Note

In Defense of (Mental) Hearth and Home: Challenges to § 922(g)(4) in the Wake of *New York State Rifle & Pistol Ass'n v. Bruen*

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> And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.[1]

INTRODUCTION

If asked, "Would you give someone battling a mental illness a firearm?" most Americans—even the strongest proponents of the Second Amendment—would likely respond with a resounding "No." The answer would likely be universal because it seems whenever there is a horrific mass shooting in America, the perpetrator's mental health is considered as a factor when analyzing their motive.[2] However, what if the question was more nuanced? Consider how most Americans would respond to the

* J.D. Candidate, University of Minnesota Law School, 2023; Head Managing Editor, *Minnesota Law Review* Volume 107. I would like to give a special thank you to my peers on the *Minnesota Law Review* for their significant help in putting this piece together, especially Calvin Lee, Jackie Cuellar, Michael Kinane, and the Volume 107 staffers. Additionally, a thank you to my grandfather, Jack Vitelli, for his substantive edits. And finally, the biggest thank you to my wife, Rachel, for supporting not only me, but our son as well, as I have taken on the endeavor of law school. I would be nowhere without her.

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

2. *E.g.*, Dan Frosch, *Colorado Shooting Suspect Was Getting Psychiatric Care*, N.Y. TIMES (July 27, 2012), https://www.nytimes.com/2012/07/28/us/colorado-suspect-was-getting-psychiatric-care.html [https://perma.cc/8GUR-AH4S] (highlighting the shooter involved at the "The Dark Knight Rises" premiere in Aurora, Colorado); Richard A. Friedman, *In Gun Debate, a Misguided Focus on Mental Illness*, N.Y. TIMES (Dec. 17, 2012), https://www.nytimes.com/2012/12/18/health/a-misguided-focus-on-mental-illness-in-gun-control-debate.html [https://perma.cc/Q25U-8GYW] (discussing mental health issues in the wake of the Sandy Hook shooting); Pierre Thomas, *Investigators Believe*

following hypothetical: A man had a depressive episode twenty years ago and was committed to a mental institution for a few weeks. After his release, he went on to live an otherwise healthy life; he retained a job and sustained healthy family relationships while having no issue with depression since his episode. Should this man be forced to permanently forfeit his Second Amendment right based on the isolated incident? There is an intensifying view that mental health is unique to each individual and that one can recover from mental illness as one can recover from physical illness.[3] Taken as true, it seems rather unjust to place such a permanent bar in response to a temporary ailment.

For Clifford Tyler, the above scenario was not hypothetical—it was his life.[4] Tyler seemingly recovered from the illness he endured.[5] However, under 18 U.S.C. § 922(g)(4), involuntary commitment is dispositive for determining if someone battling

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Las Vegas Gunman Had Severe Undiagnosed Mental Illness: Sources, ABC NEWS (Oct. 7, 2017), https://abcnews.go.com/US/investigators-las-vegas-gunman-severe-undiagnosed-mental-illness/story?id=50346433 [https://perma.cc/FRM7-5VHK] (analyzing the shooter in the days following the Las Vegas shooting); Katie Rogers, *After Florida Shooting, Trump Focuses on Mental Health Over Guns*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/trump-florida-shooting-guns.html [https://perma.cc/8PRA-UZLE] (highlighting President Trump's response in the days following the Parkland shooting).

3. *See General Information Frequently Asked Questions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/FAQ/General-Information-FAQ/Can-people-recover-from-mental-illness-Is-there-a#:~:text=Most%20people%20diagnosed%20with%20a,psychotherapy%20and%20peer%20support%20groups [https://perma.cc/2ZYK-XMXQ] (indicating that *relief* from mental illness is possible); *Recovery Is Possible*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 1, 2022), https://www.mentalhealth.gov/basics/recovery-possible [https://perma.cc/V9NF-YN9F]; *Yes, There Is a Big Difference Between Mental Health and Mental Illness*, MCLEAN HOSP. (Jan. 3, 2021) (quoting Christopher M. Palmer), https://www.mcleanhospital.org/essential/yes-there-big-difference-between-mental-health-and-mental-illness [https://perma.cc/6Y9Q-BZ89] ("For example, if someone has the flu, we wouldn't say they're currently physically healthy. Instead, we might say that they're sick. Similarly, people can have a temporary bout of mental illness, like depression after a divorce."); *see also* Ashok Malla, Ridha Joober & Amparo Garcia, *"Mental Illness Is Like Any Other Medical Illness": A Critical Examination of the Statement and Its Impact on Patient Care and Society*, 40 J. PSYCHIATRY & NEUROSCIENCE 147 (2015) (providing a critique on the assertion that mental illness should be *treated* the same as physical illness but agreeing in the potential of recovery and that the statement has become a public axiom).

4. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 683–84 (6th Cir. 2016).

5. *See id.* at 684.

mental illness should lose their Second Amendment right.[6] Therefore, even if Tyler fully recovered, he could not possess a firearm as the § 922(g)(4) ban is indefinite.[7] This begs an important social question: Does § 922(g)(4)—legislation created to combat violence perpetrated using firearms—actually reflect America's modern attitude towards mental health? Or should the law reflect that those with mental illness can recover and allow the restoration of rights taken away under § 922(g)(4)?

This issue was not unique to Tyler. The effects of the § 922(g)(4) statutory scheme have been felt by many others who have overcome their mental illness.[8] Congress responded to § 922(g)(4)'s indefiniteness in part by passing legislation that allows states to set up compliant adjudicatory programs with the power to reverse the consequences of involuntary commitment under § 922(g)(4).[9] However, in practice, several states have failed to implement a compliant program.[10] This means citizens (like Tyler) living in a state without a compliant program have no route for remedy. Consequently, the current system creates not only troubling social questions but also several legal questions. First, is the indefinite ban for citizens in states with no compliant program a violation of their Second Amendment rights? Second, if a citizen in one state has an opportunity for remedy, but a citizen with the same standing in another state does not, is there a violation of the Fourteenth Amendment? The Sixth, Third, and Ninth Circuits addressed the first question and came to different conclusions, creating a three-way circuit split on the matter.[11] No plaintiff has raised an equal protection

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6. 18 U.S.C. § 922(g)(4); *see also* 27 C.F.R. § 478.11(a) (2022) (expounding on § 922(g)(4)).

7. *See Tyler*, 837 F.3d at 684 (tracing Tyler's inability to purchase a firearm).

8. *E.g.*, Beers v. Att'y Gen. U.S., 927 F.3d 150 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020); Mai v. United States, 952 F.3d 1106 (9th Cir. 2020).

9. 34 U.S.C. § 40915.

10. *See NICS Improvement Amendments Act of 2007*, BUREAU OF ALCOHOL, TOBACCO & FIREARMS [hereinafter *List of Approved States*], https://www.atf.gov/file/155981/download [https://perma.cc/AMS9-9KGY] (showing that seventeen states have not created compliant programs as of 2021).

11. *Tyler*, 837 F.3d at 699 (finding that this indefinite ban *may* be unconstitutional); *Beers*, 927 F.3d at 158–59 (finding that the indefinite ban was constitutional *as applied to this case*); *Mai*, 952 F.3d at 1121 (finding the indefinite ban to be *broadly* constitutional).

challenge at the circuit court level; thus, the second question has not been thoroughly addressed.[12]

Although there is a three-way circuit split on the Second Amendment analysis of this issue, all three decisions are no longer good precedents. In coming to their various conclusions, all three courts applied the same two-step test when examining their respective Second Amendment challenges to § 922(g)(4).[13] However, the recent Supreme Court opinion in *New York State Rifle & Pistol Ass'n v. Bruen* did away with this test, which circuit courts had used not just for § 922(g)(4) challenges, but for Second Amendment challenges generally.[14] The *Bruen* opinion increased the probability that § 922(g)(4) will be found unconstitutional.[15] As such, one of the most prominent attempts to keep firearms out of the hands of those battling mental illness is now at a greater risk of being struck down.

This Note argues that § 922(g)(4) and its concurrent "opt-in" regime that restores the Second Amendment right are bad law, both socially and legally. Socially, the law does not serve those battling mental illness properly and does not recognize that those with mental illness can recover.[16] Legally—in the wake of *Bruen*—the law is likely unconstitutional under a Second Amendment analysis and poses a risk of being struck down.[17] Although this Note asserts § 922(g)(4) is unconstitutional as it stands, it also recognizes that a system with no statute limiting the possession of firearms for those presently battling a mental illness is absurd.[18] This Note urges Congress to create a system that allows equal opportunity for all Americans to remedy their situation. The system should grant an evaluation of the mental

12. The Ninth Circuit made it a point to mention that this argument could have been fruitful but, since it was not brought on appeal, the court need not address it. *Mai*, 952 F.3d at 1113 ("Notably, though, Plaintiff does not seek the application of the substantive standards defined in 34 U.S.C. § 40915. He has never asserted, for example, an equal-protection claim that, because persons in thirty other states benefit from programs applying § 40915's substantive standards, he too is entitled to relief or to an opportunity to meet those standards. Nor has he advanced, on appeal, an argument that due process demands the same results.").

13. *Tyler*, 837 F.3d at 685; *Beers*, 927 F.3d at 153–54; *Mai*, 952 F.3d at 1113.

14. 142 S. Ct. 2111, 2126 (2022) ("Today, we decline to adopt that two-part approach.").

15. *See id.* (holding for a more protective Second Amendment test).

16. *See* discussion *infra* Part I.

17. *See* discussion *infra* Part II.

18. *See* discussion *infra* Part III.A.

well-being of each person categorically banned under § 922(g)(4) seeking to have their rights restored. This more nuanced system would likely be constitutional and also consider the legitimate concerns of public safety as they pertain to this issue.[19] In the wake of *Bruen*, the best way to get to this system is to amend § 922(g)(4) and its remedial scheme before they are found unconstitutional.[20] The amended statute should allow restoration through the federal courts as an attempt to mandate state actors to review restoration petitions would likely violate cooperative federalism jurisprudence.[21]

Part I of this Note provides background on the intersection between the overarching issues of mental illness and gun violence in America. In addition, it details the history of the current statutory scheme and how § 922(g)(4) and its remedial regime came to be. It concludes with a summary of modern Second Amendment jurisprudence.[22] Part II explains the circuit split regarding the constitutionality of § 922(g)(4) and offers an opinion on the courts' analyses. Further, Part II explains how an analysis of § 922(g)(4)'s constitutionality will differ post-*Bruen*. It then predicts how circuit courts may handle an equal protection analysis should § 922(g)(4) still be found constitutional post-*Bruen*. Lastly, Part III offers potential solutions to create a constitutional system that reflects the interests of all Americans. This Note ultimately recommends that 18 U.S.C. § 925(c) be rewritten in a way to allow federal courts to hear petitions and restore the Second Amendment right individuals have lost under § 922(g)(4). Examples of how § 925(c) could be rewritten are provided in Appendix A and Appendix B.

I. HOW MISCONCEPTIONS REGARDING MENTAL HEALTH CREATED A FLAWED LEGAL SCHEME

To fully comprehend how and why federal law addresses the involuntarily committed the way it does, it is essential to have a firm understanding of (1) the facts and statistics surrounding mental health and firearm violence in America; (2) how federal

19. *See* discussion *infra* Part III.B.

20. *See* discussion *infra* Part III.B.4.

21. *See* discussion *infra* Part III.B.4.

22. Modern jurisprudence begins post-*Heller*. Prior to *Heller*, the last Supreme Court interpretation of the Second Amendment was in 1939. United States v. Miller, 307 U.S. 174 (1939); *see also* District of Columbia v. Heller, 554 U.S. 570, 623–25 (2008) (treating *Miller* as the most recent major Second Amendment case).

firearm law has evolved since the reform initiated by the Gun Control Act of 1968; and (3) modern American jurisprudence on the Second Amendment.

A. BACKGROUND ON MENTAL ILLNESS, SUICIDE BY FIREARM, AND INVOLUNTARY COMMITMENT IN AMERICA

This Section highlights common beliefs about the dangers of allowing those suffering from mental illness to obtain firearms. It then provides background and statistics to show what beliefs are empirically supported and which are misconceptions. Moreover, it gives reasons why Americans should care about this area of law.

1. Firearm Ownership and Violence Perpetrated by Those with a Mental Illness

Most Americans likely assume that both mental illness diagnoses and firearm-related deaths are increasing in the country. Empirical data support these assumptions. From 2005 to 2019, only five states saw a reduction in firearm death rates.[23] Additionally, it is estimated that one in five U.S. adults experience some form of mental illness each year, with one in twenty suffering from a "serious mental illness."[24] These sad realities warrant significant attention. However, it is the intersection of these two phenomena that provides the relevance and necessity for a statute that concurrently addresses these concerns.

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23. *Firearm Mortality by State*, CDC, https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm [https://perma.cc/R3XC-LCP7] (showing that as of 2019, the only states to have reduced the death rate by firearm since 2005 are Arizona, California, Nevada, New Jersey, and New York).

24. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL HEALTH (June 2022), https://www.nami.org/mhstats [https://perma.cc/6Y4D-GEFQ]; *Mental Illness*, NAT'L INST. OF MENTAL HEALTH (Jan. 2022), https://www.nimh.nih.gov/health/statistics/mental-illness [https://perma.cc/3CF9-56PQ]. The National Institute of Mental Health defines mental illness, or "any mental illness (AMI)," as "a mental, behavioral, or emotional disorder. AMI can vary in impact, ranging from no impairment to mild, moderate, and even severe impairment . . . ." *Id.* It defines a serious mental illness, or "SMI," as "a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities." *Id.*

The Gun Control Act of 1968 was the origin of 18 U.S.C. § 922(g).[25] The Act's primary focus was to combat violence perpetuated with firearms against others.[26] In fact, "suicide" is never mentioned in the Committee on the Judiciary report submitted by one of the Act's principal drafters, Senator Thomas J. Dodd.[27] However, this does not mean that suicide by firearm was not an issue Congress sought to address; on the contrary, it was clearly something the ninetieth session thought about.[28] Before the Act's passage, Senator Dodd formally submitted the following quote into the record:

> About half the American deaths are suicides. Obviously it is impossible to say how many of these victims would be alive today if the United States had stronger gun laws. Yet it seems fair to assume that at least some of them would be, if death had not been so easily available at the touch of a trigger.[29]

Although the primary goal of the Act appears to have been to combat violence against others, there was a secondary goal of preventing violence against oneself as well. These objectives still correlate with the modern American opinion of wanting to keep firearms out of the hands of those presently battling mental illness.[30]

Despite the public perception that those with a diagnosed mental illness are more likely to use firearms against fellow citizens,[31] this demographic actually perpetrates a tiny portion of

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25. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1219–21 (codified as amended at 18 U.S.C. § 922(g)).

26. S. REP. NO. 90-1501, at 22 (1968) ("The principal purposes of this act are to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States.").

27. *Id.*

28. H.R. REP. NO. 90-1577, at 7 (1968) ("In the 13 months ending in September 1967 guns were involved in more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500 aggravated assaults, and 50,000 robberies."); 114 CONG. REC. 22,257 (1968) (statement of Rep. Robert Tiernan) ("Few are aware that America has the highest gun accident rate, the highest gun suicide rate, and the highest gun murder rate among 16 of the leading nations of the world.").

29. 113 CONG. REC. 198 (1967).

30. *See* Bernice A. Pescosolido, Bianca Manago & John Monahan, *Evolving Public Views on the Likelihood of Violence from People with Mental Illness: Stigma and Its Consequences*, 38 HEALTH AFFS. 1735, 1738–41 (2019) (providing an excellent social survey on how Americans perceive potential violence from those battling various forms of mental illness).

