to an incredibly significant amendment to the FFA enacted in 1961, which radically departed from the "crime of violence" standard for firearm ownership prohibition.[105] This departure began when the phrase "crime of violence" was replaced with the term "crime *punishable* by imprisonment for a term exceeding one year."[106] The word "punishable" is crucial because "[t]he test is whether a person has been convicted of a crime punishable by more than one year; the actual sentence imposed is irrelevant."[107] When looking at the history and traditions of the United States, a sixty-year practice of "disarmament of all felons [is not] an infant, but it is hardly longstanding."[108]

Furthermore, "only a half-dozen states had adopted even limited felon-disarmament statutes (mostly limited to handgun possession) by 1925" and as of the same year "no state banned long gun possession based on a prior conviction, while only six states banned possession of 'concealable weapons' by convicts."[109] Therefore, "[t]he fact that the first *general prohibition* on [federal] felon gun possession was not enacted until 1961 further undercuts the argument that either history or tradition supports a virtue-based restriction on the right."[110]

This new general prohibition approach in lieu of the "crime of violence" standard was quickly expounded upon with the passage of the Gun Control Act of 1968 ("GCA"), one of the most significant pieces of

103. *Id.* at 698-99.

104. *Id.* at 700 (internal quotations omitted).

105. An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757 (1961).

106. *Id.* (emphasis added).

107. STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK 155 (2007 ed.) (quoting U.S. v. Johnson*,* 497 F.2d 548, 549-50 (4th Cir. 1974)) (internal quotations omitted).

108. Marshall, *supra* note 13, at 698-99 (internal quotations omitted); *see also* Brief of Plaintiff-Appellant at *23, Vincent v. Garland, 2022 WL 5140598 (No. 2:20-cv-00883) (D. Utah, Sept. 29, 2022) ("History shows the 1961 lifetime ban is a historical anomaly at odds with longstanding tradition.").

109. O'Shea, *supra* note 47, at 128-29, 129 n. 94. (quoting C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 1, 695, 701-02 (2009)).

110. *Kanter*, 919 F.3d at 464 n.12 (emphasis added).

legislation concerning firearms in modern history.[111] The GCA "explicitly identifie[d] certain classes of people who are prohibited from receiving or possessing firearms."[112] These specific classes of prohibited were codified in 18 U.S.C. § 922(g) and include persons.[113]

In the wake of *Bruen*, many of these particular classes of individuals have been challenged in federal district and circuit courts—some surviving constitutional attacks and others not. Perhaps the floodgates for these attacks on various categories of prohibited persons were opened post-*Bruen* because "[f]ew portions of the Gun Control Act were as garbled as its core, the definition of prohibited persons who were forbidden to acquire, possess or transport firearms."[114] These classes of prohibited persons and the subsequent constitutional attacks on them in the wake of *Bruen* will be discussed with more fervor in Part V of this Note.

As important as the "crime of violence" standard found in the original FFA (not to mention its deeply rooted historical support) is its omission of anything related to rights restoration.[115] Elaboration upon the ambiguities associated with restoration of rights would not come until 1965 when Congress amended the original FFA to include a "relief from disability" program, paving the way for restoration of firearm ownership rights.[116] The purpose behind these "relief from disability" measures was to "allow[] people who are disqualified from possessing firearms to petition for restoration of the right."[117]

Further, the intent for these petitions was to function "as a safety valve for persons with old convictions who pose no current danger to society" to have their Second Amendment rights restored.[118] But as the old expression goes, some things are easier said than done. This is evident when analyzing the more than decade-long journey to, and the ultimate impact of, legislation that expounded upon prohibited persons and rights

111. JOHNSON ET AL., *supra* note 7, at 616.

112. *Id.*

113. 18 U.S.C. § 922 (g).

114. David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective,* 17 CUMB. L. REV. 585, 639 (1987) (internal quotations omitted); *See* United States v. Batchelder, 442 U.S. 114, 120 (1979) ("By contrast, Title VII was a 'last minute' floor amendment, 'hastily passed, with little discussion, no hearings, and no report.'").

115. JOHNSON ET AL., *supra* note 7, at 535.

116. Ryan Laurence Nelson, *Rearming Felons: Federal Jurisdiction under 18 U.S.C. 925(c),* 2001 U. CHI. L. REV. 551, 554 (2000); Hardy, *supra* note 114, at 598.

117. JOHNSON ET AL., *supra* note 7, at 615.

118. *Id.*

restoration—the Firearm Owners Protection Act ("FOPA").[119]

The "main thrust [of FOPA] was directed at [liberalizing] the Gun Control Act" and it was the "first comprehensive redraft of the federal firearms laws since [the GCA in 1968]."[120] FOPA was enacted in part against a backdrop of "serious abuses of enforcement powers" at the hands of the Bureau of Alcohol, Tobacco, and Firearms ("ATF").[121] The kindling for the ATF's forest fire of power abuses post-GCA but pre-FOPA largely stems from the reality that a lot of the traditional duties of the ATF during this time period dwindled. [122] As a result, the ATF's "response was a series of heavily publicized projects to demonstrate a potential for firearms operations."[123] These projects ultimately led to many citizens expressing grievances against the ATF; which in turn led to Congressional hearings, stating

> [c]omplaints regarding the techniques used by the Bureau in an effort to generate firearms cases led to hearings before the Subcommittee on Treasury, Post Office, and General Appropriations of the Senate Appropriations Committee in July 1979 and April 1980, and before the Subcommittee on the Constitution of the Senate Judiciary Committee in October 1980. At these hearings evidence was received from various citizens who had been charged by [ATF], from experts who had studied the [ATF], and from officials of the Bureau itself. *Based upon these hearings, it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible.* Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk

119. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1,100 Stat. 449 (1986).
120. Hardy, *supra* note 114, at 668, 585.
121. *Id.* at 606.
122. *See* Hardy, *supra* note 114, at 604 n.108; *see also* SUBCOMM. ON THE CONST. 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS 88 (Comm. Print 1982), https://web.archive.org/web/20000819031501/http://www.constitution.org/2ll/2ndschol/87senrpt.pdf ("The mid-1970's saw rapid increases in sugar prices, and these in turn drove the bulk of the 'moonshiners' out of business. Over 15,000 illegal distilleries had been raided in 1956; but by 1976 this had fallen to a mere 609. The [ATF] thus began to devote the bulk of its efforts to the area of firearms law enforcement.").
123. Hardy, *supra* note 114, at 605.

> groups to firearms, the *overbreadth of the law* has led to neglect of precisely this area of enforcement.[124]

Thus, Congress enacted FOPA.[125] Key features of FOPA regarding prohibited persons and rights restoration involved the "expan[sion] [of] the number of persons or firearms dealers who could seek relief under 18 U.S.C. § 925(c)" and the allowance of "any person or dealer whose federal firearms privileges had been revoked to petition the Secretary [of the Treasury] to provide relief from their federal firearms disability."[126] Since the transition of the ATF from the Treasury Department to the Justice Department in 2002, these petitions are now directed to the Attorney General instead of the Secretary of the Treasury.[127]

Another key component of FOPA provides that "[a]n applicant may seek judicial review from a 'United States district court' if his application [for relief] is denied by the [Attorney General]."[128] If a court exercises judicial review, it may "in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice."[129] This "[a]voidance of a miscarriage of justice is associated with due process [concerns.]"[130] Despite the fact "FOPA confers both substantive and procedural rights upon citizens accused of Gun Control Act violations" the actual carrying out of these rights in the context of restoration has proven difficult in part because of "the structured chaos of the legislative [and political] process[es]."[131]

For example, federal law provides "a mechanism for a federal felon to

124. SUBCOMM. ON THE CONST. 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS 88 (Comm. Print 1982), https://web.archive.org/web/20000819031501/http://www.constitution.org/2ll/2ndschol/87senrpt.pdf (emphasis added).

125. Alex Yablon, *How 'The Law that Saved Gun Rights' Gutted ATF Oversight of Firearms Dealers*, THE TRACE (June 7, 2018), https://www.thetrace.org/newsletter/firearm-owners-protection-act-atf-gun-dealers/ ("Though little-known outside gun policy circles, the act is one of the most significant gun bills passed at the federal level.").

126. Nelson, *supra* note 116, at 555.

127. HALBROOK, *supra* note 107, at 169; *see also* Dan Eggen, *Move to Justice Dept. Brings ATF New Focus*, WASH. POST (Jan. 23, 2003) https://www.washingtonpost.com/archive/politics/2003/01/23/move-to-justice-dept-brings-atf-new-focus/76f43384-a848-4dec-9490-29dd2a2ade6c/.

128. United States v. Bean, 537 U.S. 71, 74, (2002) (internal quotations omitted); 18 U.S.C. § 925(c).

129. 18 U.S.C. § 925(c).

130. HALBROOK, *supra* note 107, at 166 (internal quotations omitted).

131. Hardy, *supra* note 114, at 681, 612.

restore their Second Amendment rights through an application to the Attorney General, but Congress has chosen to not fund [18 U.S.C.] § 925(c) since the early 1990s."[132] Therefore, the only options for a person convicted of a federal felony to restore their Second Amendment rights are (1) through a Presidential pardon, or (2) an expungement of the felony.[133]

Illustrative of this scheme's potential divorce from common sense is the case of *United States v. Bean*, in which the United States Supreme Court held "that a person wishing to remove disabilities may not bypass [the ATF]—even though it is prohibited from reviewing petitions—and seek disability removal in the district court."[134] Under this reasoning, one convicted of a federal felony looking to restore their Second Amendment rights is necessarily sent on a fool's errand because the law commands the ATF to be the initial arbiter of such restoration decisions while simultaneously not having the funds to do so.[135] And if the ATF has not first considered a petition, which they never can given the current lack of appropriations, a person cannot go to the courts for relief.[136] Any reasonable person likely can observe the problematic nature of this circular quandary and its consequences for rights restoration.