31. *See id.*

the gun violence directed at others in America.[32] The best estimates attribute only four percent of general violence in the United States to those with mental illness.[33] It has also been emphasized that additional criminogenic risk factors often play a more significant role in predicting violence than "psychotic symptoms as risk factors."[34] Multiple studies substantiate this assertion that—despite the national fear of those with mental illness using firearms violently against others—there is no evidence that individuals in this group are of more concern than any other citizen.[35] However, that does not mean there is no concern that this group will commit violent acts at a higher rate in general. Sadly, this demographic does perpetrate violence with firearms at a higher rate, but the violence is overwhelmingly self-inflicted.[36]

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32. *Preventing Gun Violence*, AM. PSYCH. ASS'N (Jan. 2021), https://www.apaservices.org/advocacy/misperceptions.pdf?_ga=2.226189407.414900060.1675014665-357973541.1675014665 [https://perma.cc/JM2V-QFYH] ("Mental illness by itself is not a predictor of firearm violence towards others."). In fact, those with a mental illness account for a very small portion of general violence in the United States. *See* Henry J. Steadman, John Monahan, Debra A. Pinals, Roumen Vesselinov & Pamela Clark Robbins, *Gun Violence and Victimization of Strangers by Persons with a Mental Illness: Data from the MacArthur Violence Risk Assessment Study*, 66 PSYCHIATRIC SERVS. 1238, 1240 (2015).

33. *E.g.*, Steadman et al., *supra* note 32 (citing Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, *in* VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 101 (John Monahan & Henry J. Steadman eds., 1994)).

34. *Id.* at 1240 ("Such risk factors include prior arrests and alcohol and drug abuse."); *see also Criminogenic*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Tending to cause crime or criminality.").

35. *E.g.*, Miranda Lynne Baumann & Brent Teasdale, *Severe Mental Illness and Firearm Access: Is Violence Really the Danger?*, 56 INT'L J.L. & PSYCHIATRY 44, 48 (2018) ("On the contrary, our analyses revealed that disordered individuals (even during high risk periods following hospitalization) were no more likely to be violent as a result of firearm access than their non-disordered counterparts."); Tori DeAngelis, *Mental Illness and Violence: Debunking Myths, Addressing Realities*, 52 MONITOR ON PSYCH. 31 (2021) (quoting Dr. Jeffrey Swanson, Duke Univ. Sch. of Med.) ("For example, people often believe that people with mental illness are largely responsible for incidents of mass violence and that people with mental illness are responsible for a large share of community violence. Yet both views have been roundly debunked by research . . . .").

36. *See Facts and Figures*, UC DAVIS HEALTH, https://health.ucdavis.edu/what-you-can-do/facts.html [https://perma.cc/AB5B-VGAJ] ("Sixty percent of deaths from firearms in the U.S. are suicides."); Cameron Wallace, Paul Mullen, Philip Burgess, Simon Palmer, David Ruschena & Chris Browne, *Serious Criminal Offending and Mental Disorder*, 172 BRIT. J. PSYCHIATRY 477, 483 (1998)

In 2020, over fifty percent of suicides were by firearms, resulting in the deaths of over 20,000 Americans.[37] Studies attempting to find a correlation between gun ownership and suicide by firearm produce intriguing results. First, across studies, it is agreed that suicide by firearm rates are highest in states where gun ownership is high and firearm policy is weak.[38] There

("[I]t should not be forgotten that up to one in 10 of our patients with schizophrenia will die at their own hand whereas only a small fraction of 1% will slay another."); Liz Alesse, *Gun Debate Hits Home for Families Dealing with Myths About Violence, Mental Illness*, ABC NEWS (Aug. 10, 2019), https://abcnews.go.com/Politics/debate-hits-home-families-dealing-myths-violence-mental/story?id=53449936 [https://perma.cc/TH86-3CZ5] ("And research shows people with a mental illness are more likely to harm themselves than others . . . ."); *Facts and Myths*, CHANGE YOUR MIND, https://www.changeyourmindni.org/facts-and-myths [https://perma.cc/68ZL-HCD6] ("The truth is that most people who are are [sic] mentally ill are not violent. They are more likely to be victims of violence and are also more likely to harm themselves than others."); Joseph D. Varley, *Seven Myths About Mental Health Debunked*, SUMMA HEALTH (June 11, 2018), https://www.summahealth.org/flourish/entries/2018/06/seven-myths-about-mental-health-debunked [https://perma.cc/G5HR-DBYX] ("A person suffering from a mental illness is in fact much more likely to harm themselves than others.").

37. *Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION, https://afsp.org/suicide-statistics [https://perma.cc/T2UD-Y87N]. This Note acknowledges that not all those who commit suicide are diagnosed with a mental illness, however, statistics show that the vast majority of those who commit suicide have had a psychiatric diagnosis by the time of death. *See* Louise Brådvik, *Suicide Risk and Mental Disorders*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH 2028, 2028 (2018) (citing Geneviéve Arsenault-Lapierre, Caroline Kim & Gustavo Turecki, *Psychiatric Diagnoses in 3275 Suicides: A Meta-Analysis*, 4 BMC PSYCHIATRY 37 (2004)); José Manoel Bertolote & Alexandra Fleischmann, *Suicide and Psychiatric Diagnosis: A Worldwide Perspective*, 1 WORLD PSYCHIATRY 181, 183 (2002) (stating that studies suggest the number of people that commit suicide who have a mental illness could be at least ninety percent).

38. *E.g.*, Michael Siegel & Emily F. Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981–2013*, 106 AM. J. PUB. HEALTH 1316, 1316 (2016) ("State-level firearm ownership was associated with an increase in both male and female firearm-related suicide rates . . . ."); Elinore J. Kaufman, Christopher N. Morrison, Charles C. Branas & Douglas J. Wiebe, *State Firearm Laws and Interstate Firearm Deaths from Homicide and Suicide in the United States: A Cross-Sectional Analysis of Data by County*, 178 J. AM. MED. ASS'N: INTERNAL MED. 692, 699 (2018) ("[S]tronger home state policies were associated with lower rates of firearm suicide . . . ."); Gonzalo Martínez-Alés, Catherine Gimbrone, Caroline Rutherford, Sasikiran Kandula, Mark Olfson, Madelyn S. Gould, Jeffrey Shaman & Katherine M. Keyes, *Role of Firearm Ownership on 2001–2016 Trends in U.S. Firearm Suicide Rates*, 61 AM. J. PREVENTATIVE MED. 795, 795 (2021) ("State-level firearm ownership rates largely explain the state-level difference in firearm suicide . . . .").

is, however, inconclusive evidence as to whether firearm ownership correlates to higher suicide rates generally.[39] In other words, there is strong evidence that access to firearms makes it easier for those who want to attempt to commit suicide to do so.[40] There is also evidence—albeit weaker—suggesting that those who own firearms are more likely to commit suicide than those who do not own firearms.[41] These findings, in conjunction with the rising number of mental illness cases,[42] demonstrate that firearm-related suicides are a real problem in America. How to best combat that problem should be a concern to all Americans.

2. Involuntary Commitment in America

The spectrum of mental illnesses varies vastly, just like physical illness.[43] Because mental illnesses are inherently impalpable, their severity can be hard to recognize and diagnose.[44] However, one way American society grades the severity of a person's mental illness is through involuntary commitment.[45] The use of involuntary commitment comes from the perception that those that are the most "mentally ill" are also likely the most "dangerous."[46] Persons involuntarily committed belong to the

39. *Compare* Siegel & Rothman, *supra* note 38 ("We found a strong relationship between . . . firearm ownership and suicides by any means among male, but not female, individuals."), *and* Kaufman et al., *supra* note 38 ("[S]tronger home state policies were associated with lower . . . overall suicide regardless of the strength of other states' laws."), *with* Martínez-Alés et al., *supra* note 38, at 796–97 (finding only a marginal relationship between firearm ownership and suicide generally).

40. This hearkens back to the eerie record of Senator Thomas J. Dodd in 1967. *See supra* note 29 and accompanying text.

41. *See supra* note 39 and accompanying text.

42. *See supra* note 24 and accompanying text (showing a high prevalence of mental illness in the United States as of 2020).

43. *See supra* note 24 and accompanying text (detailing the different forms of mental illness and their varying prevalence).

44. Matthew J. Edlund, *Psychiatric Diagnosis Is Difficult, and So Is Treatment*, PSYCH. TODAY (July 19, 2018), https://www.psychologytoday.com/us/blog/the-power-rest/201807/psychiatric-diagnosis-is-difficult-and-so-is-treatment [https://perma.cc/KBR2-3M5Z].

45. 27 C.F.R. § 478.11(a) (2022) (defining involuntary commitment as "[a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.").

46. Bernadette Dallaire, Michael McCubbin, Paul Morin & David Cohen, *Civil Commitment Due to Mental Illness and Dangerousness: The Union of Law*

subgroup of Americans with some form of mental illness that are actually affected by the ban imposed by § 922(g)(4).[47] Currently, the data are too limited to determine the exact number of annual involuntary commitments.[48] But analysts have estimated the number to be just over one million per year.[49]

Further, there is evidence that the rate of involuntary commitments is increasing.[50] Critiques of the legal processes and the pitfalls of involuntary commitment could be the subject of an entire Note on their own.[51] Nevertheless, the evidence shows that more people are being involuntarily committed than ever before.[52] Accordingly, Americans should be concerned with the increasing likelihood that they or someone they love may find themselves involuntarily committed. The consequences could expand far beyond losing the right to possess a firearm.[53]

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and Psychiatry Within a Treatment-Control System, 22 SOCIO. OF HEALTH & ILLNESS 679, 684–85 (2000) (highlighting the issues of grading someone's "dangerousness").

47. *See supra* note 24 and accompanying text.

48. Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 PSYCHIATRIC SERVS. 741, 741 (2020) (providing multiple reasons, including "patient privacy concerns, decentralized systems of mental health care, and variable commitment criteria across jurisdictions" as evidence for why tracking the involuntary commitment rate is so hard to do).

49. Gi Lee & David Cohen, *How Many People Are Subjected to Involuntary Psychiatric Detention in the U.S.? First Verifiable Population Estimates of Civil Commitment*, SOC'Y FOR SOC. WORK & RSCH. (Jan. 18, 2019), https://sswr.confex.com/sswr/2019/webprogram/Paper34840.html [https://perma.cc/KNG9-MESQ].

50. Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERVS. 61, 66 (2021) ("We calculated a 22-state mean incidence range of emergency detentions of 273 per 100,000 people in 2012 and 309 per 100,000 in 2016."). It should also be noted that there was a wide discrepancy in how many people were involuntarily committed by state. *See id.* (finding an annual detention rate of twenty-nine per 100,000 people in 2015 in Connecticut but 966 per 100,000 in 2018 in Florida). Analysis of how and under what circumstances these people are involuntarily committed is outside the scope of this Note but would be an interesting investigation.

51. *See e.g.*, Dallaire et al., *supra* note 46.

52. *E.g.*, Lee & Cohen, *supra* note 50, at 61 ("In 22 states with continuous data, the average yearly detention rate increased by 13%, while the average state population grew by only 4%.").

53. Clearly, involuntary commitment can lead to the loss of the right to possess a firearm. But it can also have other life changing consequences. For example, involuntary commitment can lead to a conservatorship after release. As seen through the highly publicized case involving singer Britney Spears, conservatorships can greatly limit one's ability to live freely. *See* Jacob Gershman

B. THE GUN CONTROL ACT OF 1968 AND ITS SUBSEQUENT REPERCUSSIONS

As stated, in 1968, Congress passed the Gun Control Act.[54] The purpose was to "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency . . . ."[55] The Act was passed in response to an increase in crime observed between 1964 and 1968 and the murders of John and Robert Kennedy and Martin Luther King, Jr.[56] Included in the Act were a reformation and a laying of the groundwork for 18 U.S.C. § 922(g), which dictates the various categorical bans on firearm possession.[57]

Initially, the Secretary of the Treasury had the power to review petitions for the reinstatement of the Second Amendment right and provide the requested relief to those banned.[58] But, such relief was only open to those banned due to a prior felony charge.[59] This power was eventually transferred to the Attorney General of the United States and then to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF).[60] Additionally, in 1986, the right to petition for relief was extended to all persons subject to § 922(g).[61] However, in 1992, Congress took away

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& Neil Shah, *Britney Spears' Legal Battle: What Is a Conservatorship and What Does It Mean for Your Finances?*, WALL ST. J. (July 1, 2021), https://www.wsj.com/articles/what-is-a-conservatorship-and-what-does-it-mean-for-your-finances-11613178198 [https://perma.cc/BG26-NYEM].

54. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

55. S. REP. NO. 90-1501, at 22 (1968).

56. *Id.* at 23, 89 (citing an increase in crime statistics generally and noting these cases specifically).

57. *Id.* at 56–61; *see also* 18 U.S.C. § 922(g) (banning firearm possession for the involuntarily committed as well as convicted felons, illegal immigrants, the dishonorably discharged, etc.).

58. S. REP. NO. 90-1501, at 56, 65 (1968) (defining the word "Secretary" as the Secretary of the Treasury and providing the original 18 U.S.C. 925(c) language that gave the Secretary power to grant applications of relief).

59. *Id.*; *see also* 18 U.S.C. § 922(g)(1) ("It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition . . . .").

60. 18 U.S.C. § 925(c); 27 C.F.R. §§ 478.144(a)–(b) (2022) (providing that any person may make application for relief under 922(g) of the Act and the application shall be filed with the Director).

61. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 105, 100 Stat. 449, 459 (1986).

funding for the review of applications seeking relief.[62] Legislators felt that the ATF review process was too taxing and subjective; the time and money could be better spent on agents in the field handling crime.[63]

In 2007, in response to the Virginia Tech school shooting, Congress approved the National Instant Criminal Background Check System (NICS) Improvement Amendments Act primarily to implement more vigorous background checks on individuals purchasing firearms.[64] Part of the bill allowed states to set up compliant programs to review relief applications specifically under § 922(g)(4).[65] Today, 34 U.S.C. § 40915 outlines the requirements of a compliant program.[66] After setting up a compliant program, an authorized state official must submit an application form to the ATF for review.[67] Thirty-three states have set up a

62. Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) ("That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c).").

63. S. REP. NO. 102-353, at 19–20 (1992) ("The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.").

64. S. REP. NO. 110-183, at 2 (2007).

65. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 105 121 Stat. 2559, 2569–70 (2008).

66. There are two criteria central to an adjudicatory program: (1) that it deems the person unlikely to act in a manner dangerous to self or to public safety; and (2) that granting the relief is not contrary to public interest. 34 U.S.C. § 40915. Note that some states have analogous regimes that, under state law, remove the ability of someone deemed mentally incompetent to possess a firearm and provide a remedy for restoration through state adjudication. *E.g.*, ALA. CODE § 22-52-10.8(b) (2022) (implementing the language of the § 40915 standard). States that have federally compliant programs have regimes that will restore both the individual's state gun rights and their federal ones. *Id.*; *see also List of Approved States*, *supra* note 10 (showing the thirty-three states with compliant programs as of 2021). However, some states have a regime that restores the individual's state rights but, because it is not compliant with the federal regime, does not restore the federal rights under § 40915. *E.g.*, CAL. WELF. & INST. CODE § 8103(f)(10)–(11) (West 2022) (using a different standard than what is found in § 40915); *see also* Liza H. Gold & Donna Vanderpool, *Legal Regulation of Restoration of Firearms Rights After Mental Health Prohibition*, 46 J. AM. ACAD. PSYCHIATRY & L. 298, 301 (2018) (showing where each state's regime stands with federal compliance). After *McDonald*, these state regimes were likely all constitutional; post-*Bruen*, that may no longer be the case.

67. *Certification of Qualifying State Relief from Disabilities Program*, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, https://www.atf.gov/file/11731/

compliant program.[68] § 40915 adjudication is currently the only remedy for those categorically banned under § 922(g)(4).

C. MODERN SECOND AMENDMENT JURISPRUDENCE

1. *District of Columbia v. Heller*: Finding a General Right to Firearm Possession

In 2008, the Supreme Court analyzed the Second Amendment in more depth than ever before.[69] There, the Court found a District of Columbia statute that prohibited the "possession of usable handguns in the home violat[ed] the Second Amendment."[70] The central debate between the justices discussed how the Amendment's prefatory and operative clauses interact.[71] That is, the Second Amendment allows for a "well regulated Militia" (the prefatory clause) and then states that "the right of the people to keep and bear Arms, shall not be infringed" (the operative clause).[72] The debate was whether the clauses were independent propositions or if the operative clause was qualified by the prefatory. A finding of the latter would mean the right to bear arms only related to those participating in the "well regulated Militia" not for everyday personal defense. Justice Scalia's majority opinion performed an extensive analysis of statutory construction,[73] the states' understanding of what the right to

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download [https://perma.cc/MVJ8-NKHS]. For an example of a completed form, see *Pennsylvania Certification of Qualifying State Relief from Disabilities Program*, PRINCE L. (July 1, 2019) [hereinafter *Pennsylvania Certification*], https://princelaw.files.wordpress.com/2019/07/pa-niaa-cert-7.1.19.pdf [https://perma.cc/9C95-55JU].

68. *List of Approved States*, *supra* note 10 (as of 2021). The reasons some states have not bought into the NICS varies broadly. *See Firearm Commerce Modernization Act, and the NICS Improvement Act: Hearing on H.R. 1384 and H.R. 1415 Before the Subcomm. on Crime, Terrorism & Homeland Sec.*, 109th Cong. 11 (2006) (statement of Rep. Carolyn McCarthy). One example of such a reason is privacy concerns states have about turning over citizen information to the federal government. *Id.* at 17.

69. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("[T]his case represents this Court's first in-depth examination of the Second Amendment . . . .").

70. *Id.* at 573.

71. *Id.* at 598 ("We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms?").

72. U.S. CONST., amend. II.

73. *Heller*, 554 U.S. at 576–600 (finding that an interpretation of the operative clause creating an individual right separate from the prefatory clause the only logical one).

bear arms meant,[74] the Amendment's legislative history,[75] and the interpretation of the right from immediately after the Bill of Rights was ratified through the nineteenth century.[76] Ultimately, the Court concluded that the Second Amendment included a right to personal defense.[77] However, it noted that the right is not unlimited, concluding it is limited to those weapons "typically possessed by law-abiding citizens for lawful purposes . . . ."[78] The *Heller* Court also laid out four "presumptively lawful" limitations to the Second Amendment and stated that the opinion should not be read to "cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill . . . ."[79] It ultimately concluded that the D.C. statute at issue was unconstitutional.[80]

2. *McDonald v. City of Chicago*: Extending the Second Amendment to the States

The *Heller* opinion recognized that past Supreme Court cases found the Second Amendment only applied to the federal government.[81] But it declined to address if the Second Amendment protections extended to the states. Two years after *Heller*, the Court answered this question affirmatively in *McDonald v.*

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74. *Id.* at 600–03 ("The historical narrative that [the District of Columbia] must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.").

75. *Id.* at 603–05.

76. *Id.* at 605–26 (finding that the right to personal defense was widely understood to be a purpose of the Second Amendment, not just a "well regulated Militia").

77. *Id.* at 628 ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.").

78. *Id.* at 624–25 ("We think that *Miller*'s 'ordinary military equipment' language must be read in tandem with what comes after: '[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kid in common use that the time.'" (citing United States v. Miller, 307 U.S. 174, 179 (1939))).

79. *Id.* at 626–27 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

80. *Id.* at 635.

81. *Id.* at 620 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1876)) ("States, we said, were free to restrict or protect the right under their police powers.").

City of Chicago, extending *Heller*'s holding to the states.[82] In doing so, the Court relied on the Fourteenth Amendment's Due Process Clause and the process of "selective incorporation."[83] The Court has used this process on a case-by-case basis to find that "many of the provisions of the Bill of Rights limit state government action."[84] The Court recounted the historical findings in *Heller* in conjunction with additional historical evidence.[85] Ultimately, the Court added the Second Amendment to the growing list of incorporated amendments and invalidated the municipal statutes in question.[86]

3. Post-*Heller* and *McDonald* Circuit Court Jurisprudence: The Emergence of the "Two-Step" Test

After *Heller* and *McDonald*, circuit courts overwhelmingly started to adopt a similar "two-step" test to analyze challenges to statutes allegedly in violation of the Second Amendment.[87] First, a court asked whether "the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood [at the time the Bill of Rights was ratified]."[88] This involved a historical analysis as *Heller* instructed. If the conduct was found to be outside of that scope, the inquiry

82. McDonald v. City of Chicago, 561 U.S. 742 (2010).

83. *Id.* at 763–67 (noting that although Justice Black's theory promoting that the Bill of Rights was unequivocally applied to the states through the Fourteenth Amendment had not been explicitly adopted by the Court, the theory of "selective incorporation" had pushed the Court in that direction).

84. *Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/#:~:text=Modern%20Supreme%20Court%20doctrine%20embraces,Rights%20limit%20state%20government%20action [https://perma.cc/STL3-BUYK] (listing the various amendments that have been incorporated on a case-by-case basis).

85. *McDonald*, 561 U.S. at 768–78.

86. *Id.* at 764 n.12; *see also Amdt14.S.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights*, *supra* note 84.

87. *See, e.g.*, United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Chester (*Chester I*), 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011); United States v. Torres, 911 F.3d 1253, 1258 (9th Cir. 2019); United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017). Although the test is the same across circuits, each circuit appears to name it after their own precedent. *E.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688 (6th Cir. 2016) (referring to the test as the *Greeno* test).

88. *Greeno*, 679 F.3d at 518.

ended, and the statute ruled constitutional.[89] Yet, if the conduct was found to be within the scope, then there was "a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights," and a court determined what level of scrutiny to apply.[90] This test was applied by all three circuit courts that analyzed challenges to § 922(g)(4).[91]

4. *New York State Rifle & Pistol Ass'n v. Bruen*: Ending the Two-Step Test

Although this two-step test seemed relatively agreed upon by the circuit courts, the Supreme Court obliterated that assumption in June 2022.[92] In its *New York State Rifle & Pistol Ass'n v. Bruen* opinion, the Court stated that the two-step test was inconsistent with *Heller* and *McDonald*.[93] The Court found that the approach was "one step too many" and that the test should only involve a historical analysis.[94] The Court replaced the two-step test with a standard that examines if the "Second Amendment's plain text covers an individual's conduct."[95] If it does, "the Constitution presumptively protects that conduct" and "[t]he government must then justify the regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[96] In short, *Bruen* explicitly overruled the two-step approach relied upon by the Third, Sixth, and Ninth circuits in their § 922(g)(4) analyses. It also seriously called into doubt the presumptively lawful categories highlighted by the *Heller* opinion.[97]

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89. *Id.*

90. *Id.* (citing *Chester I*, 628 F.3d at 703).

91. *See Tyler*, 837 F.3d at 685; Beers v. Att'y Gen. U.S., 927 F.3d 150 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020); Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020).

92. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–27 (2022).

93. *Id.* at 2125–26 ("In the years since [*Heller*], the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Today, we decline to adopt that two-part approach.").

94. *Id.* at 2127.

95. *Id.* at 2129–30.

96. *Id.*

97. See *infra* Parts II.A.1–2.a for an in-depth discussion on this issue.

Given *Bruen*'s abrogation of the two-step test, the future is uncertain about how circuit courts will analyze § 922(g)(4) challenges. Part II highlights how the analysis will look different. It then hypothesizes what the outcome will likely be. Further, no petitioner that made it to the circuit court level raised the issue of unequal treatment created by § 40915. In addition, Part II analyzes how a future court may rule on such an issue.

II. ANALYSIS OF THE SECOND AMENDMENT AND EQUAL PROTECTION ISSUES RAISED BY § 922(G)(4) AND § 40915

The current system's deficiencies shine through the real-life examples of Clifford Tyler, Bradley Beers, and Duy Mai. These cases, heard by the Third, Sixth, and Ninth Circuit Courts, all follow a similar fact pattern.[98] Each case involved a petitioner who had a depressive episode that resulted in a short involuntary commitment.[99] The depressive episode was an isolated event, and the petitioner in each case went on to live a successful life without any severe mental health issues.[100] Several years after their commitment, these individuals wanted to purchase a firearm but found themselves barred from doing so by § 922(g)(4).[101] Each petitioner lived in a state incompliant with

98. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688 (6th Cir. 2016); Beers v. Att'y Gen. United States, 927 F.3d 150 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020); Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020).

99. *Tyler*, 837 F.3d at 683–84; *Beers*, 927 F.3d at 152–53; *Mai*, 952 F.3d at 1110.

100. *Tyler*, 837 F.3d at 683 (having a depressive episode in 1985 leading to commitment for about four weeks); *Beers*, 927 F.3d at 152 (having a suicidal episode in 2005 leading to commitment for a few weeks); *Mai*, 952 F.3d at 1110 (having a depressive episode in 1999 leading to commitment for about nine months).

101. *Tyler*, 837 F.3d at 683–84 ("During his psychological evaluation, Tyler reported that he has 'never experienced a depressive episode' other than the one following his divorce."); *Beers*, 927 F.3d at 152 ("Beers has had no mental health treatment since 2006."); *Mai*, 952 F.3d at 1110 ("Since his release from commitment in 2000, Plaintiff has earned a GED, a bachelor's degree, and a master's degree. He is gainfully employed and a father to two children. According to the complaint, he no longer suffers from mental illness, and he lives 'a socially-responsible, well-balanced, and accomplished life.'").

§ 40915 and thus had no route to restore their Second Amendment right.[102] Constitutional challenges to § 922(g)(4) followed.[103] All three courts applied the same Second Amendment analysis but came down differently on how to properly apply it to this fact pattern.[104] Although their ultimate conclusions were reached at different steps in their analyses, the Third and Ninth Circuits held that § 922(g)(4) was constitutional as applied to the plaintiffs.[105] However, the Sixth Circuit was not convinced and determined § 922(g)(4) could be an unconstitutional overreach and remanded the case to apply intermediate scrutiny to the statute.[106]

Outside of the Second Amendment analysis, there was also an unraised equal protection issue. Because the plaintiffs lived in states that did not offer an adjudicatory scheme in compliance

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102. *Tyler*, 837 F.3d at 683 (Michigan); *Beers*, 927 F.3d at 153 n.9 (Pennsylvania); *Mai*, 952 F.3d at 1110 (Washington). Note that since the case in 2019, Pennsylvania has become a § 40915 complaint state and thus Beers' writ of certiorari was rejected and the case was dismissed as moot. Beers v. Barr, 140 S. Ct. 2758, 2758–59 (2020); *Pennsylvania Certification*, *supra* note 67.

103. *Tyler*, 837 F.3d at 681; *Beers*, 927 F.3d at 152; *Mai*, 952 F.3d at 1109.

104. *Tyler*, 837 F.3d at 678 (remanding the case for further analysis of § 922(g)(4) as applied to the plaintiff); *Beers*, 927 F.3d at 150 (finding that § 922(g)(4) imposed no burden on plaintiff's rights and is constitutional); *Mai*, 952 F.3d at 1106 (assuming a burden on plaintiff's rights but § 922(g)(4) constitutional as it passed intermediate scrutiny).

105. *Beers*, 927 F.3d at 150; *Mai*, 952 F.3d at 1106.

106. *Tyler*, 837 F.3d at 699. Intermediate scrutiny merely requires the government's legitimate interest be satisfied by a law substantially related to that interest. *Intermediate Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [https://perma.cc/5WEK-PKCE]. This is unlike strict scrutiny, which requires that the law be narrowly tailored to that interest. *Strict Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/39D9-BAQT]. However, intermediate scrutiny is a higher standard than rational basis, which simply requires there be a rational connection between the interest and the statute. *Rational Basis Test*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test [https://perma.cc/K2GL-A3W2]. The *Tyler* court determined that *Heller* explicitly ruled out rational basis as the standard for Second Amendment challenges, but also concluded that applying strict scrutiny would totally discount the presumptively lawful categories found in *Heller*. *Tyler*, 837 F.3d at 690–92; *see also supra* note 79 and accompanying text (discussing the presumptively lawful carve-outs in *Heller*). On remand, Mr. Tyler dropped his case. Email from Lucas McCarthy, Attorney for Clifford Tyler, to author (Feb. 8, 2022) (on file with author). By the time the court of appeals remanded, Mr. Tyler had advanced in age and was in need of at-home medical care. *Id.* He found the remand a significant achievement and he no longer wanted to spend his remaining time in litigation. *Id.*

with § 40915, they did not have a route for remedy. However, those with the same standing in other states would have the opportunity for such a remedy.[107] This argument may be moot if § 922(g)(4) is found unconstitutional on Second Amendment grounds. But it will continue to be a plausible argument should courts find a historical reason to uphold § 922(g)(4).

Nevertheless, as this Part addresses, asserting an equal protection claim is likely futile. This is because a plaintiff would fail to identify a similarly situated party and because a federal court is likely unable to overcome cooperative federalism jurisprudence.[108] Thus, this Note asserts that it is unlikely that a § 922(g)(4) plaintiff could invalidate the remedial regime as unconstitutional on equal protection grounds.

A. A SHIFT IN THE SECOND AMENDMENT STANDARD

The two-step test that the courts employed to analyze § 922(g)(4) was used throughout a majority of the circuits to analyze various Second Amendment challenges.[109] The Sixth Circuit was the only court that concluded that § 922(g)(4) burdens the Second Amendment right as applied to the plaintiffs which invoked step two of the analysis.[110] Because the Third Circuit found no burden on the plaintiff's right, it never reached step two.[111] The Ninth Circuit merely assumed that § 922(g)(4) satisfied step one but did no step one analysis.[112] Accordingly, the

107. *See supra* note 12 and accompanying text.

108. *See infra* Part II.B.2 and accompanying text.

109. *See e.g.*, United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Chester (*Chester I*), 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Torres, 911 F.3d 1253, 1258 (9th Cir. 2019). Although the test is the same across circuits, each circuit appears to name it after their own precedent. *E.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688 (6th Cir. 2016) (referring to the test as the *Greeno* test).

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

111. Beers v. Att'y Gen. U.S., 927 F.3d 150, 159 n.53 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) ("Beers therefore fails to surpass the first step of our Second Amendment framework, and we need not proceed to step two.").

112. Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) ("We assume, without deciding, that § 922(g)(4), as applied to Plaintiff, burdens Second Amendment rights.").

Sixth and Ninth Circuits then applied intermediate scrutiny.[113] In coming to its conclusion, the Sixth Circuit determined that *Heller* ruled out the use of rational basis review under Second Amendment challenges but also found that employing a strict scrutiny analysis would disregard *Heller*'s presumptively lawful limitations; intermediate scrutiny was therefore the only possible option.[114] The Ninth Circuit concurred and added that intermediate scrutiny was the most common standard used for Second Amendment challenges.[115] However, despite the Sixth and Ninth Circuits applying intermediate scrutiny, they reached opposite determinations.[116] The Ninth Circuit held that, when applying intermediate scrutiny, § 922(g)(4) is constitutional as applied to these plaintiffs.[117] The Sixth Circuit was not as convinced and remanded the case to the district court.[118]

1. The Reasoning for Creating the Two-Step Test

The Sixth Circuit recognized that it was obligated to adhere to Supreme Court dicta.[119] Still, it felt that the presumptively lawful categories created by *Heller* were exactly that—presumptions—and the categories were not an "analytical off-ramp to avoid constitutional analysis."[120] However, it then found that there was likely no historical, long-standing prohibition on firearm ownership for those deemed mentally ill.[121] To reconcile this finding with the presumptively lawful categories discussed in

113. *Id.* (citing *Tyler*, 837 F.3d at 690–92) ("In conclusion, we join the Sixth Circuit—the only other circuit court to have addressed the issue—in holding that intermediate scrutiny applies here.").

114. *Tyler*, 837 F.3d at 690–92.

115. *Mai*, 952 F.3d at 1115.