IV. From the Misguidance of *Miller* to *Heller* and *Bruen*, Featuring Traditionalism

With as much attention and impassioned debate the Second Amendment receives in our society, one might think there is a myriad of caselaw from the United States Supreme Court on the topic like the First

132. Hatfield v. Sessions, 322 F. Supp. 3d 885, 888 (S.D. Ill. 2018), *rev'd sub nom.* Hatfield v. Barr*,* 925 F.3d 950 (7th Cir. 2019); *see also Is there a way for a prohibited person to restore their right to receive or possess firearms and ammunition?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Aug. 21, 2019), https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and ("Although federal law provides a means for the relief of firearms disabilities, ATF's annual appropriation since October 1992 has prohibited the expending of any funds to investigate or act upon applications for relief from federal firearms disabilities submitted by individuals. As long as this provision is included in current ATF appropriations, ATF cannot act upon applications for relief from federal firearms disabilities submitted by individuals.").

133. *Frequently Asked Questions*, DEP'T OF JUST. (Aug. 16, 2023), https://www.justice.gov/pardon/frequently-asked-questions.

134. HALBROOK, *supra* note 107, at 167.

135. *Id.*

136. *Id.*

or Fourth Amendment; however this is not the case.[137] In fact, *District of Columbia v. Heller*, decided in 2008, was the first case to directly shed light on the scope of the Second Amendment since the "now-superseded" 1939 case of *United States v. Miller*.[138]

But when one considers the doctrine of incorporation "it should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."[139] Indeed, "[i]t is demonstrably not true that . . . [F]or most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial. For most of our history the question did not present itself."[140]

Ultimately, the *Miller* opinion, written by Justice McReynolds,[141] found that "the Second Amendment was adopted to assure the continuation and render possible the effectiveness of the militia, and that it must be interpreted and applied with that end in view."[142] *Miller* therefore seemed to be more of an endorsement of the "collective right"[143] viewpoint rather than the "individual right" recognized in *Heller*.[144] But the full scope of *Miller* is not so simple because, as noted in *Heller*, "*Miller* stands only for the proposition that the Second Amendment right,

137. *See* THE FIRST AMENDMENT ENCYCLOPEDIA, Presented by the John Seigenthaler Chair of Excellence in First Amendment Studies, https://www.mtsu.edu/first-amendment/encyclopedia/case-all; Jack E. Call, *The United States Supreme Court and the Fourth Amendment: Evolution from Warren to Post-Warren Perspectives*, 25 CRIM. JUST. REV. 93 (Summer 2000).

138. O'Shea, *supra* note 47, at 121; JOHNSON ET AL., *supra* note 7, at 586. ("For nearly seventy years, the *Miller* decision was the Supreme Court's primary guidance on the Second Amendment. Over that period, lower court interpretations of *Miller* would depart wildly from the text of the opinion.").

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

140. *Heller*, 554 U.S. at 626 (internal quotations omitted); *see also McDonald*, 561 U.S. at 750 ("Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

141. JOHNSON ET AL., *supra* note 7, at 361, 367 ("Justice McReynolds was notoriously lazy. This extended to his opinion writing.") ("Can *Miller's* ambiguities be partly explained as the product of a Justice who wanted to get the opinion finished with the least effort possible?").

142. JOHNSON ET AL., *supra* note 7, at 544 (internal quotations omitted).

143. *See id.* at 580.

144. Second Amendment, American Civil Liberties Union (Mar. 4, 2002) https://www.aclu.org/documents/second-amendment.

whatever its nature, extends only to certain types of weapons."[145]

The most accurate reading of *Miller*, as stated by the *Heller* majority, is that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right."[146] In sum, *Miller* and "the rule which it laid down was adequate to dispose of the cases before it and that . . . was as far as the Supreme Court intended to go."[147]

But for over seventy years, *Miller* "was the Supreme Court's primary guidance on the Second Amendment [and] [o]ver that period, lower court interpretations of *Miller* would depart wildly from the text of the opinion."[148] This departure specifically morphed into the misguided viewpoint that "the Second Amendment did not protect a private right to keep and bear arms."[149]

When it came time to finally address *Miller* once and for all, "[t]he *Heller* majority called *Miller* a virtually unreasoned opinion that contains some militia history, but discusses none of the history of the Second Amendment" and "[d]uring *Heller's* oral arguments, Justice Kennedy called *Miller* deficient and observed that it kind of ends abruptly as an opinion."[150] Moreover, both sides of the five-to-four *Heller* opinion rejected the collective right theory and it "does not appear to have any defenders among contemporary legal scholars."[151] Rather, properly understood, "the individual and collective natures of arms rights can be understood as complements, not opposites."[152]

The focus of Part IV is not on the collective or individual nature of arms rights since the dust has largely settled on that debate. The focus of

145. *Heller*, 554 U.S. at 623.

146. *Id.* at 625.

147. Cases v. United States*,* 131 F.2d 916, 922 (1st. Cir. 1942).

148. JOHNSON ET AL., *supra* note 7, at 586.

149. *Id.* at 590.

150. *Id.* at 543 ((internal quotations omitted); *see also Heller*, 554 U.S at 624 ("As for the text of the Court's [*Miller*] opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia, (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word *(not a word)* about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.") (internal citations omitted).

151. JOHNSON ET AL., *supra* note 7, at 580 (emphasis added).

152. *Id.*

this section is to introduce both *Heller* and *Bruen*'s watershed impacts on Second Amendment jurisprudence. Traditionalist reasoning in both these cases and at large as a method of constitutional interpretation will be elaborated upon.

A. *Heller*

Justice Thomas' concurrence in the 1997 case of *United States v. Printz* essentially prognosticated the arrival of not only *Heller* but also the majority opinion he authored in *Bruen* decades later.[153] In *Heller*, once and for all, the court answered Justice Thomas' musings in *Printz*.[154] Namely, that the Second Amendment does indeed confer an individual right to keep and bear arms.[155] *Heller* represents the logical precursor to *Bruen* because "the litigation in *Heller* dealt directly with home handgun possession—conduct that the Court located at the core of how Americans exercise the Second Amendment right to *'keep'* arms—*Bruen*, in turn, implicates the archetypal way that Americans understand themselves to exercise the right to *'bear'* arms."[156]

Heller undoubtedly "relied on originalist arguments to define the basic nature of the Second Amendment right."[157] In doing so, the majority opinion "analyzed the original meaning of 'Arms', 'keep', 'bear', and

153. Printz v. United States*,* 521 U.S. 898, 937–39 (1997) ("I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority.... The Second Amendment similarly appears to contain an express limitation on the Government's authority. That Amendment provides: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.' This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.' 3 J. Story, Commentaries § 1890, p. 746 (1833)").

154. *See generally Printz*, 521 U.S. 898.

155. *Heller*, 554 U.S. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

156. O'Shea, *supra* note 47, at 121.

157. *Id.* at 122.

'people[.]'"[158] However, the opinion also "employed traditionalist tests to elaborate and determine key features of the Second Amendment right."[159] For example, "one reason why a ban on handguns was unconstitutional was the simple fact that Americans acquired them in large numbers and kept them for self-defense[.]"[160] Thus, representing an endorsement of the traditionalist viewpoint that "common use [of a particular firearm] ought to be understood and applied in a concrete, *practice-based* fashion" as opposed to "abstract principles or values as the primary determinants of meaning."[161] To note, traditionalist reasoning was also wielded by the *Heller* majority in repudiating *Miller*.[162]

Further, the *Heller* majority nodded to traditionalism through its now famous dictum, that "nothing in our opinion should be taken to cast doubt on *longstanding* prohibitions on the possession of firearms by felons and the mentally ill[.]"[163] This is a negative or "limiting traditionalist argument, [which] in short, gives a reason to uphold a challenged measure as constitutional."[164] Such limiting traditionalist arguments are juxtaposed against positive "[c]onstitutive traditionalist arguments [which] provide reasons for a court to hold unconstitutional government measures that aim to restrict traditional actions."[165] Both negative and positive arguments demonstrate how the blade of traditionalism is double-edged.

B. *Bruen*

Much like *Heller* was the first case in a long time to directly address

158. *Id.*
159. *Id*.
160. *Id.*
161. O'Shea, *supra* note 47, at 122 (internal quotations omitted); *DeGirolami, supra* note 47, at 7 (emphasis added).
162. *Heller*, 554 U.S. at 624 n.24 ("[E]rroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the *reliance of millions of Americans* (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.")
163. *Heller*, 554 U.S. at 627 n.26 ("We identify these *presumptively* lawful regulatory measures only as examples; our list does not purport to be exhaustive.") (emphasis added).
164. O'Shea, *supra* note 47, at 114.
165. *Id.* at 116; DeGirolami, *supra* note 47, at 28 ("Drawing a practice too narrowly, as the Court has sometimes done,121 will stunt the tradition's interpretive power in future cases. Drawing it too broadly will dilute the tradition to the point where the method itself begins to resemble something else altogether—often something like principle-driven adjudication.").

the scope of the Second Amendment, "[t]he Supreme Court's decision to break the long drought of its Second Amendment docket by hearing *New York State Rifle & Pistol Association v. Bruen* in the October 2021 Term br[ought] these issues [concerning traditionalism and arms restrictions] to the forefront."[166] Other than *McDonald* incorporating the Second Amendment against the states, little was decided during the period between *Heller* and *Bruen* that illuminated the scope of the individual right to keep and bear arms.[167] While it might present itself as elementary, a simple alliterative device could be useful in understanding the impact of *Heller* and *Bruen* on the individual right to keep and bear arms. *Heller* means home (as in keeping weapons in the home) and *Bruen* means bring (as in bring outside in places generally accessible to the public).