116. *Tyler*, 837 F.3d at 699 ("Thus, we conclude that Tyler has a viable claim under the Second Amendment and that the government has not justified a lifetime ban on gun possession by anyone who has been 'adjudicated as a mental defective' . . . ."); *Mai*, 952 F.3d at 1121 ("The federal prohibition on Plaintiff's possession of firearms because of his past involuntary commitment withstands Second Amendment scrutiny.").

117. *Mai*, 952 F.3d at 1121.

118. *Tyler*, 837 F.3d at 699.

119. *Id.* at 686.

120. *Id.*

121. *Id.* at 690 ("In the face of what is at best ambiguous historical support, it would be peculiar to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second Amendment as historically understood based on nothing more than *Heller*'s observation that such a regulation is 'presumptively lawful.'").

Heller, the Sixth Circuit rationalized that there had to be an application of means-end scrutiny.[122] Failing to apply means-end scrutiny would mean one of two things. First, it could mean that those deemed mentally ill fell outside the scope of the Second Amendment and were not burdened.[123] But, as stated, the court found that this assertion lacked historical support. However, to find any sort of law limiting the mentally ill from possessing firearms unconstitutional would be to disregard *Heller*'s presumptions. Therefore, the court found some form of means-end scrutiny must apply.[124] Further relying on *Heller*, the Sixth Circuit used the process of elimination to declare that the level of means-end scrutiny had to be intermediate.[125]

In sum, the Sixth Circuit expressly concluded that the presumptively lawful dicta of *Heller* either meant that *Heller* recognized a historical bar to the four specified categories or that those four categories "presumptively satisfy some form of heightened means-end scrutiny."[126] Because the Sixth Circuit's historical analysis of the treatment of those with mental illness indicated the absence of any historical bar, it found the latter meaning had to be the correct interpretation.[127] This lack of historical evidence for the four presumptively lawful categories also caused other circuit courts discontent and forced the emergence

122. *Id.* at 689–90 ("In mapping *Heller*'s 'presumptively lawful' language onto the two-step inquiry, it is difficult to discern whether prohibitions on felons and the mentally ill are presumptively lawful because they do not burden persons within the ambit of the Second Amendment as historically understood, or whether the regulations presumptively satisfy some form of heightened means-end scrutiny. Ultimately, the latter understanding is the better option."); *see also* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988) (explaining that means-end scrutiny is often employed in constitutional challenges to determine if a limitation created by the government (the means) is justified because it achieves a legitimate objective (the ends)).

123. *Tyler*, 837 F.3d at 689–90.

124. *Id.*

125. *Id.* at 690–91 ("*Heller* rules out rational basis . . . . [But r]eviewing § 922(g)(4) under strict scrutiny would invert *Heller*'s presumption that prohibitions on the mentally ill are lawful.").

126. *Id.* at 690.

127. *Id.* (citing United States v. Chester (*Chester I*), 628 F.3d 673, 679 (4th Cir. 2010)).

of the two-step Second Amendment analysis across jurisdictions.[128]

However, the *Bruen* court's condemnation of the assumption of the circuit courts has created a future climate in which *Hel-*

128. *Id.* at 690 n.10 (first citing NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*NRA I*), 700 F.3d 185, 196 (5th Cir. 2012); and then citing *Chester I*, 628 F.3d at 679). Like the courts, scholars also quickly picked up on this discrepancy, and its existence is the central thesis of Carlton F.W. Larson's article that will be discussed *infra*. 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, 1372–73 (2008) ("[S]uch a view is almost impossible to maintain. . . . Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources. . . . [T]he exceptions might be explained not on originalist grounds, but as results of an unstated standard of scrutiny."). Adam Winkler has also been highly critical of the inconsistencies in *Heller*'s reliance on a historical perspective but allowing limitations that have no historical grounding. Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1560 (2009) ("Consider how Justice Scalia's opinion addresses D.C.'s ban on handguns. An originalist would look to historical sources to determine whether those who ratified the Constitution thought a ban on a particular type of weapon was contrary to the right to keep and bear arms. But Scalia's opinion doesn't do this. Handguns are protected, according to the opinion, because they are the 'most preferred firearm in the nation' to keep for self-defense."). There was some evidence in the *McDonald* opinion that the courts were misapplying *Heller*, and the *Bruen* court pointed this out. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2118 (2022). The *Bruen* court specifically cited to *McDonald* and its statements on empirical analysis. *Id.* Although the *McDonald* court seemed sure that courts would not end up doing empirical analyses on the Second Amendment policy at question, that appears to be exactly what they were doing. McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) ("Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise."); *see also, e.g.*, *Tyler*, 837 F.3d at 678 (applying an empirical study on suicide by those recently released from commitment); Mai v. United States, 952 F.3d 1106, 1117 (9th Cir. 2020) (same); Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 910 F.3d 106, 132 (3d Cir. 2018) (Bibas, J., dissenting) (accusing the majority of relying on a study that was not peer-reviewed, which linked large magazines to mass shootings); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 262 n.114 (2d Cir. 2015) (citing Brief for the State Defendants as Appellees and as Cross-Appellants at 49, *N.Y. State Rifle & Pistol Ass'n,* 804 F.3d 242 (No. 14-36-cv) (finding that because forty percent of mass public shootings were performed with semiautomatic rifles, a ban on them was constitutional). The *Bruen* court found it "more legitimate, and more administrable" to simply rely on "history to inform the meaning of constitutional text." 142 S. Ct. at 2118.

ler's presumptively lawful statement likely means little compared to the overarching historical analysis.[129] Future courts addressing § 922(g)(4) may take the Third Circuit's stance and still find the statute constitutional. But, as will be highlighted *infra*, the evidence seems to weigh heavily against a court doing so.

2. The Historical Prong: The Inclinations of the Sixth Circuit Were Correct

The two-step test that the circuit courts applied was not completely wrong. The first prong—inquiring about the "burden" on the plaintiff's rights—followed the instruction of the *Heller* court and called for a performance of historical analysis. Though, the Sixth Circuit was the only court that performed a comprehensive and reasoned analysis.[130] When the Ninth Circuit presumed that there was a burden, it completely neglected the prong the Supreme Court later held should be the whole test and went right to the prong the Supreme Court expressly rejected. Thus, dissecting the Ninth Circuit's opinion provides little insight into future cases. Instead, only the Third and Sixth Circuit's opinions provide some relevance for courts as they both attempted a historical analysis. The Sixth Circuit's analysis was more extensive, comprehensive, and consistent with the opinions of scholars.

a. Most Scholars Recognize That There Is No Historical, Long-Standing Prohibition of Second Amendment Rights for Those Deemed Mentally Ill

In 2008, Carlton F.W. Larson released a critique of the *Heller* opinion's presumptively lawful limitations dicta.[131] He noted three recurring sources used to assert that felons and the mentally ill were meant to be excluded from the Second Amendment

129. Though it should be highlighted that the presumptively lawful categories stay alive through Justice Kavanaugh's concurrence, which Justice Roberts joined. *Id.* at 2162.

130. This assertion is made on the fact that the Third Circuit relied on spotty evidence to come to its conclusion, see *infra* Part II.A.2.c, and the Ninth Circuit failed to conduct any historical analysis. *Mai*, 952 F.3d at 1114–15.

131. Larson, *supra* note 128; *see also* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (stating the four categories of presumptively lawful limitations were for (1) felons, (2) the mentally ill, (3) laws forbidding the carrying firearms in sensitive places, or (4) laws imposing conditions and qualifications on the commercial sale of arms).

right at the time of the Founding.[132] The first source was "a failed amendment offered by Samuel Adams in the Massachusetts ratifying convention."[133] The second source was a recommended amendment by New Hampshire to the federal constitution that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[134] The last source Larson discussed was "a minority report by Pennsylvania Anti-Federalists" calling for the disarming of individuals deemed a "real danger of public injury . . . ."[135] Larson's analysis was centrally focused on the disarming of felons, but he was nonetheless critical of these sources being used to justify any long-standing prohibition on that class or the class of the involuntarily committed.[136]

Larson's analysis of the historical evidence of categorical persons meant to be excluded from the Second Amendment in 1791 is by far the most cited article on the matter and has been readily accepted by others.[137] However, various scholars have

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132. Larson, *supra* note 128, at 1374–75 ("The same three sources recur again and again in the literature, yet none are especially probative.").

133. *Id.* at 1374 (citing DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788, at 86–87, 266 (Boston, 1856) [hereinafter SAMUEL ADAMS SOURCE]).

134. *Id.* at 1375 (citing 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 326 (2d ed. 1891) [hereinafter NEW HAMPSHIRE SOURCE]).

135. *Id.* (citing The Address and Reasons of Dissent of the Minority Convention of the State of Pennsylvania to Their Constituents (1787), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665 (1971) [hereinafter Pennsylvania Source]).

136. *Id.* at 1374–75. For example, Larson's critique of the SAMUEL ADAMS SOURCE, *supra* note 133, was that it was a failed Anti-Federalist amendment, it focused on the right for "peaceable citizens"—a term never seen in the Second Amendment—and a reading of "'peaceable citizens' might mean 'nonfelons,' but that reading is neither obvious nor required." *Id.* at 1374. Larson's critique of the NEW HAMPSHIRE SOURCE, *supra* note 134, included noting that the proposed amendment called for the disarming of those that had engaged in "actual rebellion." *Id.* at 1375. Rebellion was clearly used as a specific term and is only one type of criminal act. *Id.* Last, Larson felt that the Pennsylvania Source, *supra* note 135, was the strongest, but nonetheless still noted that it was a failed, Anti-Federalist amendment and its text is not reflected in the Second Amendment. *Id.* Ultimately, Larson did not seem convinced by any source, alone or collectively. *Id.* ("The best one can say is that at least some people in Pennsylvania felt criminals could be disarmed.").

137. *See e.g.*, John L. Schwab & Thomas G. Sprankling, Houston*, We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158, 166 n.59 (2012); Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have the Right to Bear Arms?*, 48

come to the same conclusions on their own.[138] Virtually all that have studied the issue agree that a historical analysis of the Founding generation's view towards those with a mental illness reveals that there is little evidence to suggest that a long-standing Second Amendment prohibition was widely accepted.

b. The Sixth Circuit's Skepticism: Finding the Larson Evidence Unpersuasive

Indeed, little evidence was uncovered in the years that followed Larson's article highlighting the common evidence used to show a historical ban on firearm use by the mentally ill. Eight years later, the government in *Tyler* cited two of the three sources given by Larson.[139] However, as the Sixth Circuit noted, the sources presented by Larson and cited by the government at best supported an argument that non-"law-abiding, responsible citizens" were meant to be excluded from the right.[140] But because the sources did not identify those with mental illness as non-"law-abiding, responsible citizens[,]" they "move[d the court] no closer to an understanding" that this group was meant to be excluded from the right in 1791.[141] Further, the Sixth Circuit emphasized that Larson specifically stated in his article that "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."[142] The Sixth Circuit ultimately concluded that the evidence provided little to show that "persons . . . committed

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WAKE FOREST L. REV. 1, 7 n.40 (2013); Coleman Gay, *"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1529, n.221 (2020); Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1381 n.9 (2022).

138. *See, e.g.*, Winkler, *supra* note 128, at 1563 ("The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes."); C. Seth Smitherman, *Rights for Thee but Not for* Mai*: As-Applied Constitutional Challenges to 18 U.S.C. § 922(g)(4)*, 25 TEX. REV. L. & POL. 515, 542–53 (2021) (arguing that the Lockean principles that undoubtably influenced the Founders promote the idea that rights are tied to the capacity to reason; when one restored their capacity to reason, their rights would also be restored).

139. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688–89 (6th Cir. 2016) (citing SAMUEL ADAMS SOURCE, *supra* note 133, and Pennsylvania Source, *supra* note 135).

140. *Id.* at 689.

141. *Id.*

142. *Id.* (citing Larson, *supra* note 128, at 1376).

due to mental illness [were] forever ineligible to regain their Second Amendment rights."[143]

c. The Third Circuit's Acceptance: Finding the Larson Evidence More Than Persuasive with an Added Burden on the Petitioner

Like it did in *Tyler*, the government in *Beers* relied on Larson's article and one of the three sources he cited: the Address and Reasons of Dissent of the Minority Convention of the State of Pennsylvania to Their Constituents.[144] The court quoted Larson's comment that judicial officials in 1791 "were authorized to 'lock up' so-called 'lunatics' or other individuals with dangerous mental impairments."[145] However, the opinion failed to recognize Larson's own critique of the Pennsylvania source or his statement about the lack of eighteenth-century laws prohibiting those with mental illness from possessing a firearm.[146] At best, the Third Circuit entertained valid evidence that firearms could be taken from those actively battling mental illness, but that evidence failed to indicate that an indefinite prohibition past the point of recovery was recognized in 1791.

d. An Independent Analysis of Colonial Laws and Attitudes Towards Those with Mental Illness Outside the Possession of Firearms Context

There is a dearth of evidence relating to colonial attitudes towards those with mental illness and their potential for firearm possession. As asserted above, the best evidence the government has offered is that non-"peaceable citizens" were meant to be excluded from the Second Amendment.[147] But it should still be recalled that the Pennsylvania Source was a proposed amendment that was *rejected*. Therefore, at best, it may reasonably be asserted that those presently suffering from a mental illness were meant to be excluded from the Second Amendment. However, to

143. *Id.*

144. Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (citing Pennsylvania Source, *supra* note 135).

145. *Id.*

146. Larson, *supra* note 128, at 1375 ("[L]ike the Samuel Adams proposal, it was offered by opponents of the Constitution, and its text is not reflected in the Second Amendment as proposed and ratified. . . . [S]uch evidence would surely be inconclusive at best in other constitutional contexts.").

147. *Tyler*, 837 F.3d at 689.

conclude that those battling mental illness are forever non-peaceable under the Second Amendment, there must be evidence that those of the colonial period believed those with a mental illness could not recover.

Evaluating colonial social attitudes and laws pertaining to the mentally ill more generally provides insight into whether an indefinite loss of a right to firearm possession for those deemed mentally ill was likely at the time.[148] An analysis of this evidence indicates that the general attitude of colonial Americans toward those suffering from a mental illness was actually at a turning point at the end of the eighteenth century toward more humane treatment for this group of people.[149] Additionally, the evidence predominately indicates a belief that those with a mental illness could be cured, and their rights should be restored upon cure.[150]

Before beginning a historical analysis, it is essential to determine what period of time is relevant to the analysis. Justice Barrett emphasized this in her concurring opinion in *Bruen*.[151] Barrett noted that, although it was irrelevant to the case at hand, it was necessary to emphasize if post-1791 evidence was the benchmark or post-1868 evidence (after the Fourteenth Amendment was ratified).[152] For her part, Barrett placed more significant value on 1791 evidence than on 1868 evidence.[153] Indeed, although the majority opinion analyzed a large span of historical practice, it noted that "not all history is created equal."[154] The majority also cautioned against relying on English common

148. After all, the *Bruen* opinion allows for analogical reasoning when performing the historical analysis. 142 S. Ct. 2111, 2133 (2022). Therefore, "the government [need only] identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* Thus, analogy to attitudes towards and other laws regulating those with mental illness will be highly relevant.

149. *See infra* notes 163–70 and accompanying text.

150. *See infra* notes 163–70 and accompanying text.

151. *Bruen*, 142 S. Ct. at 2162–63 (2022) (Barrett, J., concurring) ("[T]he Court avoids another 'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791." (citation omitted)).

152. *Id.* at 2163. There is a scholarly debate as to whether the adoption of the Fourteenth Amendment gave the Bill of Rights a new meaning. *Id.* at 2138.

153. *Id.* ("So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution 'against giving postenactment history more weight than it can rightly bear.'" (citation omitted)).

154. *Id.* at 2136.

law observed post-Bill of Rights that was never entirely accepted in the colonies.[155] With this in mind, the following analysis attempts to analyze English law between the seventeenth century, the Bill of Rights enactment in 1791, and colonial practice from 1791–1826. This Note asserts that post-*Bruen*, this period will be given the most weight in a historical analysis.

i. General Attitudes During the Colonial Period

It is well accepted that the colonists and Founding generation derived their legal and social principles from the English.[156] Therefore, a proper *Heller*/*Bruen* analysis looks at both English and American attitudes and laws concerning those with mental illness around the eighteenth century. Interestingly, the end of the eighteenth century and the beginning of the nineteenth century saw massive changes in attitudes toward the mentally ill and how they were treated.[157] One final note should be made before beginning the analysis. Two interrelated but distinct concepts will be discussed. The first is the *treatment* of those with mental illness, and the second is the *belief in a cure* for those with mental illness. Although an attitude that treating those with mental illness should be more humane often carries the belief in a cure, these opinions are distinguishable.

In the early to mid-eighteenth century, the view on insanity by the English laboring class was still somewhat medieval and closely tied to spirituality.[158] The insane were treated harshly in an attempt to "drive out the devil."[159] Although the lay opinion of the early eighteenth century tended to perpetuate a belief of incurability, and the treatment was commonly cruel, there were clearly cases where it was believed that such demons could be driven away and the person restored to their right mind.[160] Additionally, there is evidence that the medical community of the

155. *Id.*

156. Parnel Wickham, *Idiocy and the Law in Colonial New England*, 39 MENTAL RETARDATION 104, 105 (2001) (citing DAVID HACKET FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 201–05 (1989)).

157. *See infra* notes 162–70 and accompanying text.

158. KATHLEEN JONES, LUNACY, LAW, AND CONSCIENCE 1744–1845, at 2–4 (W.J.H. Sprott ed., 1955).

159. *Id.* at 4.

160. NORMAN DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES, 1789–1865, at 4 (1964) (recounting common perception of mental illness); JONES, *supra* note 158, at 4 (recalling that the insane were confined and bound and if they managed to escape there was "hope of recovery"); *see also* ALBERT DEUTSCH,

time thought that insanity was caused by natural substances in the body and would therefore perform "evacuations" in attempts to cure the illness.[161]

It appears that these primitive remedies for mental illness carried through to the colonies.[162] However, in the mid-1700s, America built its first general hospital in Pennsylvania, and the standards started to change.[163] Among the hospital's purposes was to create a division for those "disordered in their [s]enses" where they might be able to be "subject to proper treatment for their *[r]ecovery*."[164] To get funding for the division, Benjamin Franklin himself petitioned the Pennsylvania General Assembly, citing the recovery successes seen at the English mental hospital in Bethlehem.[165] Indeed, by the latter half of the eighteenth century, the prevailing medical belief no longer routed mental illness to a supernatural origin.[166] And European leaders in psychology like Philippe Pinel and William Tuke led the way in firmly establishing that insanity could be cured by therapeutics.[167] As with most things during that time period, the expert and upper-class opinion shifted and left the lay opinion to catch

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THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 13 (Colum. U. Press 2d ed. 1949) ("In England of the 16th century, a favorite prescription for 'gathering the remembrance of a lunatic' was to beat and cudgel him until he had regained his reason.").

161. JONES, *supra* note 158, at 5 ("The treatment of mental disturbance was a matter of removing the excess [natural substances] by means of evacuation.").

162. It is important to remember that the medical community in the colonies cannot be compared to the modern understanding of a medical community, and there was not a formal medical college in the colonies until 1765. *See About Us*, U. PA.: PERELMAN SCH. MED., https://www.med.upenn.edu/psom/overview.html [https://perma.cc/USV3-QDBW] (describing the founding of the first medical school in the United States); DEUTSCH, *supra* note 160, at 28 ("Mental diseases, when treated as medical problems, which was seldom, were commonly regarded as the result of an excess of bile."). With that being said, the treatment by the lay person during the early colonial years was still beyond cruel. Only those that were deemed violent were handled by society and were often hurt rather than helped. *Id.* at 39–40 ("The individual in need of assistance was apt to receive public attention only when his condition was looked upon as a social danger or a public nuisance—and he was then 'disposed of' rather than helped."). Those deemed insane were often beaten or chained and locked up and treated no differently than any other criminal. *Id.* at 53.

163. DEUTSCH, *supra* note 160, at 58.

164. *Id.* at 58–59 (emphasis added).

165. *Id.*

166. DAIN, *supra* note 160 ("Enlightened physicians believed it was a natural disease, which, like all others, should be treated by medical means.").

167. *Id.* at 5.

up.[168] However, by 1822, most lay opinions had shifted toward humane treatment and belief in cure.[169] In fact, by 1810, laymen had "pioneer[ed] in spreading the new, optimistic theories about insanity" and "initiated [one] of the earliest American mental institutions, Friends' Asylum."[170] Thus, there is good evidence that by the Founding, the social and medical common attitude had transitioned towards a belief in curability and stronger advocacy for more humane treatment for the mentally ill.[171]

The laws of pre-colonial and colonial society provide further indication that it was generally believed cure for mental illness was possible. Although there is some evidence that those with mental illness had their rights limited generally, there is minimal evidence that the laws carried a long-term effect. When dissecting the legal jargon of the time, it is important to note that the terms "idiot" and "distracted persons" were not recognized as

168. *Id.* at 28.

169. *Id.* at 28–33 (highlighting the social movement and attitudes of the public towards those with mental illness at the end of the eighteenth century and beginning of nineteenth century); DEUTSCH, *supra* note 160, at 69–71 (discussing various trusts and policies to open hospitals specifically for the mentally ill in the late 1700s).

170. DAIN, *supra* note 160, at 29.

171. *E.g.*, ANDREW SCULL, SOCIAL ORDER/MENTAL DISORDER: ANGLO-AMERICAN PSYCHIATRY IN HISTORICAL PERSPECTIVE 52 (2019) ("There [was] the movement away from a view of madness as 'the total suspension of every rational faculty[.]' . . . There [was], instead, a new emphasis on the susceptibility of the insane to many of the same emotions and inducements as the rest of us; an insistence that 'madmen are not . . . absolutely deprived of their reason.'"); THOMAS ARNOLD, OBSERVATIONS ON THE NATURE, KINDS, CAUSES, AND PREVENTION OF INSANITY, LUNACY, OR MADNESS, at iii (1782) (expressing hope that his research leads to more effective cures for mental illness); HENRY MACKENZIE, THE MAN OF FEELING 53 (1791) ("It is true, answered Harley, the passions of men are temporary madnesses; and sometimes very fatal in their effects."); WILLIAM PARGETER, OBSERVATIONS ON MANIACAL DISORDERS 49 (1792) (emphasis original) ("The chief reliance in the cure of insanity must be rather on *management* than medicine."); ANDREW HARPER, A TREATISE ON THE REAL CAUSE AND CURE OF INSANITY; IN WHICH THE NATURE AND DISTINCTIONS OF THIS DISEASE ARE FULLY EXPLAINED, AND THE TREATMENT ESTABLISHED ON NEW PRINCIPLES 60 (1789) ("I am very positive that Insanity may be cured with great certainty and expedition . . . ."); THOMAS BAKEWELL, A LETTER ADDRESSED TO THE CHAIRMAN OF THE SELECT COMMITTEE OF THE HOUSE OF COMMONS APPOINTED TO ENQUIRE INTO THE STATE OF MAD-HOUSES 7–8 (1815) (recognizing studies on recovery for the mentally ill).

being synonymous. "Idiocy" was viewed as a permanent disability, whereas a "distracted person" was something different.[172] This is exampled by early Massachusetts law, which recognized that if put on trial "Idiots [and] Distracted persons . . . [would] have such allowances and dispensations in any cause whether [c]riminal[] or other as religion and reason require."[173] Although this early Massachusetts law provides some evidence that there were dispensations in the law for both "idiots" and "distracted persons," it also demonstrates that "idiots" and "distracted persons" were distinguishable categories. The distinction was the ability of "distracted persons" or "lunatics" to recover.[174] What the forefathers classified as an "idiot" is most synonymous with what present society would consider someone born with a developmental disability, whereas "distracted person," "lunatic," "insane," and "mad" were the colonial verbiage used to describe someone with a mental illness.[175]

There is much stronger evidence that early American and English law recognized a restoration of rights when one overcame their mental illness. For example, a review of seventeenth-century English law reveals that because a "distracted [m]an may recover his [m]emory that he hath lost," the King would not have the same interest in his property as with an "idiot['s]."[176] Rather, the "[r]esidue [of the property would] be kept for [distracted individuals'] use, and delivered unto them, when they

172. Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 YALE L.J. 2746, 2771 (2015) (alteration in original) (citing Rex v. Arnold [1724] 16 St. Tr. 695 (Eng.)) ("And it is observed they admit he was a lunatic and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may . . . ."); *see also* ARNOLD, *supra* note 171, at 323 (recognizing that those that did not recover became "idiots").

173. MASSACHUSETTS BODY OF LIBERTIES para. 52 (1641). Further, early American law recognizing a dispensation from the regular procedures and rules actually seemed to be a dispensation often in favor of the mentally ill to treat them more favorably, not to limit their rights. *See* Wickham, *supra* note 156, at 105–09 (documenting dispensations in favor of the mentally ill through protection of property and exoneration in criminal cases). This statement was made in the context of trial proceedings and was likely limited to what could be viewed as a modern plea of insanity.

174. Clemente, *supra* note 172, at 2771–72 (citing Rex v. Arnold [1724] 16 St. Tr. 695 (Eng.)) ("A man that is an idiot, that is born so, never recovers, but a lunatic may . . . .").

175. *Id.* at 2775–80.

176. JOHN BRYDALL, *NON COMPOS MENTIS*: OR, THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATICK PERSONS, INQUISITED, AND EXPLAINED, FOR COMMON BENEFIT 53–54 (1635).

[came] to be of right [m]ind . . . ."[177] This principle of property right restoration for those proving they no longer had a mental illness was then carried over into American law.[178] For example, the "Act for Supporting Idiots and Lunatics, and Preserving Their Estates" was seen in New Jersey in 1794.[179] The language used there was nearly identical to the English law stating the "chancellor . . . shall have the care, and provide for the safe keeping of all lunatics, and of their lands and tenements, goods and chattels . . . [and] shall be restored to such lunatic, *if he or she comes to his or her right mind* . . . ."[180] Similar statutory language was seen elsewhere throughout the colonies.[181]

In short, there is substantial evidence that the late 1700s and early 1800s were a revolutionary time period for the treatment of people with mental illness. Treatment drastically changed and became much more rooted in medicine than spiritual ritual.[182] As an important final note, the focus here is not necessarily on the humanity of treatment and attitudes towards the individuals but on whether they could recover from their ailment. Even some who treated the "insane" with the most barbaric practices rooted in spirituality seemed to sometimes hold the belief that there was the possibility one could be restored to the right mind, even if small.

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177. *Id.*

178. JAMES E. MORAN, MADNESS ON TRIAL: A TRANSATLANTIC HISTORY OF ENGLISH CIVIL LAW AND LUNACY 151–52 (2019) (providing an example with a New Jersey citizen named John L.).

179. An Act for Supporting Idiots and Lunatics, and Preserving Their Estates, ch. CCCCXCI, 1794 N.J. Laws 931.

180. *Id.* § 2 (emphasis added).

181. *E.g.*, An Act to Vest in the Court of Chancery the Care of Idiots and Lunatics, ch.III.c, § 4, 1793 Del. Laws. 1056 ("And in case of the recovery or death of such idiot or lunatic, his or her Trustee shall deliver . . . to him or her . . . all his or her lands, tenements, and hereditaments, goods, chattels, and other personal estate . . . ."); An Act Reducing into One, the Several Acts Making Provision for the Restraint, Support and Maintenance of Idiots and Lunatics, and the Preservation and Management of Their Estates, ch. 55, § 17, 1792 Va. Acts 165 ("The lands, tenements and chattels, of all idiots and lunatics . . . shall be kept for their use, to be delivered unto them when they come to right mind . . . .").

182. *See supra* notes 158–61 and accompanying text.

ii. The Rushes and the Babcocks: Providing Insight into Prominent Figure Opinion

Outside of the medical and lay opinions towards those with mental illness, it is important to know how the Founding Fathers and prominent figures of the time may have felt about mental illness, as this was the class that debated and enshrined the Bill of Rights. An interesting case that provides insight into this comes from the "Father of Psychiatry"[183] and a signer of the Declaration of Independence himself: Benjamin Rush. One of the most prominent medical doctors of the time, Rush dedicated a large portion of his practice to those with mental illness.[184] He believed that mental illness was caused by issues in the circulatory system and was a strong proponent of the belief that mental illness could be cured.[185]

Rush also had a personal involvement with depression and suicide through his eldest son John.[186] John was known to have sporadic tendencies but ended up serving in the Navy and was stationed in New Orleans.[187] In 1807, it was reported that he was challenged to a duel by a fellow officer and close friend, wherein John ended up killing the man, leading to a deep depression and suicide attempt.[188] John was sent home to be looked after by his

183. *History of Pennsylvania Hospital*, U. PA. HOSP., https://www.uphs.upenn.edu/paharc/timeline/1751/tline7.html [https://perma.cc/V2QA-57WX] (noting that Benjamin Rush is called the father of American psychiatry).

184. Fritz Wittels, *The Contribution of Benjamin Rush to Psychiatry*, 20 BULL. HIST. MED. 157, 157 (1946).

185. BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS ON THE DISEASES OF THE MIND 24 (1789) ("I infer madness to be primarily seated in the blood-vessels, from the remedies which most speedily and certainly cure it, being exactly the same as those which cure fever or disease in the blood-vessels from other causes, and in other parts of the body.").

186. J. JEFFERSON LOONEY & RUTH L. WOODWARD, PRINCETONIANS 1791–1794, at 429–39 (1991) (documenting Rush's struggle with John's depression).

187. *Id.* at 436.

188. *Id.*; *Letter from Benjamin Rush to Thomas Jefferson*, NAT'L ARCHIVES (Jan. 2, 1811), https://founders.archives.gov/documents/Jefferson/03-03-02-0203 [https://perma.cc/75D7-KNGH] ("My eldest son was brought home to me from new Orleans in a state of melancholy derangement induced by killing a brother naval Officer who was at the same time his most intimate friend, in a duel.").

family.[189] There is a record from Benjamin that John had recovered by mid-1809 and began serving in the Navy again,[190] but no naval records reflect his service.[191] Sometime after, John slipped into depression again and was admitted to a Pennsylvania hospital where he remained until his natural death.[192]

Although John's story did not end in recovery, it was something Benjamin Rush conversed with his fellow Founding Fathers about. Upon hearing of John's commitment, Thomas Jefferson wrote to the elder Rush, saying,

> I have myself known so many cases of recovery from confirmed insanity, as to reckon it ever among the recoverable diseases. One of these was that of a near relation and namesake of mine, who after many years of madness of the first degree, became entirely sane, & amused himself to a good old age in keeping school; was an excellent teacher, & much valued citizen.[193]

In sending his condolences after hearing of John Rush's commitment, John Adams told Benjamin Rush, "I still pray and will hope that [John] will be recovered and restored . . . ." Perhaps these messages were simple condolences wished upon Rush and his family. However, whatever weight this evidence is given, it certainly weighs in favor of an assertion that at least some of the Founding Fathers believed a cure for mental illness was possible.

Additionally, Colonel Henry Babcock provides another case of a prominent figure being deemed mentally ill. Son of Revolutionary War General and Rhode Island Supreme Court Justice Joshua Babcock,[194] Henry was named a captain at eighteen

189. *Letter from Benjamin Rush to John Adams*, NAT'L ARCHIVES (July 26, 1809), https://founders.archives.gov/documents/Adams/99-02-02-5399 [https://perma.cc/J9KB-RGCA].

190. *Letter from Benjamin Rush to John Adams*, NAT'L ARCHIVES (Aug. 14, 1809), https://founders.archives.gov/documents/Adams/99-02-02-5414 [https://perma.cc/R9MX-9DUF].