Bruen held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[168] In doing so, it found that the State of New York's public-carry licensing regime violated the Constitution because of its "*special need* for self-defense" requirement.[169] This "special need" (otherwise known as "proper cause") was an incredibly high bar to meet, and something as simple as "living or working in an area noted for criminal activity d[id] not suffice."[170] Interestingly, the 1911 Sullivan Law from which "New York's firearm licensing requirement originated . . . was passed in response to post-Reconstruction concerns about organized labor, the huge number of immigrants, and race riots in which some blacks defended themselves with firearms."[171]

166. O'Shea, *supra* note 47, at 106-07; *Id.* at 106 n.10 ("By the end of October Term 2020, the Supreme Court had not issued a decision on the merits in an argued Second Amendment case since *McDonald v. City of Chicago*. 561 U.S. 742, 791 (2010) (holding that the Second Amendment individual right to keep and bear arms applies fully, via the Fourteenth Amendment, against state and local governments.").

167. O'Shea, *supra* note 47, at 106 n.10.

168. *Bruen*, 142 S. Ct. at 2122.

169. *Id*. (emphasis added).

170. *Id.* at 2123 (internal quotations omitted); *see also id.* at 2159-60 (Alito, J., concurring) ("At argument, New York's solicitor general was asked about an ordinary person who works at night and must walk through dark and crime-infested streets to get home. The solicitor general was asked whether such a person would be issued a carry permit if she pleaded: "[T]here have been a lot of muggings in this area, and I am scared to death." The solicitor general's candid answer was "in general," no. To get a permit, the applicant would have to show more—for example, that she had been singled out for attack. A law that dictates that answer violates the Second Amendment.") (internal citations omitted).

171. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn

An applicant would have to "demonstrate a special need for self-protection distinguishable from that of the general community" which essentially means that they have personally been "singled out for an attack."[172] The problematic nature of this approach is obvious. One can ask the driver who was almost carjacked at gunpoint in Hartford, Connecticut, whether he knew he had been singled out for an attack.[173] Or one can ask the Native American women in Montana if they can predict when they may be singled out for an attack.[174]

Be that as it may, in a similar fashion to *Heller*'s analysis of what it meant to keep arms, *Bruen* began by looking to the plain text of the Second Amendment for the definition of bearing arms.[175] The court then found the "definition of 'bear' naturally encompasses public carry [because] [m]ost gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table . . . . [And] most do not 'bear' (i.e., carry) them in the home beyond moments of actual confrontation."[176]

Aside from this practical understanding of what it means to "bear" arms is the reality that "[t]o confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."[177] Given "self-defense is the central component of the [Second Amendment] right" itself, such a confinement of firearms to essentially only the home via discretionary "may issue" (proper cause) regimes completely frustrates the purpose of the Second Amendment.[178] This is especially true when one considers the common sense reality that, someone from Chicago is "more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."[179]

Defender Services, et al. as Amici Curiae in Support of Petitioners at *9, N.Y. State Rifle & Pistol Ass'n, Inc. v. Corlett, (2021) (No. 20-843) 2021 WL 4173477 (internal quotations omitted).

172. *Bruen*, 142 S. Ct. at 2123.

173. Amy Swearer, *12 More Incidents in Which Lawful Gun Owners Stopped Criminals*, THE HERITAGE FOUND. (Nov. 9, 2022), https://www.heritage.org/firearms/commentary/12-more-incidents-which-lawful-gun-owners-stopped-criminals.

174. Katie Tercek, *Women learn self-defense tactics to face MMIW issue*, MONTANA RIGHT NOW: NONSTOPLOCAL (Apr. 9, 2012), https://www.montanarightnow.com/great-falls/women-learn-self-defense-tactics-to-face-mmiw-issue/article_3453c76a-5aba-11e9-a734-4fcadd859718.html.

175. *Bruen*, 142 S. Ct. at 2134, 2126.

176. *Id*. at 2134.

177. *Id.* at 2134-35.

178. *Id.* at 2135.

179. *Id.* at 2135 (quoting Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012)).

In distinguishing New York's "may issue" licensing system from other states, the Court noted how forty-three other states are "shall issue jurisdictions, where authorities *must issue* concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability."[180] Ultimately, the Court concluded that New York had not met its "burden to identify an American tradition justifying [the State's] proper-cause requirement."[181]

The court found that New York's licensing regime requiring an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" was a bridge too far; there is no deeply rooted American tradition that effectively prevents people from bearing arms outright in places generally accessible to the public (notwithstanding sensitive places), whether this be through open or concealed carry restrictions.[182] This conclusion can best be understood as the crux of the *Bruen* decision.

But this conclusion was preceded by a "long journey through the Anglo-American history of public carry."[183] Such a journey through traditions and history is of course the hallmark of traditionalism, and it was on prominent display in *Bruen*. Regarding this method of constitutional interpretation, the Court acknowledged that

> [h]istorical analysis can be difficult; it sometimes requires resolving threshold questions and making nuanced judgments about which evidence to consult and how to interpret it." But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to

180. *Id.* at 2123 (emphasis added) (internal quotations omitted).

181. *Id.* at 2138.

182. *Id.* at 2123, 2156; *see also* Transcript of Oral Argument at 11, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) https://www.oyez.org/cases/2021/20-843 ("I mean, it is true that during time periods where open carry was allowed that some states did specifically restrict concealed carry on the precise theory that if we allow you to carry open, then, if you're carrying concealed, you're probably up to no good. And Heller did exhaustively survey those cases, and what it concluded is that if a state allows open carry, then it can prohibit concealed carry, I suppose vice versa.").

183. *Bruen*, 142 S. Ct. at 2156.

> "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[184]

Traditionalism in *Bruen* directly rejected the "two-step framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny," which had taken off in appellate courts since *Heller* was decided.[185] More specifically, *Bruen* rejected the "second step" means-ends connection analysis, where courts determined "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[186] The Court found this was "one step too many" and that the government instead has the burden to prove "that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[187] This should come as unsurprising considering that the very first question asked by the Court during oral argument concerned how text, history, and tradition would inform the analysis of the issue.[188]

The time periods surveyed in *Bruen* were "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[189] Because "not all history is created equal," a heavy emphasis was placed upon the Founding Era to clarify the original meaning of the Second Amendment, but also to the Reconstruction Era to understand how arms-bearing traditions had developed from the Founding Era to postbellum America—particularly in the wake of the Fourteenth Amendment's ratification.[190]

Regarding how much weight should be given to these two different historical time periods, it was suggested during oral argument by the

184. *Id.* at 2130 (first quoting *McDonald*, 561 U.S. at 803-04 (Scalia, J., concurring); then quoting *McDonald*, 561 U.S. at 790-91 (plurality opinion)) (internal quotations omitted).

185. *Id.* at 2125-26 (internal quotations omitted).

186. *Id.* at 2126 (quoting *Kanter*, 919 F.3d at 441) (internal quotations omitted).

187. *Id.* at 2127.

188. Transcript of Oral Argument, *supra* note 182, at 3 ("If we analyze this and use history, tradition, the text of the Second Amendment, we're going to have to do it by analogy. So can you give me a regulation in history that is a base – that would form a basis for a legitimate regulation today? If we're going to do it by analogy, what would we analogize it to?").

189. *Bruen*, 142 S. Ct. at 2135–36.

190. *Id.* at 2136.

petitioners that history at the time of Reconstruction could potentially be given preference over the founding.[191] This seems to be an accurate understanding in according weight to these two time periods because historical sources from Reconstruction help "demonstrat[e] how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens."[192]

An exhaustive undertaking of all the history and traditions concerning public carriage of arms that *Bruen* analyzed would spill far too much digital ink for this Note. In sum, the court surveyed an extensive "variety of historical sources from the late 1200s to the early 1900s" reasoning by analogy to find laws and practices potentially similar to the New York "proper cause" regime.[193] As one may predict from the holding of *Bruen*—the Court found none.

But importantly, the Court noted "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin.* So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[194] This distinction between historical *analogues* and historical *twins* should comfort those who believe "the mere mention of [history and] tradition in law [is a] sufficient reason to run screaming."[195] For example, there is a historical analogue between laws from the past and today dealing with the prohibition of bearing arms while intoxicated, but no such analogue exists for people who merely use intoxicants from time to time—like 18 U.S.C.

191. Transcript of Oral Argument, *supra* note 182, at 3. ("[I]f there were a case where there was a contradiction between those two, you know, and the case arose in the states, I would think there would be a decent argument for looking at the history at the time of Reconstruction… and giving preference to that over the founding.").

192. *Bruen*, 142 S. Ct. at 2150.