191. LOONEY & WOODWARD, *supra* note 186, at 437.

192. *Id.*

193. *Letter from Thomas Jefferson to Benjamin Rush*, NAT'L ARCHIVES (Jan. 16, 1811), https://founders.archives.gov/documents/Jefferson/03-03-02-0231 [https://perma.cc/5PYZ-Z2V2]. It should also be noted that Jefferson used the term "much valued citizen" here. This ability for someone with mental illness to become a "much valued citizen" seems to directly refute the "peaceable citizen" standard asserted by the government through the Pennsylvania Source often used. *See supra* note 136 and accompanying text.

194. STEPHEN BABCOCK, BABCOCK GENEALOGY 64 (1903).

years of age and rose quickly through the military ranks.[195] In 1776 he was charged with commanding a brigade of 750 men in Rhode Island.[196] Although Babcock certainly had the respect of some of his peers,[197] it was clear that he caused issues leading to the Rhode Island legislature sanctioning his actions not long after this assignment.[198] By April of 1776, Babcock was imprisoned by his own men,[199] and in May he was dismissed from his duty by the legislature after finding he was suffering a fit of insanity.[200] Unfortunately, little is recorded about Babcock's life between his relief in 1776 and death in 1800. However, it is known that he went on to serve in the Connecticut legislature.[201] Contrast what Babcock's story provides with what John Rush's does. The fact that Rush died while still ill does not indicate if the people of the time would have ever found him cured in practice. That is, perhaps the kind words of the elder Rush's friends were simply that. Babcock's story shows that those determined to be mentally ill in 1776 had the ability to recover at least to a point of being trusted in a position of representation.[202] Again, Bab-

195. 1754–1755 R.I. Acts & Resolves 85 (indicating Babcock's promotion to captain); 1758–1759 R.I. Acts & Resolves 12 (showing Babcock reached the rank of colonel roughly three years after his promotion to captain).

196. 1775–1776 R.I. Acts & Resolves 250–54.

197. *Letter from Major General Israel Putnam to George Washington*, NAT'L ARCHIVES (Dec. 1, 1775), https://founders.archives.gov/documents/Washington/03-02-02-0423 [https://perma.cc/U2DW-6KZW] (recommending Washington promote Babcock to the rank of brigadier general).

198. 1775–1776 R.I. Acts & Resolves 342–43; *see also* Letter from Governor Nicholas Cooke to Colonel William Richmond (Mar. 30, 1776), *in* 1 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 313 (George H. Haynes, John H. Edmonds, Julius H. Tuttle & Clarence S. Brigham eds., 1926) (indicating that within the month, Babcock was still causing issues and ignoring his sanctions).

199. Letter from Colonel William Richmond to Admiral Esek Hopkins (Apr. 21, 1776), *in* 5 AMERICAN ARCHIVES, FOURTH SERIES: CONTAINING A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA, FROM THE KING'S MESSAGE TO PARLIAMENT, OF MARCH 7, 1774, TO THE DECLARATION OF INDEPENDENCE BY THE UNITED STATES 1005 (Peter Force ed., 1844).

200. 1776–1777 R.I. Acts & Resolves 44; *Letter from Governor Nicholas Cooke to George Washington*, NAT'L ARCHIVES (Apr. 23, 1776), https://founders.archives.gov/documents/Washington/03-04-02-0094 [https://perma.cc/M267-E486].

201. CHARLES J. HOADLY, THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 168–69 (1922).

202. *But see* BABCOCK, *supra* note 194, at 65 ("[H]e had a severe fit of sickness which so affected his mind that he never entirely recovered.").

cock's story alone is by no means dispositive in a post-*Bruen* Second Amendment analysis. But whatever weight this evidence is given, it seems to point to § 922(g)(4) being unconstitutional.

In sum, the colonial age saw a shift towards seeing mental illness as something that could be overcome. Further, there is evidence that once it was overcome, certain legal rights would be restored to the individual. Evidence that a long-standing prohibition on the right to bear arms was recognized in 1791 simply is not there. All evidence of the analyzed time period points to a conclusion that—even if those with a mental illness were banned from owning a firearm at the time they were battling their mental illness—they would be able to regain their rights by proving they were mentally sound again.

B. AN EQUAL PROTECTION ARGUMENT IS LIKELY TO FAIL

As stated, it is possible that a court could still find § 922(g)(4) constitutional post-*Bruen* as the Third Circuit likely would have.[203] Therefore, analyzing alternative arguments § 922(g)(4) complainants could make is important. The current statutory scheme creates an interesting predicament not seen in many areas of law. As pointed out in the Introduction,[204] § 40915 allows states to set up compliant adjudicatory schemes to review the cases of those prohibited from firearm ownership under § 922(g)(4).[205] The § 40195 standard requires an authorized court to find that the plaintiff "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[206] If an authorized court finds the petitioner meets this standard, it can restore their rights.[207] However, as demonstrated through the cases of

203. It has already been asserted by a district court that § 922(g)(4) will likely stand post-*Bruen* in light of Justice Kavanaugh's concurrence reiterating the presumptively lawful categories of *Heller*. Clifton v. U.S. Dep't of Just., No. 21-cv-00089, 2022 WL 2791355, at *9 (E.D. Cal. July 14, 2022). But that court did not offer an official opinion on the matter. *Id.* ("That is not a question that this court must answer today."). Although it respects that Judge Drozd did not perform a full analysis, this Note readily disagrees with the opinion's simple dismissal of the question with seemingly no issue. *Id.*

204. *See supra* notes 9–10 and accompanying text.

205. 34 U.S.C. § 40915.

206. 34 U.S.C. § 40915(a)(2).

207. *Id.*

Tyler, *Beers*, and *Mai*[208]—not all states have set up compliant programs.[209] This means that if Clifford Tyler, Bradley Beers, or Duy Mai had lived in a neighboring state, they would have the potential to regain their firearm rights.[210] Facially, this appears to cut directly against the premise of equal protection under the law.[211] However, it is unlikely that an equal protection claim would be successful due to the plaintiffs' inability to identify a similarly situated party that the named defendant treated differently and because the result of a federal court upholding an equal protection claim against § 40915 would likely cut against Supreme Court precedent.[212]

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208. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 683 (6th Cir. 2016) ("The government represented in its supplemental brief that thirty-one states have created qualifying relief programs. Tyler's home state of Michigan is not one of them."); Beers v. Att'y Gen. U.S., 927 F.3d 150, 153 n.9 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (explaining that Beers was still prohibited from owning a firearm because Pennsylvania's relief program did not comply with federal requirements); Mai v. United States, 952 F.3d 1106, 1112 (9th Cir. 2020) (concluding that Washington's relief program was invalid because it did not comply with federal law).

209. *See List of Approved States*, *supra* note 10.

210. For example, Clifford Tyler lived in Michigan. *Tyler*, 837 F.3d at 683. But, had he lived in Wisconsin or Indiana, which have approved schemes, he would have had route for remedy. *See* IND. CODE § 33-23-15 (2023); WIS. STAT. §§ 51.20, 51.45, 54.10, 55.12 (2022).

211. *Equal Protection*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The 14th Amendment guarantee that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances."). Although the Fifth Amendment lacks an Equal Protection Clause, the Supreme Court has stated that the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause are not mutually exclusive. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). This has come to be known as "reverse incorporation." Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 503 n.431 (2010).

212. Tyler, Beers, and Mai attempted to bring due process and equal protection claims, but they were shut down at the district court level. Tyler v. Holder, No. 12-CV-523, 2013 U.S. Dist. LEXIS 11511, at *19–20 (W.D. Mich. Jan. 29, 2013) (citing Albright v. Oliver, 510 U.S. 266, 273 (1994)) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that [sic] Amendment, not the more generalized notion of "substantive due process," must be the guide for

1. An Analogous Scheme Found in Immigrant Benefits and Why an Equal Protection Claim Has Merit but Is Likely to Fail

The current § 40915 scheme is a unique one with few parallels offered in any field of law. Although, one such parallel can be seen in cases involving benefits offered to immigrants through the state and federal governments. Like § 40915, immigration cases present examples of the federal government creating systems that allow for the unequal treatment of people from state to state.[213] However, because the plaintiffs in those cases

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analyzing these claims.'" (citations omitted)); Mai v. United States, No. C17-0561, 2018 U.S. Dist. LEXIS 21020, at *18 (W.D. Wash. Feb. 8, 2018) (same); *see also* Beers v. Lynch, No. 16-cv-6440, 2017 U.S. Dist. LEXIS 166492, at *13 (E.D. Pa. Sept. 5, 2017) (dismissing the Due Process claims on the grounds that, because Beers failed to allege a Second Amendment violation, it need not address the Due Process issue). However, it is important to note a key difference about the arguments that they attempted to make, and the argument being made here. The three plaintiffs attempted to show the district courts that their rights were violated *at the time of their commitment* to the mental institution. The argument being analyzed in this section is one that contemplates a *post-commitment* violation to the right of equal protection. The distinction here is important. The argument the plaintiffs made was that the courts treated them differently when adjudicating them as mental defectives. This Note analyzes the argument that the plaintiffs have been treated differently when attempting to restore their gun rights. No circuit court has specifically addressed this question, though the Ninth Circuit alluded to the possibility of the violation. Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020) ("Notably, though, Plaintiff does not seek the application of the substantive standards defined in 34 U.S.C. § 40915. He has never asserted, for example, an equal-protection claim that, because persons in thirty other states benefit from programs applying § 40915's substantive standards, he too is entitled to relief or to an opportunity to meet those standards. Nor has he advanced, on appeal, an argument that due process demands the same results."). At the district court level there has also been limited analysis. In a 2021 case, the Northern District of California noted that the plaintiff raised an equal protection argument, but declined to address it, instead choosing to decide the case on different grounds. Stokes v. U.S. Dep't of Just., 551 F. Supp. 3d 993, 999 (N.D. Cal. 2021) (refusing to analyze the constitutional equal protection question as the court found Stokes had never been "committed" by the meaning of the term under § 922(g)(4)). In *Jefferies v. Sessions*, the Eastern District of Pennsylvania rejected the plaintiff's equal protection argument but still offered a limited analysis. 278 F. Supp. 3d 831, 846–47 (E.D. Pa. 2017).

213. The general fact pattern goes as follows: the federal government offered a benefit that included distribution to non-citizen immigrants and the state governments acted as the distributor (often those receiving the benefits were unaware they were coming from the federal government). *E.g.*, Pimentel v. Dreyfus, 670 F.3d 1096, 1098–99 (9th Cir. 2012) (providing the example of the Supplemental Nutrition Assistance Program); Pham v. Starkowski, 16 A.3d 635, 640–41 (Conn. 2011) (providing an example of various medical benefits); Bruns v.

failed to "point[] to similarly situated individuals who [were] treated differently by the State[,]" there was no discrimination and "there can be no equal protection violation without discrimination[.]"[214] Further, the courts noted that a claim against the federal government would also likely fail.[215] The conclusions of these courts can be extrapolated to § 922(g)(4) cases to reject potential equal protection claims against § 922(g)(4).

An equal protection argument can be broken into three steps. First, the plaintiff must identify a similarly situated party that the defending entity has allegedly treated differently.[216] At this step, a § 922(g)(4) plaintiff will have to claim unequal treatment in comparison to the average American or unequal treatment in comparison to those also in the § 922(g)(4) class. A claim under the former argument would be an attack on § 922(g)(4) itself rather than the remedial regime of § 40915. Thus, pursuing that avenue would likely fail under *Albright v. Oliver*, which held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process [or equal protection,'] must be the guide for analyzing [the] claims."[217] Attempting to

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Mayhew, 750 F.3d 61, 63 (1st Cir. 2014) (offering an example pertaining to Medicaid); Korab v. McManaman, 805 F. Supp. 2d 1027, 1030 (D. Haw. 2011) (another example on Medicaid); *see also Pimentel*, 670 F.3d at 1106 ("We conclude that the district court, in assessing the likelihood of success and ruling in Pimentel's favor, abused its discretion by finding that the termination of FAP resulted in an equal protection or due process violation."). The federal government then cut program eligibility for non-citizens under the Welfare Reform Act (PRWORA). *Pimentel,* 670 F.3d at 1099–100. The state decided to continue providing the full benefits using its own funding and acting as both the provider and distributor, exhibiting no change in the process to the recipient. *E.g.*, *id.* at 1101. Eventually, due to budgetary restrictions, the state could no longer provide this service and stopped giving benefits to non-citizens. *E.g.*, *id.* at 1103 ("DSHS headquarters notified its regional administrators that FAP was being eliminated as a result of budget reductions."). However, the state continued to distribute the benefits provided by the federal government to full citizens as PRWORA allowed. *E.g.*, *id.* A non-citizen then sued for a breach of equal protection. *E.g.*, *id.* at 1106.

214. *Pimentel,* 670 F.3d at 1106.

215. *Id.* at 1106 n.10 (citing Mathews v. Diaz, 426 U.S. 67, 96 (1976)).

216. *Id.* (citing Aleman v. Glickman, 317 F.3d 1191, 1195 (9th Cir. 2000)) ("To state an equal protection claim of any stripe, whatever the level of scrutiny it invites, a plaintiff must show that the defendant treated the plaintiff differently from similarly situated individuals.").

217. 510 U.S. 266, 273 (1994); *see also supra* note 212 and accompanying text.

claim unequal treatment in comparison to the average American would likely lead a court right back to a Second Amendment analysis.

However, consider a plaintiff in a § 922(g)(4) case that decided to pursue the latter option and claim unequal treatment within the category of those involuntarily committed. If that plaintiff chose to sue a state entity (as was done in *Tyler*)[218] it would be impossible for them to identify another § 922(g)(4) individual in similar standing that the state had treated differently.[219] By the nature of the § 40915 regime, no involuntarily committed citizen of a non-compliant state has a chance to restore their rights, and therefore the state has not discriminated against any of *its* citizens. The discrimination that can be alleged here is across state lines. Thus, to make an equal protection argument the claim must be against a federal entity through the Fifth Amendment.[220]

Second, once the plaintiff has identified a party, they must show that there was actual discrimination on the part of the defending entity.[221] In the immigrant benefit cases, the fact that the Supreme Court has said that Congress can discriminate against non-citizens (to some extent) was dispositive of any claim

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218. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 681 (6th Cir. 2016) (suing the local sheriff's department).

219. The parties in the immigrant benefits cases were unable to show anyone the *state* had treated differently. *Pimentel*, 670 F.3d at 1096 (suing Susan Dreyfus, Washington Secretary of Social and Health Services); Pham v. Starkowski, 16 A.3d 635, 635 (Conn. 2011) (suing Michael Starkowski, Connecticut Commissioner of Social Services); Bruns v. Mayhew, 750 F.3d 61, 61 (1st Cir. 2014) (suing Mary Mayhew, Commissioner of the Maine Department of Public Health); Korab v. McManaman, 805 F. Supp. 2d 1027, 1027 (D. Haw. 2011) (suing Patricia McManaman, Director of Hawaii Department of Human Services); Khrapunskiy v. Doar, 909 N.E.2d 70, 70 (N.Y. 2009) (suing Robert Doar, Commissioner of the New York State Office of Temporary and Disability Assistance). The courts fully rejected this argument, reasoning that the federal program was exactly that, even if the state was the one helping to administer the benefits. *Pimentel*, 670 F.3d at 1107 (stating that a comparison of FAP to SNAp was faulty because there were two separate programs, one administered by the state and another administered by the federal government).

220. See *supra* note 211 and accompanying text for a note on how the Equal Protection Clause of the Fourteenth Amendment has been said to extend to the federal government through the Fifth Amendment and the process of reverse incorporation.

221. *Pimentel*, 670 F.3d at 1106.

against the federal government.[222] Because the citizen versus non-citizen differentiation is a non-issue in § 922(g)(4) cases, a claim against the federal government may go further. However, the best argument a § 922(g)(4) plaintiff could make is that the federal government has created the *possibility* of discrimination, not that the federal government has discriminated itself; after all, § 40915 allows for the potential of all states to set up compliant restoration systems. Moreover, the "mere possibility" of discrimination has been held not to satisfy an equal protection claim.[223] The § 40915 regime allows all states to create compliant adjudicatory programs. Therefore, it is difficult to argue that the federal government is the entity ultimately causing the discrimination. The federal government cannot be blamed because one sovereign state chose to comply and another did not.[224] Consequently, § 40915 creates a paradoxical standard. A *state* is causing discrimination against its citizens at the *federal* level.

The third step, should a plaintiff show discrimination, is determining what level of scrutiny to apply to the statute.[225] But, because a § 922(g)(4) plaintiff would likely fail to satisfy the first two steps under either a federal or state claim, this step would not be reached.

Only two district courts at the time of writing have directly analyzed § 922(g)(4) equal protection claims alleging discrimination within the § 922(g)(4) class;[226] both rejected it, albeit on different grounds.[227] Although this Note argues that it is unlikely

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222. Mathews v. Diaz, 426 U.S. 67, 86–87 (1976) ("Contrary to appellees' characterization, it is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.").

223. *E.g.*, Vanderhoof v. District of Columbia, 269 A.2d 112, 116 (D.C. 1970) (citing Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 84–85 (1946)).

224. There is even an incentive from the federal government to get states to comply. S. REP. NO. 110-183, at 16 (2007).

225. *See, e.g.*, *Pimentel*, 670 F.3d at 1106 ("Only once [plaintiff establishes that defendant treated them differently than similarly situated individuals] may a court proceed to inquire whether the basis of the discrimination merits strict scrutiny.").

226. Jefferies v. Sessions, 278 F. Supp. 3d 831 (E.D. Pa. 2017); Clifton v. U.S. Dep't of Just., No. 21-cv-00089, 2022 WL 2791355 (E.D. Cal. July 14, 2022).

227. In *Jefferies v. Sessions*, Steven Jefferies had an altercation with his then wife after concluding that she cheated on him. 278 F. Supp. 3d at 834. After he threatened suicide, his wife petitioned to have him involuntarily committed. *Id.* This was granted and lasted about twenty days. *Id.* Jefferies brought an

that an equal protection claim would succeed on its merits, the lack of case law indicates that this could be a weak point for § 922(g)(4) plaintiffs to attack when bringing a complaint.

2. A Court Upholding an Equal Protection Claim Would Likely Require the Commandeering of State Officials and Violate Cooperative Federalism Jurisprudence

There is an additional problem: What would the remedy look like if a plaintiff persuaded a federal court to find a violation of equal protection? A federal court could likely not force a state to comply with § 40915 without breaking the Supreme Court's cooperative federalism precedent. There have been several occasions when the federal government has attempted to commandeer state officials to act, but the Supreme Court has ruled such attempts as violations of the Tenth Amendment.[228]

In *New York v. United States*, the Supreme Court was faced with a question about how far the federal government could push to incentivize a state to implement legislation.[229] The substance of the case had to do with hazardous waste removal.[230] The federal government "incentivized" the states in several ways, including telling them that if they did not comply and implement the legislation the federal government wanted, the states would

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equal protection claim, but was denied for not establishing a similarly situated party. The district court said that Jefferies's allegations about which parties the United States treated differently was unclear, although it was also unclear how Jefferies should have done that. *Id.* at 847 ("If Mr. Jefferies is alleging he is treated differently than other individuals subject to § 922(g)(4) based on their involuntary commitment, his claim fails because he does not allege how the United States applied the ban on possessing firearms differently to him and other individuals who were involuntarily committed."). *Id.* Admittedly though, it does not appear that equal protection was a central argument for Jefferies, and the court likely did not have much to analyze. *See* Plaintiff's Steven Jefferies's Memorandum in Opposition to Federal Defendant's Motion to Dismiss, Jefferies v. Sessions, 278 F. Supp. 3d 831 (2017) (No. 17-2346) (making only Second Amendment arguments, none about equal protection). In *Clifton v. United States Department of Justice*, the court entertained a Fifth Amendment "equal protection" claim that did allege a similarly situated party. No. 21-cv-00089, 2022 WL 2791355, at *11 (E.D. Cal. July 14, 2022). However, the court found that the discrimination was between citizens of different states and thus not between any suspect or even semi-suspect class of individuals. *Id.* at *12. The court therefore applied rational basis review and found that the government's interest in handling gun violence curbed any claim the plaintiff had. *Id.*

228. U.S. CONST. amend. X.

229. New York v. United States, 505 U.S. 144, 149 (1992).

230. *Id.* at 149–50 (highlighting the radioactive waste legislation).

assume all liability for waste generated within their borders.[231] The Supreme Court found this unconstitutionally coercive and crossed the line into directing the states on how to legislate—a violation of the Tenth Amendment.[232] In *Printz v. United States*, the Brady Handgun Violence Protection Act of 1993 required that chief law enforcement officers (local officials) examine a "Brady form" before transferees could receive a handgun.[233] The Supreme Court held that this was a violation of the Tenth Amendment and that the federal government could not commandeer state officials to implement federal legislation.[234] Accordingly, if a court ruled that state legislators or courts needed to comply with § 40915, it would contradict the holdings of *New York* and *Printz*. A mandatory § 40915 would require federal compulsion of state officials in every state.

If an equal protection claim were to be granted in a § 922(g)(4) case, there are two options that a court could take to eradicate any discrimination between the states. First, a court could strike down § 40915 and not allow for any remedial scheme that might potentially not be applied to all United States citizens. If a court did this, there would be no route for any § 922(g)(4) plaintiff in the country to have their rights restored, and thus there would be no discrimination. If § 922(g)(4) is still found constitutional on Second Amendment grounds post-*Bruen*, this route would not help the present plaintiffs but only hurt those living in states with compliant § 40915 programs, so there is little reason to argue for this outcome.

The second option a court could take is requiring states to provide § 40915 compliant adjudicatory schemes. This would make § 40915 mandatory, not optional. If § 40915 *had* to be applied to all states, all § 922(g)(4) plaintiffs would have a route for remedy and there would be no discrimination. To do this would be to either (1) require state legislators to create an adjudicatory scheme that is compliant (as was rejected in *New York*) or

231. *Id.* at 153–54.

232. *Id.* at 188 ("While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.").

233. Printz v. United States, 521 U.S. 898, 902–03 (1997) (highlighting the steps of how one needed to go about transferring a firearm).

234. *Id.* at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

(2) commandeer current state adjudicatory systems (such as state courts) to review § 922(g)(4) petitions in a compliant way without direction from the state legislators (as was rejected in *Printz*). Either way, it appears impossible for a federal court to make an equal protection ruling that would be productive for complainants while abiding by Supreme Court precedent.[235]

III. HOW TO CHANGE THE CURRENT SCHEME TO BETTER REFLECT MODERN INTERESTS

As noted, mental health has become a significant issue in present-day America.[236] There has recently been a campaign to normalize talking about mental health issues and treat mental illness similarly to any physical illness.[237] However, there is still a legitimate government interest in combatting the dangers of giving someone with severe mental illness a firearm.[238] Since this Note argues that § 922(g)(4) is likely unconstitutional as written post-*Bruen*, it follows that Congress should amend the statute to be constitutional and better serve the goals of keeping Americans safe while recognizing the ability of individuals to overcome their mental illness.

A. THE CURRENT SCHEME DOES NOT PROMOTE PUBLIC INTERESTS IN THE BEST WAY

The two circuit courts that upheld the constitutionality of § 922(g)(4) made a similar statement in their conclusions: "We emphatically do not subscribe to the notion that 'once mentally ill, always so.'"[239] The courts were bound by precedent and supposedly impartial interpretation when determining the constitutionality of § 922(g)(4), but § 922(g)(4) and the courts' rulings reinforce the stigma they purport to disagree with. It is

235. However, see *infra* Part III.B.2 for an argument that a mandate of § 40915 could be differentiated from *New York* and *Printz*.

236. *See supra* notes 2–3 and accompanying text.

237. *See supra* notes 2–3 and accompanying text.

238. *See supra* Part I.A.1. This Note certainly does not make the argument that there should be *no* regulation governing mental illness and firearm possession.

239. Mai v. United States, 952 F.3d 1106, 1121 (9th Cir. 2020); Beers v. Att'y Gen. U.S., 927 F.3d 150, 159 (3d Cir. 2019), *cert. granted, judgment vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) ("Nothing in our opinion should be read as perpetuating the stigma surrounding mental illness. Although Beers may now be rehabilitated, we do not consider this fact in the context of the very circumscribed, historical inquiry we must conduct at step one.").

challenging to analyze the cases of Bradley Beers and Duy Mai and not conclude that § 922(g)(4) has not added to the "once mentally ill, always so" view.[240] A belief in full recovery is not backed in law when the law does not allow a "recovered" person to enjoy the rights they had before they were deemed ill. Thus, even if § 922(g)(4) is still found constitutional, it will continue to be a disservice to society's legitimate interests. Just because something is constitutional does not mean it is right.

To best serve societal and governmental interests, the statutory scheme banning possession of firearms by those battling mental illness needs to allow for a more individualized process of restoring possession rights after it has been shown that a petitioner has overcome their mental illness. This would be a system like what was already seen when 18 U.S.C. § 925(c) was in effect and fully funded.[241] A scheme such as this would be more congruent with the idea that mental illness is like any illness from which one can recover while still upholding public safety concerns. Furthermore, such a scheme would almost certainly be found constitutional. While there is no strong evidence that an indefinite Second Amendment ban on those with mental illness was present in 1791, there is evidence that banning those presently battling mental illness was, or was at least constitutionally permissible.[242]

B. POTENTIAL SOLUTIONS THAT ALLOW RESTORATION OF SECOND AMENDMENT RIGHTS IN EVERY STATE WHILE RESPECTING PUBLIC SAFETY CONCERNS

There are several routes that Congress can take to ensure constitutionality and serve its legitimate interest of keeping the public safe while better respecting that mental illness can be overcome. These options include: (1) restoring funding to the ATF to review applications under 18 U.S.C. § 925(c); (2) attempting to mandate that states comply with § 40915; (3) detaching

240. *Mai*, 952 F.3d at 1121.

241. 18 U.S.C. § 925(c) (granting the Attorney General the power to grant relief from 18 U.S.C. § 922(g) bans).

242. Pennsylvania Source, *supra* note 135. The Third Circuit's argument that being able to "lock up lunatics" and remove their personal possessions is a compelling one; at minimum, it is reasonable to argue that someone with severe mental illness at least lost some of their rights before being deemed cured. *See supra* note 145 and accompanying text. This is also congruent with the loss of property rights experienced by the mentally ill. *See supra* notes 178–81 and accompanying text.

§ 40915 from the NICS, rewriting it to give more discretion to the reviewing state entity, and giving that power of review to the adjudicatory system that committed the petitioner to begin with; or (4) creating an adjudicatory system within the federal courts to review applications. This Note argues for the fourth option.

1. Restore Funding to the ATF to Review Applications

One simple solution to this problem is for the government to repeal its 1992 law and allow the ATF to review applications again.[243] This is not an ideal option. As noted in the Congressional reports, the review process was time-consuming and costly for an agency like the ATF.[244] The ATF should spend more time and money on investigation than on application review. Given the high number of possible petitions,[245] the ATF likely lacks the necessary personnel to review these applications effectively. The agency would likely require additional staffing and budget appropriations and the creation of a department to handle the review process; this could create complications such as the logistics of creating a department and training individuals to manage and perform the review process.[246] Additionally, there is the underlying question of whether an executive branch agency is best to act as a judicial adjudicator.

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243. Recall that by 1992, the power to review petitioner applications was given to the ATF, but that year Congress revoked any funding going towards the process. Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

244. *See* S. REP. NO. 102-353, at 20 (1992).

245. *See* Lee & Cohen, *supra* note 49 and accompanying text (noting rising rates of involuntary commitment); Lee & Cohen, *supra* note 50 and accompanying text (same).

246. *See* Bureau of Just. Stats., *Federal Law Enforcement Officers, 2016—Statistical Tables*, U.S. DEP'T OF JUST. (Oct. 2019), https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf [https://perma.cc/FX9H-N3TT] (showing that, as of 2016, there are only 2,675 full-time ATF officers while the FBI has 13,799 officers). *Compare Congressional Budget Submission: Fiscal Year 2019*, BUREAU OF ALCOHOL, TOBACCO & FIREARMS (Feb. 2018) [hereinafter *ATF Budget Submission*], https://www.atf.gov/file/147951/download [https://perma.cc/SQ89-W7HM] ("ATF's FY 2019 budget request . . . totals $1,316,678,000 for Salaries and Expenses . . . ."), *with FY 2022 Budget Request at a Glance*, FBI (2021), https://www.justice.gov/jmd/page/file/1399031/download [https://perma.cc/9QMM-7MGH] ("The FY 2022 budget request for FBI totals $10,275.8 million, which is a 2.1 percent decrease from the FY 2021 Enacted.").

2. Attempt to Mandate § 40915

Another option would be to mandate compliance with § 40915 through a legislative act. Congress could require state courts to accept petitions from § 922(g)(4) plaintiffs and that those courts hear and decide if the petitions should be granted. Although it would create an opportunity for review for all U.S. citizens and solve the problem of discrimination among the states, the mandate would likely be challenged as a violation of the Tenth Amendment, as highlighted *supra*.[247] However, if the constitutionality of a mandate were challenged, there are persuasive arguments differentiating this option from the facts of *New York* or *Printz*.

For example, in both *New York* and *Printz*, the government attempted to commandeer state officials to *limit* freedoms. In *New York*, Congress tried to force state legislators to create restrictions on waste disposal (whether right or wrong, this is a limit on the ability to dump waste freely).[248] In *Printz*, Congress attempted to force the state executive to review transfer applications before citizens could obtain a firearm (again, whether right or wrong, this is a limit on citizens' Second Amendment right).[249] In the present case, if Congress were to mandate that states review § 922(g)(4) petitions, it would be an *expansion* of rights, not a limitation. This could be considered a form of "remedial commandeering," which has some support.[250]

Commandeering is justifiable as "remedial commandeering" when it is used to enforce constitutional values, such as the substantive provisions of the Fourteenth Amendment.[251] For example, *Obergefell v. Hodges* could be interpreted as a federal order commandeering state actors to provide marriage application review for same-sex couples.[252] Courts have not scrutinized *Obergefell* for this issue, since the potential commandeering action is

247. *See supra* Part II.B.2.

248. New York v. United States, 505 U.S. 144, 149 (1992).

249. Printz v. United States, 521 U.S. 898, 902–03 (1997).

250. Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2002 (2021) ("[*R*]*emedial commandeering*: federal lawmaking that enforces the Fourteenth and Fifteenth Amendments by imposing direct obligations on state governments.").

251. *Id.* at 2003–04 (describing how the *Civil Rights Cases* provided a foundation for the proposition that Congress can do remedial commandeering).

252. Obergefell v. Hodges, 576 U.S. 644 (2015).

enforcing a constitutional right.[253] Therefore, there is some merit to an argument that mandating § 40915 among the state courts is a valid form of commandeering synonymous with what has been seen in other areas of civil rights.

3. Rewrite § 40915 and Give More Lenient Discretion to the Court that Committed the Plaintiff to a Mental Institution

Congress could rewrite § 40915 in a way that lacks the current requirements and gives complete discretion to the state courts to restore Second Amendment rights.[254] There is a logical sense that if a state court, commission, or board commits someone to a mental institution and thus takes away their right to possess a firearm, that group should be the entity that can restore those rights. Additionally, recall that setting up a compliant adjudicatory scheme under § 40915 is one of several requirements a state must perform to receive grant funding under the NICS.[255] Some states had their reasons for failing to comply with the NICS in the amendments' entirety and, although a compliant program can be set up without implementing all of the NICS requirements,[256] some state may still associate the requirements

253. Aviel, *supra* note 250, at 2038 n.183; *see, e.g.*, Miller v. Caudill 936 F.3d 442 (6th Cir. 2019) (holding that a Kentucky county clerk had to pay attorney's fees to parties that brought suit against her for not doing her constitutional duty under *Obergefell*). This has been seen in other areas of law as well. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958) (rejecting the argument that state executive officers did not need to abide by a federal court ruling after *Brown v. Board of Education*, 347 U.S. 483 (1954)).