193. *Id.* at 2122; *see also id.* at 2132 ("[T]his historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.') (citing Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

194. *Id.* at 2133 (*"*analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not '"uphold every modern law that remotely resembles a historical analogue,'" because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" (quoting Drummond v. Robinson*,* 9 F.4th 217, 226 (3d Cir. 2021).

195. DeGirolami, *supra* note 47, at 5 (internal quotations omitted).

§ 922(g)(3) calls for.[196]

C. Traditionalism

Traditionalism has frequently been mentioned throughout the course of this Note. Before moving onto Part V of this Note where the method of interpretation will be applied to restoration of rights and the constitutionality of lifetime bans—a brief overview is in order.

There is little doubt that textualism and originalism on one hand, and the living constitution on the other, have basked in the spotlight as methods of constitutional interpretation.[197] However, traditionalism has been on prominent display throughout the Supreme Court's recent terms.[198] This is not to say that traditionalism is new, nor is it a hobbyhorse for conservative members of the Supreme Court—it has been used by members of the Court's liberal bloc as well.[199] Far beyond the scope of this Note and the Second Amendment, it is important for law students, legal practitioners, and academics to grasp traditionalism as a method of constitutional interpretation because "for good or ill, traditionalism is enjoying its constitutional moment in the sun. It is the present reality of much of constitutional law, and it is likely to be with us for some years, if not decades or more. It is time to understand it."[200]

First, traditionalism is by no means merely looking at "history for the sake of studying history."[201] Rather, a baseline definition of traditionalism includes first

> concrete practices, rather than principles, ideas, judicial precedents, and so on, as the determinants of constitutional meaning and law; and [second] the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice's use before, during, and after enactment of a constitutional provision.[202]

196. 18 U.S.C. § 922(g)(3); *see also Shelby,* 90 Mo. at 303.

197. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019).

198. DeGirolami, *supra* note 47, at 2-3.

199. *Id.*

200. DeGirolami, *supra* note 47, at 5.

201. Transcript of Oral Argument, *supra* note 182, at 4.

202. DeGirolami, *supra* note 47, at 6.

By no means at all is this to say that judicial precedent and the like is to be totally disregarded, as "[t]raditionalism includes the enduring traditions of national actors in resolving questions . . . [but] the focus might be on comparatively minor figures and events in our national history [and] it also prioritizes the traditions of non-national persons and entities."[203]

Traditionalism can also be understood "as a bottom up emphasis on decentralized concrete practices."[204] A focus on these decentralized concrete practices is important because "[e]nduring practices . . . sometimes away from the centers of elite legal and political power give the traditionalist interpreter presumptive confidence that such practices are ingredients of the text's meaning and of the law of the Constitution."[205] Marc DeGirolami illuminates the scope of traditionalism with a metaphor about winter sports, stating that a

> tradition's duration—combining two dimensions of age and continuity—may be understood metaphorically by imagining a ski slope. The slope may be long or short; and it may be smooth or sparse. Sections of the slope that are smooth may be densely packed or coated only with a thin layer. A slope that is too short, or too sparse, cannot be skied. Likewise, a tradition that is too short, or too sparse, lacks interpretive authority.[206]

Equally important is understanding what traditionalism is not, especially for those who find the idea of history and tradition in law frightening. Such individuals should find solace in the fact that "a tradition is authoritative only if it is consistent with constitutional text."[207] Take for example, our country's shameful past of racial segregation (as addressed in *Brown v. Board of Education*) [208] and lack of suffrage (as addressed by

203. *Id.* at 25.

204. O'Shea, *supra* note 47, at 108-09 (internal quotations omitted).

205. DeGirolami, *supra* note 47, at 19.

206. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV.1123, 1124 (2020).

207. *Id*.

208. Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) ("[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.") (Harlan, J., dissenting)).

the Nineteenth Amendment).[209] Although these are sordid realities in the history of the United States, they are not of the continuous slope that amount to constitutional history and tradition, as described by DeGirolami's analogy.[210]

A counter argument to traditionalism is that judges are not historians, and the very nature of history itself can lead to different accounts or reporting of events, which in turn could lead to judges shopping for historical accounts that fit their desired outcome for public policy—otherwise known as "law office history."[211] But history does not exist in a vacuum, and *Bruen* exemplified this well because "[w]hen the Court in *Bruen* details concurrence of 19th century state and territorial firearms regulations, *observing outliers* and achieving a collective sense of the regulatory landscape, it is again *aggregating the diffuse practices* of individuals and localities across the nation to understand the Second Amendment's scope."[212]

There is an argument that the traditionalist method of interpretation rooted in practice and public understanding is more legitimate than decisions made by unelected federal judges routinely wielding abstract principles, doctrines, and cost-benefit analyses to inform their decisions.[213] Further, traditionalism is an "approach more suited to nonelites in American society—those whose longstanding practices, and the moral and political commitments they instantiate, may not conform to the ongoing thoughtful reimagination of the Constitution to reflect and impose elite opinion as a national mandate."[214]

209. U.S. CONST. amend. XIX.

210. *See* Range v. U.S. Att'y Gen., 69 F.4th 96, 104 (3d Cir. 2023) ("The Government's attempt to identify older historical analogues also fails. The Government argues that 'legislatures traditionally used status-based restrictions' to disarm certain groups of people. Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments.").

211. *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting) ("a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion") (quoting Saul Cornell*, Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. REV. 1095, 1098 (2009)).

212. DeGirolami, *supra* note 47, at 25-26.

213. *Bruen*, 142 S. Ct. at 2130 ("Reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field.").

214. DeGirolami, *supra* note 206, at 1175 (internal quotations omitted).

Traditionalism seems to be a valid and reasonable method of constitutional interpretation because it serves the dual purpose of staying faithful to the text and original meaning of the Constitution while still considering the ever-evolving nature of the Anglo-American legal system.[215] Traditionalism also "has the advantage that it focuses judges' attention on the concrete . . . . Rather than debating in the abstract about costs and benefits, or about the scope of principles such as 'equality,' 'liberty,' or 'dignity.'"[216]

To conclude, such a focus on the concrete that traditionalism provides can be a breath of fresh air in lieu of abstract musings on the meaning of the Constitution. While "traditionalism may contain some built-in uncertainty . . . so do virtually all interpretative methods anybody finds attractive."[217] No matter how one may feel about the merits of this method of traditionalist interpretation, as recent Supreme Court decisions inform us, traditionalism is not going anywhere. Therefore, it is imperative to wrap one's head around this method of constitutional interpretation as we continue to march forward towards the future.

V. Post-*Bruen* Prohibited Persons Litigation, Lifetime Bans, and an Approach for Restoration of Rights

The impact of the *Bruen* decision a little over a year ago cannot be understated.[218] To some the decision was hailed as a victory, and to others "a grave misstep."[219] Whatever one opines about the case's validity as a matter of constitutional law, or its impacts for public policy, the reality is the Second Amendment is no longer being treated as a "second-class right."[220] While *Heller*, *McDonald*, and *Bruen* have streamlined Second Amendment jurisprudence, the area of the law is still nonetheless in uncharted waters as federal district and circuit courts grapple with

215. DeGirolami, *supra* note 47, at 29.

216. *Id.*

217. *Id.* at 28.

218. Adam Liptak, *Supreme Court Strikes Down New York Law Limiting Guns in Public*, NEW YORK TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html ("The decision is expected to spur a wave of lawsuits seeking to loosen existing state and federal restrictions and will force five states — California, Hawaii, Maryland, Massachusetts and New Jersey, home to a quarter of all Americans — to rewrite their laws").

219. *Id.* ("Gun rights advocates welcomed the decision on Thursday. Jonathan Lowy, a lawyer with Brady, a gun control group, said the decision was a grave misstep.").

220. *McDonald*, 561 U.S. at 780.

challenges to various firearm restrictions.

Circuit splits were abundant during the years between *Heller* and *Bruen,* and now, albeit for different reasons, it appears the same is true post-*Bruen*.[221] However, this could change soon considering the Supreme Court will be hearing a post-*Bruen* Second Amendment case in the upcoming October 2023 Term.[222] The final section of this Note will discuss the landscape of prohibited persons litigation in the wake of *Bruen* and current restoration of rights procedures. After, a proposed approach for restoration of rights as guided by history and tradition will be set forth while considering the constitutionality of lifetime bans on firearms ownership.

A. Post-*Bruen* Prohibited Persons Litigation

Much like "not all history is created equal" various prohibited persons laws have remained (and will likely stay) solidified, but others have been struck down quickly.[223] This section will first address some of the less contested prohibited persons laws before touching on some of the more controversial and heavily challenged categories of prohibited persons.

i. Aliens, Citizenship Renouncers, and Fugitives

The following prohibited persons categories appear to be the most legitimate. Under 18 U.S.C. § 922(g)(5)(a) and § 922(g)(7), respectively, aliens unlawfully in the United States may not possess firearms, and those who have renounced their American citizenship also may not possess firearms.[224] The two categories should easily be deemed valid because these individuals are not a part of "the people" that the text of the Second Amendment refers to.[225] *United States v. Sitladeen* considered this issue in

221. Transcript of Oral Argument, *supra* note 182, at 27 ("they've pointed out that some lower courts have refused to apply the history test, for example, and said they will not extend Heller outside the home until this Court does. Other courts have applied intermediate scrutiny and variations of that.").

222. *See generally Bonta*, 542 F. Supp. 3d 1009 (challenging constitutionality of California's Assault Weapons ban); *Rahimi*, 61 F.4th 443 (banning on possession by individuals under domestic violence restraining order, *cert. granted*).

223. *Bruen*, 142 S. Ct. at 2136.

224. 18 U.S.C. § 922(g)(5)(a); 18 U.S.C. § 922(g)(7).

225. *See Harrison*, 2023 WL 1771138 at *8; *see also* United States v. Verdugo–Urquidez, 494 U.S. 259, 265 (1990).

the wake of *Bruen* and arrived at this very conclusion.[226] *Sitladeen* also noted that no circuit "found § 922(g)(5)(a) to be unconstitutional."[227]

Of the prohibited persons categories that appear to be the most valid, § 922(g)(2) is actually more difficult to consider than one may initially think, especially in light of the lack of caselaw concerning this class of prohibited persons. This statutory provision prevents "fugitive[s] from justice" from possessing firearms.[228] The knee-jerk reaction to hearing the word "fugitive" suggests prison escapees and convicts on the lam, thus leading someone to the conclusion that this is a lawful prohibition.[229] But the legal definition is not so narrow nor simple.[230]

An ode to the pitfalls of bureaucracy, "[u]ntil recently, the ATF and the FBI used different criteria in determining who met the definition of a fugitive from justice."[231] The ATF definition has prevailed, which defines "fugitive from justice as a person who both had a warrant for their arrest and traveled to a different state from the state in which the warrant was issued."[232] In these cases, "the prosecution must meet the burden of proving that the accused concealed himself with the intent to avoid arrest or prosecution."[233]

To provide a hypothetical scenario that exemplifies why § 922(g)(2) might not be as simple as it seems: what if someone lawfully possesses a firearm, but then finds themselves with a warrant out for their arrest while they are in another state? Does the fact they lawfully possessed the firearm prior to the issuance of the warrant (not to mention a potential lack of intent to avoid arrest in the other state) preclude them from being prosecuted under § 922(g)(2)? How might the analysis change if a warrant is out for a crime of violence compared to a non-violent crime? To date, no court since *Bruen* has considered the intricacies of this class of prohibited

226. United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023); *see also* United States v. Jimenez-Shilon, 34 F.4th 1042 (2022).

227. *Id.* at 984.

228. 18 U.S.C. § 922(g)(2).

229. *See America's Most Wanted*, IMBD, https://www.imdb.com/title/tt11710016/ (last visited Oct. 15, 2023).

230. Zack Goldstein, *Feds Limit Definition of Fugitive of Justice and Allow More People with Arrest Warrants to Purchase Firearms*, GOLDSTEIN MEHTA LLC (Nov. 24, 2017), https://goldsteinmehta.com/blog/feds-limit-definition-of-fugitive-of-justice-and-allow-more-people-with-arrest-warrants-to-purchase-firearms.

231. *Id.*

232. *Id.* (internal quotations omitted).

233. United States v. Durcan, 539 F.2d 29, 31 (9th Cir. 1976) (emphasis added) (quoting United States v. Wazney, 529 F.2d 1287, 1289 (9th Cir. 1976)).

persons.

ii. Heavily Contested Prohibited Persons Categories

Moving on to more contested and controversial prohibited persons categories, 18 U.S.C. § 922(g)(1) (the so-called "felon in possession" law) makes it unlawful for anyone to possess a firearm who has been convicted of "a crime punishable by imprisonment for a term exceeding one year."[234] A case currently pending before the Tenth Circuit is considering the constitutionality of § 922(g)(1) as applied to a non-violent offender.[235] But the Third Circuit case of *Range v. Attorney General United States of America* already held § 922(g)(1) unconstitutional as applied to a gun owner who was also a non-violent offender.[236] It appears the *Range* court arrived at the correct conclusion and the Tenth Circuit should follow suit when it decides *Vincent v. Garland*.[237]

In *Range*, the gun owner was convicted in 1995 for "making a false statement to obtain food stamps in violation of Pennsylvania law."[238] Despite the fact that "state misdemeanors are excluded from th[e] prohibition [§ 922(g)(1)] if they are punishable by a term of imprisonment of two years or less, that safe harbor provided no refuge for Range because he faced up to five years' imprisonment."[239] Difficult as it may seem to wrestle with the constitutionality of § 922(g)(1), history and tradition make it clear there should be only one conclusion: citizens can only be disarmed if they have been convicted of a crime of violence.

The *Range* court addressed this by looking at the original language in the FFA and by noting the 1961 amendment which changed the language of § 922(g)(1) to its current form.[240] And of course, by also surveying historical analogues and refuting those presented by the government.[241] The opinion noted that its holding was a "narrow one" which is true given

234. 18 U.S.C. § 922(g)(1).

235. During the editing process, Vincent v. Garland was decided, and the Tenth Circuit upheld § 922(g)(1) as constitutional. *See* Vincent v. Garland, 80 F.4th 1197, 1199 (10th Cir. 2023).

236. *See* Brief of Amici Curiae Firearms Policy Coalition and FPC Action Foundation in Support of Appellant and Reversal, *supra* note 32; *see also Range*, 69 F.4th at 98.

237. *See* Brief of Amici Curiae Firearms Policy Coalition and FPC Action Foundation in Support of Appellant and Reversal, *supra* note 32.

238. *Range*, 69 F.4th at 98.

239. *Id.* (internal citations omitted) (internal quotations omitted).

240. *See id.* at 104.

241. *See id.* at 104-05.

the nature of the as-applied challenge.[242] However, there is a colorable argument to be made that history and tradition prove § 922(g)(1) is facially unconstitutional due to overbreadth, and that it should not apply to non-violent offenders. Reasoning by analogy, the same could potentially be said of 18 U.S.C. § 922(g)(6) which prohibits anyone from owning a firearm who has been "discharged from the Armed Forces under dishonorable conditions" if the dishonorable discharge did not involve a crime of violence.[243] But the complexities of military law may complicate this conclusion, and further analysis is required to declare this with certainty.

For reasons like those in *Range*, 18 U.S.C. § 922(g)(3) (prohibiting anyone from possessing a firearm "who is an unlawful user of or addicted to any controlled substance") was held unconstitutional as applied in *United States v. Harrison*.[244] The thrust of the issue in *Harrison* was "whether stripping someone of their right to possess a firearm solely because they use marijuana is consistent with the Nation's historical tradition of firearm regulation."[245]

The court first noted that § 922(g)(3) "does not have deep roots; it wasn't enacted by Congress until the Gun Control Act of 1968" and how "it was amended in 1986 to broadly prohibit the receipt *or possession* of a firearm by any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."[246] Anyone who has ever heeded the advice of a law school professor to always read the footnotes would understand why § 922(g)(3) was unconstitutional as applied to the defendant.[247] The government's position defending § 922(g)(3) proved too much because "[w]hen asked at argument whether the United Sates was 'able to find even a single law that prohibited a person, not [an] intoxicated

242. *Range*, 69 F.4th at 106.

243. 18 U.S.C. 922(g)(6); *see* Tiffini Theisen & Jim Absher, *Dishonorable Discharge: Everything You Need to Know*, MILITARY.COM (June 9, 2023), https://www.military.com/benefits/military-legal/dishonorable-discharge-everything-you-need-know.html.

244. *Harrison*, 2023 WL 1771138 at *2 (internal quotations omitted).

245. *Id.* at *3.

246. *Id.* at *2 (internal quotations omitted); *see also* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

247. Patrick Kane, *Always Read the Footnotes*, JD SUPRA (Nov. 24, 2020), https://www.jdsupra.com/legalnews/always-read-the-footnotes-54478/#:~:text=There%20is%20a%20school%20of,readers%20might%20skip%20over%20them.

person, but a person who uses intoxicants, even when sober, from possessing a gun,' counsel for the United States responded 'No.'"[248]

As stated above, while there are historical traditions and analogues for restricting people from bearing arms during times of intoxication, no such restrictions existed just because someone used intoxicants. The government's position in *Harrison* would put an incredibly cumbersome "burden on the right of armed self-defense," which was one of the "central consideration[s]" of *Bruen*.[249] Take for example, the burden placed upon nearly "400,000 Oklahomans who use marijuana under state-law authorization."[250]

The court did not need to reach the vagueness claim offered by the defendant.[251] If it did, yet another colorable argument exists that § 922(g)(3) is unconstitutionally vague not just from the language of § 922(g)(3), but also the language of the Controlled Substances Act.[252] The Controlled Substances Act and its scheduling regime contain so many controlled substances and schedules that one is necessarily left to inquire—what if someone is lawfully prescribed a schedule II narcotic, but the person is also addicted to it? Maybe in a post-*Bruen* world some answers will arrive.

When it comes to the possession of firearms and mental states, a similar, yet still fundamentally different vein to 18 U.S.C. § 922(g)(3) is § 922(g)(4), prohibiting anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" from owning firearms.[253] To elaborate, "committed" means individuals "who are *involuntarily* committed by an appropriate judicial authority following due process safeguards."[254] A post-*Bruen* case addressing § 922(g)(4) is *United States v. Gould*, which dismissed the defendant's argument that § 922(g)(4) is unconstitutional.[255]

In doing so, the court relied heavily on *Heller*'s dicta about

248. *Harrison*, 2023 WL 1771138 at *7 n.35 (quoting Tr. of Oral Arg. (Dkt. 35), at 37).
249. *Bruen*, 142 S. Ct. at 2133.
250. *Harrison*, 2023 WL 1771138 at *18.
251. 18 U.S.C. § 922(g)(3); 21 U.S.C. § 802(6) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.").
252. *Id.*
253. 18 U.S.C. § 922(g)(4).
254. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 682 (6th Cir. 2016) (emphasis added).
255. United States v. Gould, No. 2:22-cr-00095, 2023 WL 3295597, at *1 (S.D.W. Va. May 5, 2023).

"presumptively lawful" measures regarding the mentally ill.[256] But "courts are not bound by dicta."[257] Furthermore, "the [*Heller*] Court expressly noted it was not 'clarify[ing] the entire of field' of the Second Amendment, and, importantly, the Court reserved for later cases an exploration of the historical justifications for its enumerated prohibitions."[258] This means *Heller*'s dicta "did not invite courts onto an analytical off-ramp to avoid constitutional analysis" for anything that might seemingly fall in line with its now famous dicta.[259]

Nonetheless, perhaps what makes § 922(g)(4) challenging (especially in light of history and tradition) is the fact that medical understandings of mental illness have only recently taken off, and this area of medicine has not necessarily advanced until the last few decades.[260] Still, the *Gould* court found the government's historical analogues persuasive.[261] Specifically, that "in eighteenth-century America, justices of the peace were authorized to lock up lunatics who were dangerous to be permitted to go abroad."[262]

A similar argument was put forth in *Harrison*, but the court disposed of that argument by noting that "the mere use of marijuana does not indicate that someone is in fact dangerous, let alone analogous to a dangerous lunatic."[263] Similarly, as mental health stigmas and understandings have changed now that the area of medicine is better understood, to label anyone who may have a mild form of a mental health issue an automatic danger to themselves or society is potentially painting with too broad of a brush.[264]

Sadly, this was not the case in *Gould*, where the defendant was

256. *Id.* at *5.

257. *Id.* at *5 (quoting Myers v. Loudoun Cnty. Pub. Schs., 418 F.3d 395, 406 (4th Cir. 2005)) (internal quotations omitted).

258. *Tyler*, 837 F.3d at 686.

259. *Id.*

260. *See* Wallace Mandell, *The Realization of an Idea*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, https://publichealth.jhu.edu/departments/mental-health/about/origins-of-mental-health (last visited Oct. 16, 2023).

261. *See Gould*, 2023 WL 3295597 at *12.

262. *Id.* (quoting 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, 1377 (2009)) (internal quotations omitted).

263. *Harrison*, 2023 WL 1771138, at *18 (internal quotations omitted).

264. *Understanding The Spectrum of Mental Health*, TAKE ACTION FOR MENTAL HEALTH, http://takeaction4mh.com/wp-content/uploads/docs/TakeAction4MH-UnderstandingTheSpectrumofMentalHealth.pdf (last visited Oct. 16, 2023).

involuntarily hospitalized four times in five years and was found in possession of a firearm within three years of his most recent hospitalization.[265] Post-*Heller* but pre-*Bruen*, the leading § 922(g)(4) case was *Tyler v. Hillside Cty. Sherrif's Dept.*[266] *Tyler* can best be understood as the antithesis to *Gould* because of how much the facts differ.[267] In *Tyler*, the complainant was involuntarily hospitalized following a difficult divorce in 1985.[268] During the course of Tyler's seventy-four years on earth, this was his only hospitalization or reported mental health issue.[269] In fact, after his darkest days in the mid-1980s, he went on to eventually remarry and successfully work for almost twenty years.[270]

In 2012, a medical doctor concluded the 1985 incident was an isolated one and that Tyler did not present any evidence of mental illness.[271] Around the same time, nevertheless, Tyler was still ineligible to purchase a firearm.[272] In response, he argued that "the Second Amendment forbids Congress from permanently prohibiting firearm by possession by currently healthy individuals who were long ago committed to a mental institution."[273]

In its en banc decision, the Sixth Circuit held "the federal ban on gun possession by those involuntarily committed for mental illness should be reviewed under intermediate scrutiny; and . . . the government had not adequately justified the ban in *Tyler* requiring a remand."[274] The reason why the government had not adequately justified the ban rested largely on the fact that the ban in *Tyler* was "effectively permanent" but "mental illness is not static."[275] *Bruen* foreclosed the intermediate scrutiny issue, but the latter issue concerning the government's justification of the ban continues to present difficult issues post-*Bruen*.[276]

Reasoning by analogy to the historical analogues for the intoxication issues surveyed in *Harrison*, for the same reasons that § 922(g)(3) is likely unconstitutional, so too is § 922(g)(4) (if only for now). This is because of

265. *Gould*, 2023 WL 3295597 at * 1.
266. *See Tyler*, 837 F.3d at 681.
267. *Compare Tyler*, 837 F.3d 678, *with Gould*, 2023 WL 3295597 *1.
268. *Tyler*, 837 F.3d at 683.
269. *Id.* at 683-84.
270. *Id.* at 683.
271. *Id.* at 684.
272. *Id.*
273. *Id.*
274. JOHNSON ET AL., *supra* note 7, at 1134.
275. *Tyler*, 837 F.3d at 694, 699.
276. *Bruen*, 142 S. Ct. at 2118.

§ 922(g)(4)'s overinclusive nature stemming from the dynamic, non-static nature of mental health conditions.[277] A statute like § 922(g)(4) could likely pass constitutional muster if there were more coherent restoration of rights procedures in place for people like Tyler.[278]

There is no doubting the highly sensitive nature of this prohibited class and the unique issues that mental illness presents, but there is also no reason to think that there are no viable restoration of rights mechanisms based on objective criteria for individuals like those in *Tyler*. Furthermore, to essentially give someone a scarlet letter to wear for the rest of their life that says "[o]nce mentally ill, always so" is offensive to the notion that people can be rehabilitated and serves as a way to further stigmatize people who may have dealt with depression or another mental health issues at one isolated point in their long lives.[279]

Next on the list is §922(g)(8), which "prohibit[s] the possession of firearms by someone subject to a domestic violence restraining order."[280] The Fifth Circuit recently in *United States v. Rahimi* upheld a facial challenge to §922(g)(8), holding it unconstitutional.[281] This decision has generated much backlash, and the Supreme Court has granted certiorari to hear the case in its October 2023 Term.[282] Noting the controversial nature of this prohibited persons category, the opinion began by stating "[t]he question presented in this case is not whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a *laudable policy goal*. The question is whether 18 U.S.C. § 922(g)(8) . . . is *constitutional*."[283] What § 922(g)(8) essentially does is

> deprive an individual of his right to possess (i.e., "to keep") firearms once a court enters an order, after notice and a hearing, that restrains the individual "from harassing, stalking, or threatening an intimate partner" or the partner's child. The order can rest on a specific finding

277. *Tyler*, 837 F.3d at 681-82.

278. *Id.* at 682; *see also NICS Improvement Amendments Act of 2007*, ATF, https://www.atf.gov/firearms/docs/guide/nicsactlist7-7-21pdf/download (last visited Oct. 16, 2023) (providing a list of states that have qualified relief of disability programs).

279. *Tyler*, 837 F.3d at 688.

280. *Rahimi*, 61 F.4th at 448; 18 U.S.C. §922(g)(8).

281. *Rahimi*, 61 F.4th at 448.

282. *United States v. Rahimi,* SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/united-states-v-rahimi/ (last visited Oct. 16, 2023).

283. *Rahimi*, 61 F.4th at 448 (emphasis added).

> that the restrained individual poses a "credible threat" to an intimate partner or her child. Or it may simply include a general prohibition on the use, attempted use, or threatened use of physical force reasonably expected to cause bodily injury. The covered individual forfeits his Second Amendment right for the duration of the court's order. This is so even when the individual *has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature*.[284]

The core of *Rahimi*'s holding after its journey through proffered historical analogues was that the government cannot disarm someone after only a civil proceeding—even restraining orders.[285]

For those who find the *Rahimi* decision concerning, relief can be found through 18 U.S.C. § 922(g)(9), which prevents possession of firearms by anyone "who has been *convicted* in any court of a misdemeanor crime of domestic violence."[286] The fact that disarmament under § 922(g)(9) hinges on a domestic violence conviction accords well with history and traditions of disarming individuals who commit crimes of violence. And unlike in *Rahimi*, it is in response to a criminal conviction, not a civil proceeding.[287]

The recent case of *United States v. Ryno* dismissed an as-applied challenge to the constitutionality of § 922(g)(9).[288] The court surveyed an extensive history like that of *Rahimi*, and while the *Ryno* court seemingly arrived at the right conclusion—this conclusion could have been arrived at more quickly considering historical traditions of disarmament for those convicted of crimes of violence. But the question necessarily remains—when it comes to disarming individuals for crimes of violence, when can they restore their rights, if at all?

B. Restoration of Rights

This section will begin by addressing the current restoration of rights landscape. More specifically, it will address the waltz between federal and

284. *Id.* at 455 (emphasis added).
285. *See id.* at 461.
286. 18 U.S.C. § 922(g)(9) (emphasis added).
287. *See Rahimi*, 61 F.4th 443.
288. United States v. Ryno, No. 3:22-CR-00045, 2023 WL 3736420 (D. Alaska Feb. 22, 2023.

state law that deals with the subject. It will also explain the reasoning behind the conclusion that lifetime bans on firearm ownership are most likely unconstitutional in most cases. Before concluding this Note, a proposal for a constitutionally permissible approach for rights restoration analogous to "shall-issue" concealed carry permitting regimes will be presented.

The difficulty of restoring one's right to keep and bear arms largely turns on inherent conflicts between federal and state law and the lack of caselaw addressing this topic.[289] Further, issues of statutory interpretation arise in light of the language of 18 U.S.C. § 921(a)(20)(B), which defines what constitutes a conviction.[290] Aside from *United States v. Bean*, a leading Supreme Court case concerning rights restoration is *Beecham v. United States*.[291]

In *Beecham*, the Court considered "which jurisdiction's law is to be considered in determining whether a felon has had civil rights restored for a prior federal conviction."[292] Ultimately, the Court found "restoration of rights under state law does not extinguish [a] conviction under federal law" and that "petitioners c[ould] take advantage of § 921(a)(20) only if they have had their civil rights restored under federal law."[293]

However, *Beecham* left open the question of "whether a federal felon [may] have his civil rights restored under federal law [at all]," going as far to say "[w]e express no opinion on whether a federal felon cannot have his civil rights restored under federal law. This is a complicated question, one which involves the interpretation of the federal law relating to federal civil rights." [294]

The complexities of restoration of rights under federal law was first introduced in Part III when referencing FOPA, the lack of congressional funding for the ATF to review petitions, and the infirmities of *United States v. Bean*. As one firearms attorney accurately summarized,

289. *See* Beecham v. United States*,* 511 U.S. 368, 369 (1994); *Bean*, 537 U.S. at 72; Caron v. United States, 524 U.S. 308, 309 (1998).

290. 18 U.S.C. § 921(a)(20)(B) ("What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.").

291. *Beecham*, 511 U.S. 368.

292. *Id.* at 369 (internal quotations omitted).

293. JOHNSON ET AL., *supra* note 7, at 615; *Beecham*, 511 U.S. at 374.

294. *Beecham,* 511 U.S. at 373 n.2.

> Under 18 U.S.C. 925(c), you can apply to the Bureau of Alcohol, Tobacco & Firearms to restore your gun rights. And if your application is denied, then you [technically] can seek judicial review in federal court. But since 1992, Congress barred ATF from spending money to review and investigate a felon's application to restore gun rights. Then, later, the U.S. Supreme Court ruled that "no action" does not equal a "denial." In other words, no denial equals no right to go to federal court.[295]

While the text of § 921(a)(20) contemplates expungement as a means for restoration of rights, if one were to attempt to expunge their federal conviction, they would be sent on a wild goose chase because "Congress has not provided federal legislation that offers any comprehensive authority or procedure for expunging criminal offenses. There exist only statutes that allow expungement in certain cases for possession of small amounts of controlled substances."[296] Furthermore, "[s]ome federal court circuits have stated they have no power to expunge records. However, other federal courts have indicated that they do have the power to expunge [but] the Supreme Court has passed on hearing cases that would have resolved the split between the circuits."[297]

Thus, the only restoration remedy available to those with federal convictions effectively is a presidential pardon.[298] Practically speaking, presidential pardons are "seldom granted" and left entirely to the unfettered discretion of the Department of Justice's Office of the Pardon Attorney and the President.[299] One may wonder what the "proud men who wrote the charter of our liberties" would think about this procedural maze for non-violent federal felons that effectively leaves a Presidential pardon

295. *How Do I Restore my Firearm Rights Under Federal Law?*, ZUANICH LAW PLLC, https://www.zuanichlaw.com/how-do-i-restore-my-federal-firearm-rights (last visited Oct. 16, 2023).

296. KIRK EVANS ET AL., TEXAS GUN LAW ARMED AND EDUCATED, 336, (2018-19 ed.) (including expungement procedures for veterans in certain cases).

297. *Id.* at 336; *see also* Sealed Appellant v. Sealed Appellee*,* 130 F.3d 695 (5th Cir. 1997).

298. EVANS ET AL., *supra* note 296, at 335; *Frequently Asked Questions*, OFF. OF THE PARDON ATT'Y (Aug. 16, 2023), https://www.justice.gov/pardon/frequently-asked-questions.

299. EVANS ET AL., *supra* note 296 at 335.

their only relief for restoring "the natural right of resistance and self-preservation."[300]

Even when an individual has a state felony conviction, but not a federal one, they too can hit a restoration gridlock as exemplified by the recent Eighth Circuit decision of *Smith v. United States* which ultimately fell in line with *Beecham*.[301] In *Smith*, the gun owner as a young man led a turbulent life, racking up several felony convictions in Minnesota and Iowa.[302] But as the expression goes—time heals all wounds. And in the decades since his troubled youth, Smith became "a rehabilitated, well educated family man living in Minnesota . . . employed as an IT systems engineer for a prominent Minnesota employer."[303] Even though Smith's rights were restored under Minnesota law, "no federally licensed firearms dealer [would] sell him a firearm" and he was told by an FBI agent "the Minnesota Restoration of Rights does not restore federal firearm rights for felony convictions listed on your Iowa state record."[304]

Affirming the district court, the Eighth Circuit held "the restoration of civil rights in Minnesota applied only to Smith's Minnesota convictions. As the Iowa convictions have not been restored, *under federal law* they continue to bar him from possessing a firearm."[305] In theory, if Smith also had his rights restored in Iowa, then he could potentially be exempted from federal prohibitions on firearm ownership. But the Supreme Court case of *Caron v. United States* dealing with the so-called "unless clause" of § 921(a)(20) explains why this is not so simple.[306]

In *Caron*, the Court considered whether a felon convicted under § 922(g)(1) could possess rifles and shotguns, but not handguns, under state law.[307] What made this case interesting is the state law restoration mechanism that allowed him to possess long guns, but not handguns, outside his home or business.[308] Defying this blessing by the state of Massachusetts for Caron to possess long guns, the Court found "if the Massachusetts convictions count for some purposes, they count for all and

300. Maryland v. King, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting); JOHNSON ET AL., *supra* note 7, at 158 (quoting Blackstone).
301. Smith v. United States, 63 F.4th 677, 678 (8th Cir. 2023).
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 680.
306. *See Caron v. United States*, 524 U.S. at 310 (1998).
307. *Caron*, 524 U.S 308.
308. *Id.* at 311.

bar possession of all guns" and thus he was convicted under federal law.[309]

Now is a logical turning point to explain why bans on firearm ownership for life are likely unconstitutional. *Beecham* was decided in 1994, *Caron* was decided in 1998, and *Bean* in 2002; this was all before *Heller* in 2008*, McDonald* in 2010*,* and *Bruen* in 2022. In the second edition of the Firearms Law and the Second Amendment casebook (published post-*Heller* but *pre-Bruen*) the question was raised, "[d]oes the Supreme Court recognition of a fundamental individual right to arms in *Heller* and *McDonald v. City of Chicago* . . . suggest that there must be a viable rights restoration mechanism for prohibited persons?"[310] The answer is most likely yes.

History and tradition support this conclusion as illustrated in Part II. The long journey from the English common law to the second founding of 1868 proves that history and tradition do not contemplate complete and total disarmament for non-violent individuals the way federal law does today. Even for actual (or perceived) violent and dangerous individuals, whether it be for Catholics and those sympathetic to rebellion in seventeenth century England, colonists in the new world, disgruntled Continental Army veterans in 1787, or ex-Confederates in 1867, remedies to cure disarmament persisted, or as in the case of ex-Confederates—no remedy was necessary because no right was ever lost. History and tradition prove that the "old soil of the Second Amendment" was "buried under strata of statutory sediment, layers of laws that covered up constitutional demands" during the twentieth century.[311]

Accordingly, misplaced reliance on present-day legislation enacted by a rubber stamping of the commerce clause and amorphous judicial balancing tests does not change the fact the Second Amendment is an enumerated, fundamental, and *individual right*.[312] It is incredibly important to make the distinction between civil rights which "include the right to vote, to hold office, and to serve on a jury" but also individual rights like due process (Fifth Amendment), confronting witnesses (Sixth Amendment), freedom of speech (First Amendment), and freedom from

309. *Id.* at 314.

310. JOHNSON ET AL., *supra* note 7, at 615.

311. Brief of Plaintiff-Appellant at *1, Vincent v. Garland, 2022 WL 5140598 (No. 2:20-cv-00883) (D. Utah, Sept. 29, 2022).

312. *See Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) (emphasis added); *see also* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that the [Gun Free School Zone] Act exceeds the authority of Congress "[t]o regulate Commerce ... among the several States....") (quoting U.S. Const., Art. 1, § 8, cl. 3).

unreasonable searches and seizures (Fourth Amendment.)[313]

Thus, for the individual right to keep and bear arms in the Second Amendment, simply believing "guns are bad" does not mean the Second Amendment is a "second class right" worthy of averting one's eyes from the unavoidable text enshrined in the Bill of Rights.[314] To quote Justice Scalia, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[315]

Bruen drove home the incredibly significant point that there is "no other constitutional right that an individual may exercise only after demonstrating to government officers some special need."[316] But make no mistake, the distinguishing factor between the right enshrined in the Second Amendment and the First Amendment can best be conveyed through the nursery rhyme: sticks and stones may break my bones, but words shall never hurt me. Firearms absolutely can hurt and kill people. Which is exactly why restoration of rights measures could be rescued from constitutional infirmity while still accounting for public safety concerns by mirroring "shall issue" permitting regimes.[317]

i. Proposed Approach for Restoration of Rights

Justice Kavanaugh's concurring opinion in *Bruen* emphasized that States are not prohibited "from imposing licensing requirements for carrying a handgun for self-defense . . . [rather] [t]he Court's decision addresses only the unusual *discretionary* licensing regimes, known as 'may-issue' regimes."[318] Such licensing regimes were "problematic

313. HALBROOK, *supra* note 107, at 157-58; *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting); Christopher Brown, *What Are Your Individual Rights?*, THE BROWN FIRM PLLC (Dec. 26, 2016), https://www.brownfirmpllc.com/what-are-your-individual-rights/; *see also* Transcript of Oral Argument, *supra* note 182, at 59 ("if you're asserting a claim to confront the witnesses against you under the Constitution, you don't have to say I've got a special reason, this is why I think it's important to my -- my defense. The Constitution gives you that right. And if someone's going to take it away from you, they have to justify it. You don't have to say when you're looking for a permit to speak on a street corner or whatever that, you know, your speech is particularly important. So why do you have to show in this case, convince somebody, that you're entitled to exercise your Second Amendment right?").

314. *Bruen*, 142 S. Ct. at 2160 (Alito, J., concurring); *McDonald*, 561 U.S. at 780.

315. *Heller*, 554 U.S. at 636.

316. *Bruen*, 142 S. Ct. at 2156.

317. *Id.* at 2161-62 (Kavanaugh, J., concurring).

318. *Id.* at 2161 (emphasis added).

because [they] grant[] open-ended discretion to licensing officials and authorize[] licenses only for those applicants who can show some special need apart from self-defense."[319] It is precisely this issue of subjective discretion that makes restoration of rights such a difficult issue. This is especially so when one's fundamental, and individual right to self-defense is at stake; but on the other hand, there are also legitimate concerns about public safety.

Shall-issue licensing regimes require an applicant to meet a certain set of criteria and upon completion, they must be issued their concealed carry permit.[320] Such a system could work well with restoration of firearm rights in light of history and tradition. There are state-level restoration of rights requirements that already function this way.[321] Some state restoration of rights procedures still allow for inherent subjective discretion from officials rather than objective standards that "shall-issue" licensing schemes possess, but others appear to at least be on the right track.[322] For example:

In Louisiana, "[f]irearm rights only lost for crime of violence, drug felony, sex offenses, *restored automatically* for ten years after completion of sentence, or earlier by pardon."[323]

In Oregon, "[f]irearms rights lost, *restored automatically* to certain first offenders after 15 years; restoration by court to non-violent offenders with one-year waiting period, juveniles after 4 years; otherwise by pardon."[324]

In Michigan, "[f]irearms rights lost (for felonies) for three years after completion of sentence, five years for specified violent or drug offenses (plus county restoration)."[325]

In New Mexico, "[f]irearms rights lost, *restored automatically* ten

319. *Id.*

320. *Id.* at 2162.

321. For a full list, *see Federal Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/#I_Loss_restoration_of_civilfirearms_rights (last visited Oct. 17, 2023).

322. *Id.*

323. *50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, RESTORATION OF RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/ (last visited Oct. 17, 2023) (citing LA. REV. STAT. ANN. § 14:95.1(C) (2023)) (emphasis added).

324. *Id.* (citing OR. REV. STAT. §§ 166.270, 166.274 (2010)) (emphasis added).

325. *Id.* (citing MICH. COMP. LAWS §§ 28.424, 750.224f (2017)).

years following the conviction, or by earlier pardon."[326]

In Idaho, "[f]irearms rights lost only during sentence, except for enumerated violent felonies; those convicted of violent felonies must seek restoration through "expungement, pardon, setting aside the conviction, *or other comparable procedure*."[327]

In Minnesota, "[f]irearms rights lost upon felony conviction restored upon completion of sentence unless crime of violence (defined to include drug crimes and many theft and burglary offenses), in which case court *may restore* upon petition."[328]

In Montana, "[f]irearms rights lost if conviction involves use of dangerous weapon; may be regained through application to court."[329]

In North Dakota, "[f]irearms rights lost for five years after sentence or release discharge in case of nonviolent felonies and violent misdemeanors; for 10 years in case of violent felonies. Pardon restores earlier if expressly stated."[330]

In South Dakota, "[f]irearms rights lost if convicted of 'crime of violence' or serious drug felony, restored automatically after 15 years if no similar conviction; earlier by pardon."[331]

In Texas, "[f]irearms rights restored five years after release from supervision, but only for possession at home."[332]

These states' heavy reliance on "crimes of violence" and "violent" felonies for disarmament and restoration is in accord with historical understanding and tradition while also reinforcing the reality that § 922(g)(1) is likely overbroad. Other states persist with schemes that mirror the federal government's restoration mechanisms (or lack thereof.)[333]

For example, in Wyoming, "[f]irearms rights lost by those convicted of violent felony or drug offense unless pardoned." [334] Or Wisconsin, "[f]irearms rights lost by felony offenders; regained by pardon."[335] With the Second Amendment incorporated against the states, these measures

326. *Id.* (citing N.M. STAT. ANN. § 30-7-16. (2022)) (emphasis added).
327. *Id.* (citing IDAHO CODE ANN. §§ 18-310, 18-3316(4) (2022)) (emphasis added).
328. *Id.* (citing MINN. STAT. §§ 609.165, 624.712-624.713 (2023)) (emphasis added).
329. *Id.* (citing MONT. CODE ANN. §§ 45-8-313, 45-8-314, 45-8-321 (2021))
330. *Id.* (citing N.D. CENT. CODE § 62.1-02-01 (2023)).
331. *Id.* (citing S.D. CODIFIED LAWS §§ 22-14-15, 24-14-12 (2023)).
332. *Id.* (citing TEX. PENAL CODE § 46.04) (2021).
333. *50-State Comparison*, *supra* note 323.
334. *Id.* (citing WYO. STAT. § 6-8-102 (2023); § 6-8-104 (2021)).
335. *Id.* (citing WIS. STAT. § 941.29) (2023).

that leave restoration of rights up to strictly a gubernational pardon could potentially be unconstitutional akin to the infirmity of the federal government's restoration of rights procedures.

The most logical rescue from constitutional infirmity for current restoration of rights procedures would be Congress funding the ATF so the agency can review petitions under § 925(c). This way, if the ATF denies a petition for rights restoration, at least a prospective gun owner can go to the courts for relief. Thus, any procedural due process concerns would at the very least be alleviated.

If Congress does fund the ATF to review petitions, the language of the statute currently reads "the Attorney General *may* grant such relief."[336] The statute then describes how the Attorney General would consider things like the applicant's record and reputation, circumstances of the disability, and potential for public safety concerns.[337] However, recall the heavy emphasis placed by the Court in *Bruen* on "shall issue" permitting regimes as opposed to "may issue" permitting regimes.[338] The reasoning of *Bruen*'s majority opinion and Justice Kavanaugh's concurrence regarding the distinction between "shall" and "may" issue concealed carry permitting regimes should apply analogously to restoration of rights.

In the event Congress does fund the ATF to review restoration petitions, the language of the statute should provide: "Attorney General *shall* grant such relief" instead of "*may*." The statute could then condition relief on objective criteria, such as: whether the crime was violent; the duration since the conviction or the involuntary hospitalization; any new convictions; and so forth. This would be a big step towards a constitutionally permissible restoration of rights scheme because history and tradition support *objective* restoration criteria.

If Congress never funds the ATF to review restoration petitions, the strongest restoration of rights approaches can be found in the states' statutes listed above (notwithstanding Wyoming and Wisconsin because of their subjective discretion in restoring rights). While each state varies, most have some combination of automatic restoration procedures based on a set term of years, distinctions between types of offenders (whether violent, felon, or misdemeanant) and they elaborate upon specific (and funded) procedures for restoration of rights. Focusing on such objective criteria accords well with history and tradition because of the specificity

336. 18 U.S.C. § 925(c).
337. *See id*.
338. *Bruen*, 142 S. Ct. at 2161-62 (Kavanaugh, J., concurring).

of the restoration requirements (like those historical sources found in Part II and III of this Note) and the lack of a potential lifetime ban on firearm ownership.

VI. Conclusion

The focus of this Note concerned *who* may possess firearms, and *when* individuals can be restored of this right if lost through a criminal conviction. In sum, whether the year be 1753 in Birmingham, England, or 2023 in Birmingham, Alabama, "due restrictions" on firearm ownership are of course valid. But the burden on "the right of armed self-defense" becomes incredibly undue when "[a]n eighty-year-old farmer convicted of a felony bad check charge when he was twenty-years old is guilty of being a felon in possession of a firearm."[339] Or the undue burden on a "young man who graduated from high school with honors" but had also "repeatedly been the victim of violent stranger assaults and robberies on the street."[340] When this young man started a job that "required that he travel two hours for work every day, he decided to carry a firearm."[341] Because he was prosecuted under the New York law challenged in *Bruen*, this young man is now forever a "violent felon."[342] Further, "he will face the worst kind of "'civil death' of discrimination by employers, landlords, and whoever else conducts a background check."[343]

In any case, "it is difficult to see the justification for disarming a 60 year old who was convicted of a crime of violence at age 20 . . . was released at age 40, and has stayed clean for 20 years . . . [and] it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968."[344] People can change, and most people deserve second chances—especially for their constitutional rights and their own safety.

339. HALBROOK, *supra* note 107, at 131.

340. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, *supra* note 171, at *20-21.

341. *Id.* at *21.

342. *Id.*

343. *Id.* at *22; *see* Utah v. Strieff, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting).

344. Marshall, *supra* note 13, at 735.