254. 34 U.S.C. § 40915. The current scheme requires that an adjudicatory body find that: (1) the plaintiff is not likely to act in a manner that is dangerous to public safety; and (2) granting the requested relief is not contrary to public interest. *Id.*

255. S. REP. NO. 110-183 (2007).

256. For example, Colorado has a § 40915 compliant program but has never received grant funding, meaning it did not comply with other provisions. *Compare NICS Act Record Improvement Program (NARIP) Awards FY 2009–2021*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/programs/nics-improvement-amendments-act/state-profiles?tid=491&ty=tp#5is2kq [https://perma.cc/YV2U-MZFK] (showing that Colorado is not in the list of states that received funding), *with* Gold & Vanderpool, *supra* note 66, at 301 (showing that Colorado is § 40915 compliant). Colorado's standard of review comports with § 40915. *Compare* 34 U.S.C. § 40915 (allowing an individual to petition for relief from a federal firearms prohibition imposed pursuant to 18 U.S.C. § 922), *with* COLO. REV. STAT. § 13-9-124(5)(a) (2022) (same).

altogether. States may have a plethora of reasons for not implementing the NICS requirements, and keeping § 40915 attached to NICS may be acting as a deterrent for states to comply.

By detaching § 40915 from the NICS and giving legitimate, state-run, adjudicatory schemes complete discretion to restore firearm rights, states may be more likely to set up the systems on their own or use the ones they already have in place. The number of states implementing these kinds of programs may increase from the current number of thirty-three. However, there is the chance that a state will still choose not to create a compliant program; giving full discretion to the state courts is not the same as requiring them to do it. There is no evidence that this detachment of § 40915 from the NICS would dramatically increase state participation. And even if only one state chose not to comply, the issues this Note analyzes would still be real for the citizens of that state.

4. Give the Power to Review Applications to the Federal Courts

The power to restore the Second Amendment right limited under § 922(g)(4) could be removed from the states and given to the federal courts for hearing and review. As highlighted *supra*, a major issue created by requiring states to set up systems that would restore rights under federal law is the concern of cooperative federalism.[257] If § 922(g)(4) plaintiffs were allowed to petition in federal court to have their gun rights restored under federal law, there would be no concern that states would not comply and thus no federalism concern. All § 922(g)(4) plaintiffs would have the possibility of being heard and having their gun right restored, so a worry of disparate or selective application across the states would be solved. Additionally, it makes sense that because it is a federal law that removes rights under § 922(g)(4), it should be a federal adjudicatory body that returns them. This would also likely provide more uniformity in the standard of review as states vary in their attitudes toward firearm ownership.[258]

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257. *See supra* Part II.B.2.

258. *See, e.g.*, *Gun Ownership by State 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/gun-ownership-by-state [https://perma.cc/NME2-ANKD]. Of the sixteen states with over fifty percent gun ownership, fourteen voted Republican in the 2020 presidential election. *Id.*; *Presidential Results*, CNN, https://www.cnn.com/election/2020/results/

There may be an argument that the same logistical issues that might plague the ATF would also be present here.[259] However, it should be recognized that the federal court system's budget and number of employees dwarf that of the ATF.[260] So, a lack of resources will likely not be as prevalent in practice for the federal court system.

The efficiency of the process could also be greatly aided by providing requirements a petitioner must satisfy before being heard by a court.[261] This would weed out undisputedly ineligible applications by petitioners. For example, the Ninth Circuit agreed that the suicide risk factors for the involuntarily committed post-release diminished but remained higher than those never committed.[262] Thus, a post-commitment time period requirement could be necessary before a petitioner could apply. Additional requirements could include: (1) an endorsement from a certified psychiatrist;[263] (2) evidence the petitioner followed

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president [https://perma.cc/9GM6-ECAZ] (the two states that voted Democrat, Oregon and Vermont, ranked fifteen and sixteen on that list). The ten states with the lowest firearm ownership rate all voted Democrat.

259. *See supra* Part III.B.1.

260. *Compare ATF Budget Submission*, *supra* note 246 ("ATF's FY 2019 budget request . . . totals $1,316,678,000 for Salaries and Expenses . . . ."), *and Fact Sheet—Facts and Figures for Fiscal Year 2020*, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, https://www.atf.gov/about-atf/budget-performance#:~:text=In%20fiscal%20year%20(FY)%202020,budget%20was%20approximately%20%241.4%20billion [https://perma.cc/3CXJ-QAN7] (showing 5,082 full time employees for FY 2020), *with* BARRY J. MCMILLION, CONG. RSCH. SERV., IF11842, JUDICIARY BUDGET REQUEST, FY 2023 (2022) (requesting over $8.6 billion for FY 2023), *and* James C. Duff, *Annual Report 2018—Director's Message*, U.S. CTS., https://www.uscourts.gov/statistics-reports/annual-report-2018#:~:text=It%20enabled%20us%20to%20keep,made%20great%20progress%20on%20others [https://perma.cc/AL5X-7UJZ] (stating there are 30,000 employees in the federal judiciary).

261. § 922(g)(4) is likely constitutional so long as there is some form of remedial scheme offered to all Americans. However, it is asserted that the limits imposed on such remedial scheme will be given great deference by the courts. Therefore, it is likely that Congress can liberally set the limits on the procedure in the federal courts for these types of petitions.

262. Mai v. United States, 952 F.3d 1106, 1118 (9th Cir. 2020).

263. Going to see a psychiatrist about mental illness can help the patient to get better. *Psychotherapy*, MAYO CLINIC (Mar. 17, 2016), https://www.mayoclinic.org/tests-procedures/psychotherapy/about/pac-20384616 [https://perma.cc/AE8M-Z7FK]. And this condition may provide an incentive for a patient to continue treatment, which is often an issue. Lisa B. Dixon, Yael Holoshitz & Ilana Nossel, *Treatment Engagement of Individuals Experiencing*

out-patient orders post-release from involuntary commitment;[264] (3) affidavits from other members of the petitioner's community attesting to the mental health of the individual;[265] (4) no incidents involving medical professionals or law enforcement relating to the petitioner's mental health or possible drug use post-release;[266] and (5) no further use of mental health medication (or some limitation on this).[267]

Implementing these criteria could be achieved directly by rewriting 18 U.S.C. § 925(c).[268] Or § 925(c) could be rewritten to give the ATF the power to create the criteria. A form reflecting these criteria could then be created with the requirement that it be submitted to a federal court before a hearing could be considered. Appendix A is an example of the former option and Appendix B is an example of the latter.[269] Although both are valid options that would be better than the current system, this Note argues that giving the ATF the power to decide the proper pre-

Mental Illness: Review and Update, 15 WORLD PSYCHIATRY 13, 13 (2016) ("According to data from both the U.S. National Comorbidity Survey and the Epidemiologic Catchment Area survey, up to half of individuals with serious mental illness had not received mental health treatment in the prior year."). This would also give the court an informed expert opinion on the state of the petitioner.

264. This would show to the court the petitioner was truly committed to being cured.

265. Familial knowledge of the petitioner's state is clearly of importance when judging their mental fitness to own a firearm. *Why Family Support in Mental Health Recovery Is Key*, BANYAN, https://www.banyanmentalhealth.com/2019/11/12/why-family-support-in-mental-health-recovery-is-key [https://perma.cc/JG8Z-LSJ3].

266. Those suffering from a mental illness are much more likely to relapse and their potential for drug use is higher. Haiyi Xie, Gregory J. McHugo, Melinda B. Fox & Robert E. Drake, *Substance Abuse Relapse in a Ten-Year Prospective Follow-Up of Clients with Mental and Substance Use Disorders*, 56 PSYCHIATRIC SERVS. 1282, 1282 (2005). A lack of relapse clearly would indicate to the courts that a cure had been reached.

267. It has been asserted that mental illness cannot be cured by pharmacological treatment; rather that only the symptoms can be relieved by such treatment. Iliyan Ivanov & Jeffrey M. Schwartz, *Why Psychotropic Drugs Don't Cure Mental Illness—But Should They?*, 12 FRONTIERS PSYCHIATRY 1, 1 (2021). Therefore, someone still needing to take medication to overcome their symptoms may not be cured. Depending on the severity of the illness and strength of the medication, this criterion could be variable.

268. 18 U.S.C. § 925(c).

269. See Appendix A for an example of what § 925(c) would look like if criteria were directly written in. App. A. See Appendix B for an example of what § 925(c) would look like if it was written to give the ATF power to set criteria and what an ATF provided form could look like that would need to be submitted to the courts before a petitioner qualified for a hearing. App. B.

hearing criteria is best. Because mental health is of high interest to Americans, studies in the discipline will continue to evolve and better data will be collected. This data may show that specific criteria should be added or removed from the pre-hearing requirements list. It will be easier to amend the criteria through an executive act than a legislative one.

Implementing this scheme would create a system that would (1) be evenly applied across all the states; (2) combat any concern about cooperative federalism; (3) not weigh down the resources of the judiciary; (4) better match the modern understanding that people can recover from their mental illness while respecting the legitimate concerns of public safety; and (5) likely be constitutional. It is possible that a criterion could be challenged as unconstitutional. However, the point of the criteria would be to allow the petitioner to separate themselves from the people currently battling mental illness and prove that they had recovered. It is much more likely that a court would respect the criteria, especially if legislators and/or executive experts had set them.

CONCLUSION

The number of mental illness cases in America continues to rise with no signs of slowing down.[270] Although this is a significant problem with many aspects that need to be addressed, the American conversation is shifting towards acknowledging that the problems even exist.[271] There is little evidence that people with mental illness are more dangerous to the public than the average person.[272] However, there is a legitimate concern that people with mental illness are more likely to harm themselves.[273] For this reason, a statute attempting to limit the possession of firearms by the mentally ill serves the legitimate government interest of public safety. Unfortunately, the current statute that does this, § 922(g)(4), stigmatizes those with mental illness and perpetuates a belief that there is no recovery for those battling a mental disease. Further, in the wake of *Bruen* and its strong emphasis on a historical analysis, the statute is likely unconstitutional and poses the risk of being struck down.[274] This

270. *See supra* note 24 and accompanying text.
271. *See supra* note 3 and accompanying text.
272. *See supra* notes 31–35 and accompanying text.
273. *See supra* notes 36–41 and accompanying text.
274. *See supra* Part I.C.4 and Part II.A.

would remove one of the federal government's most prominent safeguards keeping firearms out of the hands of those currently battling mental illness, and could leave a potentially dangerous legislative gap in the United States Code. Therefore, to properly reflect the belief that those with a mental illness can recover while still properly respecting public safety, the federal government should rewrite § 925(c) and give the federal courts power to examine § 40915 petitions to restore Second Amendment rights taken away under § 922(g)(4). This would create an even application of the restoration program across all states, no substantial burden on the federal courts, a solution to any concerns of cooperative federalism, and it will recognize petitioners' ability to overcome mental illness in the same way they could overcome a physical illness. Additionally, proactive rewriting of the statute will avoid any risk of § 922(g)(4) being struck down, leaving legislators scrambling to put something in its place to uphold public safety.

APPENDIX A: WRITING THE CRITERIA REQUIREMENTS INTO THE STATUTE[275]

18 U.S.C. § 925

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition **under 18 U.S.C. §º922(g)(4)** may make application to ~~the Attorney General~~ **a federal court** for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and ~~the Attorney General~~ **a federal judge** may grant such relief if it is established **after hearing** to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. **Before a hearing will be granted, the petitioner must submit to the court evidence that they:**

(1) were released from involuntary commitment more than 15 years ago; and

(2) followed out-patient orders post-release; and

(3) an endorsement from a certified psychiatrist stating the petitioner is competent to handle firearms; and

(4) affidavits from at least two members of the petitioner's community attesting to the mental health of the petitioner; and

(5) have had no incidents involving medical professionals or law enforcement relating to the mental health of possible drug use of the petitioner since their release from commitment.

(6) are no longer in need of medication to combat their mental illness.

Any person whose application for relief from disabilities is denied by the ~~Attorney General~~ **district court** may ~~file a petition with the~~ **appeal to the** United States ~~district~~ **appellate** court for the district in which he resides for a ~~judicial~~ review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this

275. For both App. A and App. B, stricken language is shown with a line through it and added language is indicated using bold font.

chapter [18 USCS §§ 921 et seq.], who makes application for relief from the disabilities incurred under this chapter [18 USCS §§ 921 et seq.], shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section. ~~Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.~~

APPENDIX B: GRANTING THE ATF POWER OVER REQUIRED CRITERIA AND A POTENTIAL FORM TO BE SUBMITTED TO THE COURTS

18 U.S.C. § 925

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition **under 18 U.S.C. § 922(g)(4)** may make application to ~~the Attorney General~~ **a federal court** for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and ~~the Attorney General~~ **a federal judge** may grant such relief if it is established **after hearing** to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. **Before a hearing will be granted, the petitioner must complete and satisfy criteria set forth by the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives. The petitioner will submit a form to the court showing satisfaction of the criteria.** Any person whose application for relief from disabilities is denied by the ~~Attorney General~~ **district court** may ~~file a petition with the~~ **appeal to the** United States ~~district~~ **appellate** court for the district in which he resides for a ~~judicial~~ review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USCS §§ 921 et seq.], who makes application for relief from the disabilities incurred under this chapter [18 USCS §§ 921 et seq.], shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section. ~~Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.~~

U.S. Department of Justice

Bureau of Alcohol, Tobacco, Firearms and Explosives

Qualifications for Hearing on Relief from Disabilities

This form is to be used by a petitioner to certify to a federal court that they qualify for a hearing on relief from the firearms disabilities program that satisfies certain *minimum* criteria (identified below) under 18 U.S.C. § 925(c).

Qualifications

As the petitioner for relief, I hereby certify that I have satisfied each of the following minimum criteria to qualify for Relief From Disabilities hearing under 18 U.S.C. § 925(c):	**Check Appropriate Box**	
	Met	**Not Met**
1. **Time Period:** I was released from involuntary commitment more than 15 years prior to the filing of this petition.		
2. **Out-Patient Orders:** I have attached satisfying evidence that I followed out-patient orders from my doctor following release from my involuntary commitment. Such evidence may be, but is not limited to, an affidavit from such doctor.		
3(a). **Endorsement from Psychiatrist:** I have completed a psychiatric evaluation with a certified psychiatrist that endorses my competency to handle firearms. Evidence of such evaluation and endorsement has been attached to this form.		
3(b). **Endorsement from Members of Community:** I have included two affidavits from members of my community stating their relationship to me and attesting to my mental health.		
4. **Incidents Involving Mental Illness or Drug Use:** Since being released from my involuntary commitment I have had no incidence with law enforcement or medical professionals that related to:		
a. the well-being of my mental health.		
b. my use of drugs.		
5. **Medication Use:** I am no longer in need of medication to combat any form of mental illness.		

Petitioner's Signature	**Petitioner's Home Address**	**Date**
Petitioner's Printed Name	**Phone**	**E-mail Address**

(For Court Use Only)

The Petitioner's Relief Program Hearing Application Is:

☐ **APPROVED**

☐ **DENIED, for the reasons stated below.**

Court Clerk's Signature	**Office**	**Decision Date**
Printed Name and Title	**Phone**	**E-mail Address**

Reasons for disapproval, or additional comments:

Please Mail This Form To: **[Address of Court and Clerk's Office]**

Important Notice

Privacy Act Information: Solicitation of this information is authorized 18 U.S.C. § 925(c)

Approval Notice: Approval of this form does not mean that a petitioner has had their rights reinstated under 18 U.S.C. § 925(c). Approval of this form only means that an individual qualifies for a hearing on the matter. The federal judge must certify the petitioner after the hearing for their rights to be restored.

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine whether a petitioner has met the minimum requirements, to the satisfaction of the federal court, that they have qualified for a relief from disabilities program hearing in accordance with the requirementsof 18 U.S.C. § 925(c).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB