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United States v. White: Disarming Domestic Violence Misdemeanants Post-Heller

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I. INTRODUCTION

In June of 2008, the Supreme Court decided *District of Columbia v. Heller*.¹ In that case, the Court held that the Second Amendment “conferred an individual right to keep and bear arms” and that the District of Columbia’s wholesale ban on the possession of handguns in the home violated that right.² However, the newly proclaimed individual right was “not unlimited.”³ The Court qualified its holding by stating that “nothing in [the] opinion should be taken to cast doubt” on certain “longstanding prohibitions” on the possession of firearms by certain classes of persons, on “laws forbidding” persons from carrying firearms in certain locations, or on “laws imposing” restrictions on firearms dealers.⁴ This list of “presumptively lawful regulatory measures” was not intended to be exhaustive; it simply provided examples of gun regulations that remained valid even in light of *Heller*.⁵

Nevertheless, the *Heller* decision resulted in a deluge⁶ of challenges to firearms regulations. Earlier this year, the Eleventh Circuit had occasion to consider one such challenge. In *United States v. White*, Ludovic White, Jr., appealed his conviction for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. § 922(g)(9), the “Lautenberg Amendment.”⁷ Defendant White asserted, among other arguments, that section 922(g)(9) was unconstitutional post-*Heller*.⁸ In a brief section of the opinion, the court concluded that section 922(g)(9) was “a presump-

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1. 128 S. Ct. 2783 (2008).

2. *Id.* at 2799, 2821–22.

3. *Id.* at 2816.

4. *Id.* at 2816–17.

5. *Id.* at 2817 n.26.

6. *See, e.g.*, *United States v. Chester*, No. 09-4084, 2010 WL 675261, at *1 (4th Cir. Feb. 23, 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2010); *United States v. Pettengill*, No. CR-09-138-B-W, 2010 WL 374437 (D. Me. Feb. 1, 2010); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1233–34 (D. Utah 2009).

7. 593 F.3d 1199, 1200 (11th Cir. 2010).

8. *Id.* at 1205.

tively lawful ‘longstanding prohibition[] on the possession of firearms.’⁹ Reasoning that the Court in *Heller* had explicitly reaffirmed the constitutionality of felon-in-possession laws, and that the domestic abusers the statute targeted were more dangerous than non-violent felons, the Eleventh Circuit concluded that section 922(g)(9) must be among those presumptively lawful regulatory measures since it was designed to keep guns out of the hands of persons who are more dangerous than non-violent felons.¹⁰

Yet the quoted *Heller* dicta does not so directly address the question of section 922(g)(9)’s constitutionality as might appear from reading the *White* opinion.¹¹ This Note argues that there are two flaws with the Eleventh Circuit’s approach in *White*. First, if the Second Amendment right is a fundamental one—as appears likely from *Heller*—then a court may not “presume” the constitutionality of a statute affecting that right.¹² Second, a close analysis of *Heller*’s footnote twenty-six suggests that the list of “presumptively lawful regulatory measures” is, in fact, exhaustive as to categories of firearms regulations, but is not exhaustive as to comparable classes of firearms regulations within each category. Thus, a court faced with a constitutional challenge to an “unlisted” in-possession regulation, such as section 922(g)(9), must make two distinct determinations: (1) whether the prohibition at issue is comparable in type to *Heller*’s listed presumptively lawful measures, and (2) whether the prohibition at issue qualifies as “longstanding.”

This Note contends that, in light of the above understanding of the *Heller* language, there must be some greater exploration of the constitutionality of section 922(g)(9) than the court’s somewhat conclusory analysis in *White*. Section II introduces the statute at issue and provides background to the Lautenberg Amendment. Section III explores the two main reasons why courts must perform some greater level of analysis of the constitutionality of section 922(g)(9). Section IV surveys recent cases involving challenges to section 922(g)(9) as well as the possible methods of evaluating the constitutionality of the statute. Section V concludes.

II. THE LAUTENBERG AMENDMENT

In 1996, Congress passed the Lautenberg Amendment to the Gun

9. *Id.* at 1206.

10. *Id.* at 1205–06.

11. *In re United States*, 578 F.3d 1195 (Murphy, J., dissenting).

12. *See Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (“a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity”).

Control Act of 1968, codified at 18 U.S.C. § 922(g)(9). The amendment makes it unlawful for anyone “who has been convicted in any court of a misdemeanor crime of domestic violence” to possess a handgun that has been in interstate commerce.¹³ The Supreme Court’s holding in *United States v. Morrison*¹⁴ likely prevented Congress from legislating in the area of domestic violence without some direct connection to interstate commerce. Section 922(g)(9) contains specific language that connects the provision to interstate commerce,¹⁵ and lower courts have upheld the statute as a valid exercise of Congress’s power to regulate interstate commerce.¹⁶ Senator Frank Lautenberg attached the amendment to the Omnibus Consolidated Appropriations Act of 1997.¹⁷

The policy behind the Lautenberg Amendment was to keep guns out of the hands of individuals who pose a danger to those in their household. The legislative history of section 922(g)(9) shows that Senator Lautenberg proposed the amendment because he was concerned about the number of people who engage in serious domestic abuse, yet who were still permitted to own firearms.¹⁸ This is because many of these individuals either were not charged at all, or were only convicted of misdemeanor offenses,¹⁹ and thus existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers. The Senate also considered that sixty-five percent of domestic murders involve a gun.²⁰

III. WHERE THE LOWER COURTS HAVE GONE WRONG

Much of the controversy surrounding the Court’s decision in *Heller* stems from a mismatch between a purportedly originalist opinion and an unquestionably nonoriginalist result. More narrowly, however, this Note

13. 18 U.S.C. § 922(g)(9) (2006).

14. 529 U.S. 598 (2000).

15. 18 U.S.C. § 922(g)(9). The statute prohibits individuals convicted of domestic violence misdemeanors from possessing a firearm that is “in or affecting interstate commerce.” *Id.*

16. *See, e.g.*, Fraternal Order of Police v. United States, 172 F.3d 898, 907–08 (D.C. Cir. 1999); Nat’l. Ass’n. of Gov. Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997) *aff’d* 155 F.3d 1276 (1998). For a discussion of Congress’s power to enact the amendment under its commerce clause powers see Kerri Fredheim, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9)*, 19 PACE L. REV. 445, 482–89 (1999).

17. 142 CONG. REC. S11,872–01. *See* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 551–59 (2003) (discussing the legislative history of section 922(g)(9)); Melanie C. Schneider, *Comment: The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 515 (2008) (characterizing the amendment as an “obscure rider” attached to a “desperately-needed appropriations bill”).

18. 142 CONG. REC. S10,377 (1996) (statement of Sen. Lautenberg).

19. *Id.*

20. 142 CONG. REC. S9,628 (1996) (statement of Sen. Lautenberg).

attempts to untangle two of *Heller*'s doctrinal knots—the “fundamental” right to bear arms and the “longstanding prohibitions”²¹—as they relate to section 922(g)(9) and the *White* decision.

For our limited purposes, the phrase in *Heller* at issue is a mildly convoluted qualifier to the majority opinion. As Justice Scalia explained:

[N]othing in our opinion should be taken to cast doubt on *long-standing 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.²²

In an opinion striking down a gun control regulation and professing an individual right to bear arms under the Second Amendment,²³ such a statement seems awkwardly situated.²⁴ Nonetheless, the statement has become an oft-quoted passage²⁵ from *Heller* as a means for lower courts to dodge constitutional challenges to a wide array of gun control laws. And the Court further qualified its statement by way of an even more ambiguously drafted footnote: “We identify these *presumptively lawful* regulatory measures only as examples; our list does not purport to be exhaustive.”²⁶

These two statements, when operating in tandem, have the effect of neutralizing nearly all federal gun control laws from constitutional attack. For instance, a felon challenging a federal felon non-possession law as abridging his or her constitutional individual right to bear arms will not succeed under *Heller*. The court will merely quote *Heller*'s statement on “longstanding prohibitions,” noting that prohibitions on felons are specifically listed and then quickly determine under *Heller*'s footnote that such a law is “presumptively lawful.” Those challenging unspecified individual ownership prohibitions, such as domestic vio-

21. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008). *See also* *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1233 n. 37 (2009) (noting that “the *Heller* Court did not declare the presumption of lawfulness to be irrebuttable”).

22. *Heller*, 128 S. Ct. at 2816–17 (emphasis added).

23. *Id.* at 2821–22. *See* BRIAN DOHERTY, *GUN CONTROL ON TRIAL* xvii (2008).

24. *See* Darrel A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1291 (2009) (explaining that the Court in “*Heller* purports to adhere to the most disciplined of plan text and original public understanding methodologies. But at crucial moments, it flinches. It cannot stomach the spectacle of the judiciary enforcing a right of felons, [or] the mentally ill . . . to keep and carry arsenals of lethal weapons”); Miguel E. Larios, Note, *To Heller and Back: Why Many Second Amendment Questions Remain Unanswered After United States v. Hayes*, 56 SEP FED. LAW. 58, 59–50 (2009) (explaining that *Heller*'s list of exclusions “provided lower courts with an easy way out when they are presented with constitutional challenges to criminal convictions for the possession of a firearm by felons, the mentally ill, or spousal abusers”).

25. *See* discussion *infra* Part IV.

26. *Heller*, 128 S. Ct. at 2816 n.26 (emphasis added).

lence misdemeanants, may face a similar analysis. Such was the case in *White*: The Eleventh Circuit “explicitly [held] that § 922(g)(9) is a presumptively lawful ‘longstanding prohibition[] on the possession of firearms,’” finding nothing in *Heller* to “cast doubt” on the statute’s constitutionality.²⁷ In dismissing Defendant White’s claim, the Eleventh Circuit relied wholly on *Heller*’s “presumptively lawful” language and thus impliedly found it unnecessary to “scrutinize § 922(g)(9) apart from the language in *Heller*.”²⁸

Perhaps this approach was precisely what the Supreme Court intended. In its effort to individualize the right to bear arms under the Second Amendment, the Court essentially destabilized decades of Second Amendment jurisprudence in the lower courts. A shift from a collectivist interpretation of the Second Amendment to an individualist interpretation would not go unnoticed. With the removal of collectivist theories from the lower courts’ arsenals, the courts would need a new basis for upholding second amendment challenges to federal, as well as state, gun control regulations. “If the Court had found an individual right to keep and bear arms but had refused to carve out a list of exceptions, then federal courts today might be striking down all sorts of reasonable gun control laws.”²⁹ Indeed, some scholars assert that *Heller*’s non-exhaustive list of longstanding, presumptively lawful regulatory measures was “calculated to reduce expectations among, for example, felons convicted of possessing firearms in violation of federal law, who may have otherwise thought that *Heller* represented a ‘Get Out of Jail Free’ card”³⁰ and “prevented lower courts from throwing into disarray the gun control regimes of the fifty states and the federal government.”³¹ In finding section 922(g)(9) constitutional in light of *Heller*’s caveat, the Eleventh Circuit upheld a gun control regulation that has, surely most would agree, a profound basis in public policy.³²

27. *United States v. White*, 593 F.3d 1206 (11th Cir. 2010).

28. *United States v. Chester*, No. 09-4084, 2010 WL 675261, at *1 (4th Cir. Feb. 23, 2010).

29. Adam Winkler, *The Second Amendment Right and the Right to Bear Arms After D.C. v. Heller*, 56 UCLA L. REV. 1551, 1574 (2009).

30. Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 Nw. U. L. REV. 2035, 2039 (2008).

31. Winkler, *supra* note 29, at 1574.

32. See discussion *supra* Part II As noted, section 922(g)(9) was necessary because existing felon-in-possession laws were not keeping firearms out of the hands of many domestic abusers and “[f]irearms and domestic strife are a potentially deadly combination nationwide.” *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). In *Hayes*—a post-*Heller* decision—the Court construed section 922(g)(9) and held that a domestic relationship need not be a defining element of the predicate offense. *Id.* at 1082. The Court did not cite *Heller* and did not address explicitly the statute’s constitutionality. The Eleventh Circuit’s *White* decision did not, however, rely on *Hayes* as the basis for presuming section 922(g)(9)’s constitutionality; instead, the Eleventh Circuit cited *Hayes* for the proposition that domestic abusers are violent and dangerous. 593 F.3d

Lower courts have overwhelmingly clung—albeit in a variety of forms³³—to this *Heller* dicta as a kind of solace, a kind of protection from a perceived unraveling of their second amendment jurisprudence. Yet there is an enormous difference between upholding a regulation after analysis and simply quoting Supreme Court language and concluding it applies. The *Heller* dicta does not directly address the question of section 922(g)(9)'s constitutionality³⁴: Defendant White was not a felon; there was no suggestion that he was mentally ill; he was not in possession of the gun in a school or near a government building; nor was the sale of the firearm at issue.³⁵ Therefore, the Eleventh Circuit erred in treating the *Heller* language as a sort of talisman against a finding of unconstitutionality.

A. A Question Over the Fundamental Right to Bear Arms

For two reasons, more analysis was required to determine whether section 922(g)(9) remained constitutional in light of *Heller*. First, if the Second Amendment right is a fundamental one, then a court may not “presume” the constitutionality of a statute affecting that right.³⁶ Rather, “challenges to firearms regulations under the Second Amendment must be individually analyzed because such regulations restrict the exercise of a constitutional entitlement.”³⁷ Without applying a recognized level of scrutiny, the Eleventh Circuit perfunctorily classified section 922(g)(9) as a “presumptively lawful ‘longstanding prohibition[].’”

While the Supreme Court has yet to hold whether the Second Amendment right is a fundamental one,³⁸ there are indications that it is, beginning with the *Heller* opinion itself. “[L]anguage throughout *Heller*

at 1205. These misdemeanants are more dangerous than, for example, non-violent felons. *Id.* Because *Heller* explicitly delineated “the possession of firearms by felons” as a longstanding, presumptively lawful regulatory measure, section 922(g)(9) must be among those presumptively lawful measures since it keeps guns out of the hands of persons who are more dangerous than non-violent felons. *Id.* at 1205–06.

33. See discussion *infra* Part IV.

34. *In re United States*, 578 F.3d 1195 (Murphy, J., dissenting).

35. See generally *United States v. White*, 593 F.3d 1201–02 (11th Cir. 2010).

36. See *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (“a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity”).

37. *United States v. Chester*, No. 09-4084, 2010 WL 675261, at *1 (4th Cir. Feb. 23, 2010); see also *United States v. Skoien*, 587 F.3d 803, 808 (7th Cir. 2009) (holding that in light of *Heller*, “gun laws—other than those like the categorically invalid one in *Heller* itself—must be independently justified”).

38. However, currently before the Court is *McDonald v. City of Chicago*, presenting the question of whether the Second Amendment right to keep and bear arms is incorporated as against the States. *Nat'l Rifle Ass'n v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, *McDonald v. City of Chicago*, 130 S. Ct. 48 (2009). Since one test under modern incorporation analysis asks whether a right is “fundamental to the American scheme of justice,” *Duncan v. Louisiana*, 391

suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated.”³⁹ For example, the opinion observed that at the time of the founding, “the right to have arms had become *fundamental* for English subjects.”⁴⁰ The Court also noted that Blackstone “cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen”; indeed, having and using arms for self-preservation and defense was a “natural right.”⁴¹ Moreover, the majority classed the Second Amendment rights among other Bill of Rights amendments containing fundamental rights. The Court observed that the Second Amendment, “like the First and Fourth Amendments,” codified a right that pre-existed the Constitution.⁴² Similarly, the “Second Amendment . . . [l]ike the First, . . . surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁴³

Heller’s holding that the Second Amendment confers an individual right—akin to the rights contained in the First and Fourth Amendments—to keep and bear arms (at least for the purposes of defense of home and family) necessarily commands courts to scrutinize a statute that permanently and absolutely bars gun possession by non-felons. Indeed, in rejecting rational basis as the appropriate standard of review, the majority found it “obvious[]” that some stricter level of scrutiny was required to evaluate regulation of “a specific enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”⁴⁴ In light of *Heller*’s holding—and despite its appealing “presumptively lawful” language—it is likely that a court may not presume that section 922(g)(9) is constitutional.

B. A Question Over Longstanding Prohibitions

But the lower courts have also lost sight of another key issue—the Court’s use of the term “longstanding” as a modifier to “prohibitions” as compared with the remainder of *Heller*’s list of exclusions. *Heller*’s list of “presumptively lawful regulatory measures” includes three categories: “longstanding prohibitions” on firearm possession by certain classes of individuals, “laws forbidding” persons from carrying firearms in

U.S. 145 (1968), it is possible that in ruling on *McDonald* the Court will resolve the question of whether the Second Amendment right implicated under section 922(g)(9) is fundamental.

39. *Nordyke v. King*, 563 F.3d 439, 456–57 (9th Cir. 2009).

40. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (emphasis added).

41. *Id.* (citing 1 Blackstone 136, 139–40 (1765)).

42. *Id.* at 2797.

43. *Id.* 2821.

44. *Id.* at 2817 n.27.

certain locations, and “laws imposing” restrictions on firearms dealers.⁴⁵ Worth noting is that “longstanding” only modifies the first category of “presumptively lawful” firearms regulations. The remaining two categories are far less limited. In order for the prohibition on possession of firearms by domestic violence misdemeanants to be constitutional in light of a Second Amendment challenge, such a prohibition must be “longstanding,” whereas under *Heller*’s list, a lower court might easily uphold a *recently enacted* firearms dealer restriction.

One means of resolving this issue would be to assume that the Court’s statement that “our list does not purport to be exhaustive” denotes a further qualification, allowing for exclusion of the three listed categories and other unspecified categories of gun control regulations, such as prohibitions on individual possession of firearms, which have only recently been enacted. But such a view broadens *Heller*’s list to a point of irrelevancy. If the list is not limited to the three categories of regulations specified then what reason could lie behind the use of the term “longstanding” at all? The term becomes superfluous under this framework.

A second, and more practical, resolution of the issue assumes that *Heller*’s list of exclusions is exhaustive as to categories of excluded firearms regulations, but not exhaustive as to comparable classes of excluded firearms regulations within each category. Essentially, a court could uphold a prohibition on firearm possession by domestic violence misdemeanants as a comparable class exclusion, but only if it can first determine that such a prohibition is “longstanding.” This Note argues that within this framework, a court must make two distinct determinations: (1) whether the prohibition at issue is comparable in type to *Heller*’s specified exclusions, and (2) whether the prohibition at issue qualifies as “longstanding.” This Part addresses each determination in turn.⁴⁶

1. SECOND AMENDMENT JURISPRUDENTIAL THEORIES—EVOLUTION FROM COLLECTIVE RIGHTS TO INDIVIDUAL RIGHTS?

The Court’s decision in *Heller*, above all else, theoretically shifted Second Amendment jurisprudence away from collective rights theory and toward an individual rights theory. In effect, however, no such shift has occurred, primarily because of *Heller*’s list of exclusions.⁴⁷ A brief historical analysis of Second Amendment jurisprudence must begin with the language of the Amendment itself: “A well regulated Militia, being

45. *Id.* at 2816–17.

46. See discussion *supra* Part III.B.2–3.

47. See discussion *infra* Part IV.

necessary to the security of a free State, the *right of the people* to keep and bear Arms, shall not be infringed.”⁴⁸

Generally, two opposing views have developed from this language. The first assumes that the phrase “a well regulated Militia, being necessary” qualifies the right to bear arms as conferred on the states, rather than the people individually, thereby permitting such a right to be exercised solely by the people in collective form—collective rights theory.⁴⁹ A second view, which treats the militia language as precatory, focuses instead on the latter part of the phrase, reasoning that the government cannot infringe on persons’ rights to bear arms individually—individual rights theory.⁵⁰

Akhil Reed Amar theorizes that collective rights theory ignores the drafters’ use of the term “people” in the Second Amendment. Where the drafters conferred a right directly on the states they used the term “states” as opposed to “people.”⁵¹ Similarly, individual rights theorists have ignored the historically military connotation of the phrase “bear arms,” further ignoring earlier drafts of the Second Amendment that had

48. U.S. CONST. amend. II. (emphasis added).

49. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 265 (1886). See also John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 *BRANDEIS L.J.* 659, 677–78 (2002) (explaining that “[t]o the extent the extremely limited judicial precedent reflects any model at all, that model is what until recently seemed to be the orthodox view, that the Second Amendment only limits the federal government from regulating state militias out of existence”).

50. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 322 (2006). See also DOHERTY, *supra* note 23, at 1 (arguing that the Court’s interpretation of the Second Amendment in *Heller* “would have seemed perfectly natural to nearly any American of the founding era”); Prince, *supra* note 49, at 678 (arguing that “all that recommends the individual rights model is the reading of framers’ intent”); Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 645–47 (1989) (“it seems tendentious to reject out of hand the argument that one purpose of the Amendment was to recognize an individual’s right to engage in armed self-defense against criminal conduct”). But see David C. Williams, *Civic Republicanism and the Citizen Militia: the Terrifying Second Amendment*, 101 *YALE L.J.* 551, 554 (1991) arguing that:

the error of those who today seek to guarantee a private right to arms is that they would thereby consign the means of force to those who happen to possess firearms—a partial slice of society—rather than to the whole people assembled in militia. Even in the eighteenth century, literal universality was never more than a rhetorical aspiration or a regulative ideal, but it was nevertheless the prevailing ideal, and any departure from it meant failure. At a minimum, therefore, any modern version of this militia must be so inclusive that its composition offers some meaningful promise that it will not become the tool of a slice of society, as it could in the case of those who decide for private reasons to buy a gun or to become members of the national guard. The militia must be the people acting together, not isolated persons acting individually.

Id. A purely collective rights formulation would allow wide-ranging gun control laws, while a purely individual rights formulation would subject the least intrusive of gun control regulations to constitutional scrutiny.

51. *Id.* at 322. See U.S. CONST. amend. X.

included a conscientious objector clause.⁵² Despite the Court's contentions in *Heller*,⁵³ the framers' intent cannot readily be ascertained to interpret the Second Amendment, though some statements may enlighten.⁵⁴

During the period between the late eighteenth century and the early nineteenth century numerous states drafted their constitutions to provide for the right of individuals to bear arms "in defence of himself" or "themselves."⁵⁵ But scholars are wary of the Court's reliance on such provisions because they "postdate the ratification of the Bill of Rights," essentially they are inapposite to an originalist interpretation of the Second Amendment.⁵⁶ Such scholars further argue that despite *Heller*'s clever analytical incantations, these provisions provide no basis for an individual right to bear arms for self defense.⁵⁷

The Seventh Circuit's Judge Posner has remained critical of the Court's decision in *Heller*, rejecting any claims that the Court derived an individual right to bear arms from an originalist understanding of the Constitution, but rather commenting that *Heller* is "evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."⁵⁸

2. LONGSTANDING PROHIBITIONS—QUALIFICATION IN COMPARABLE CLASS TERMS

Heller's list excludes from constitutional challenge prohibitions on gun ownership for two specified classes of individuals—felons and the

52. AMAR, *supra* note 50, at 322.

53. See discussion *supra* Part I.B.

54. THE FEDERALIST NO. 28 (Alexander Hamilton) (writing that "[i]f the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. In a single state . . . [t]he citizens must rush tumultuously to arms, without concert, without system, without resource").

55. PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 131 (2009). See, e.g., PA. CONST. art. IX, § 21(1790) ("the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned"); VT. CONST. *Declaration of Rights*, art. XVI ("the people have a right to bear arms, for defence of themselves and the State"); KY. CONST. art. X, § 23 (1799) ("the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned"); OHIO CONST. art. VIII, § 20 (1802) ("the people have a right to bear arms for the defense of themselves and the state"); MISS. CONST. art. I, § 23 (1817) ("Every citizen has a right to bear arms, in defence of himself and the State"); CONN. CONST. art. I, § 17 (1818) ("Every citizen has a right to bear arms in defence of himself and the state"); ALA. CONST. art. I, § 23 (1819) ("Every citizen has a right to bear arms in defence of himself and the state").

56. Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1186 (2009) *But see* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 811–12 (1998).

57. Henigan, *supra* note 56, at 1186.

58. *Id.* at 1194.

mentally ill.⁵⁹ The two examples provide barely a glimpse into which other categories of prohibitions the Court intended to exclude by analogy. Federal gun control statutes have prohibited gun ownership by felons from as early as 1968. Similarly, federal law has also prohibited persons adjudicated as mentally incompetent and persons placed in mental institutions from gun ownership since 1968. However, federal law also prohibited the ownership of guns by minors and drug users and addicts as early as 1968,⁶⁰ yet the Court in *Heller* failed to include these categories of prohibitions in its list of exclusions for no apparent reason.

In one sense the Court's provision of these two examples is puzzling, perhaps denoting a kind of shorthand by the Court. Intentional ambiguity may have also been useful for the Court in this context because it allows for unlimited flexibility in interpretation. Had the Court specifically listed each of the four categories of prohibitions found in the Gun Control Act of 1968 as exclusions, lower courts would have been somewhat constrained in arguing that any prohibition outside of the these classes should be considered "presumptively lawful." By merely noting two such prohibitions, and mischaracterizing the latter prohibition,⁶¹ the Court injected a practical level of uncertainty. Lower courts may freely question from where the Court drew these excluded prohibitions.

Realistically, however, the Court's specific mention of these two classes of prohibitions provides some guidance to lower courts facing second amendment challenges to gun ownership laws. For our purposes, the first question becomes whether domestic violence misdemeanants represent a class of persons comparable to felons and the mentally ill so that the *Heller* list would classify section 922(g)(9) as a "presumptively lawful regulatory measure."

A felon is defined as "a person who commits a felony," which is a crime "punishable by death or by imprisonment for more than one year."⁶² Section 922(g)(9)'s domestic violence misdemeanants are a class of persons distinctly different from felons. By strict definition, misdemeanants are persons who have committed a crime "usually punishable by incarceration for up to one year."⁶³

However, definitions alone do not resolve the problem. One must in addition consider the policy reasoning behind the prohibition on gun ownership by felons. Arguably, these prohibitions have arisen for two

59. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

60. Gun Control Act, 18 U.S.C. § 922 (1968).

61. 18 U.S.C § 922(g)(4) (2006) (prohibiting persons "who has[ve] been adjudicated as a mental defective or who ha[ve] been committed to a mental institution" from possessing firearms).

62. WEBSTER'S LEGAL DICTIONARY 99 (2d ed. 1996).

63. *Id.* at 165.

reasons. First, policymakers have been concerned with permitting felons to own firearms because such persons may be considered “at-risk” of committing future, potentially violent crimes,⁶⁴ although even non-violent felons are precluded from gun ownership. Second, such prohibitions may be viewed as a kind of lost privilege.

Historically,⁶⁵ one can understand these purposes by turning to the Republican ideology behind the Second Amendment, which entangled the right to bear arms with the idea of the “virtuous citizen.”⁶⁶ Accordingly, lower courts have attempted to resolve the inconsistency between the originalist focus of *Heller*’s holding and the flexible nature of *Heller*’s list of exclusions by once again focusing on the framers’ intent. For instance, the court in *United States v. Li* explained that: “at the time of the framing, the most ardent supporters of a specific amendment guaranteeing an individual right to keep and bear arms recognized that convicted felons and those who engaged in violent criminal activity would not enjoy the benefit of such a right.”⁶⁷

Within this framework, domestic violence misdemeanants appear as a class of persons comparable to felons.⁶⁸ In fact, the legislative history behind the enactment section 922(g)(9) details Congress’s concern that domestic violence misdemeanants, while not felons, have exhibited violent behavior and are likely a potential danger to their families. Allowing such persons to own guns merely increases this risk. Much of the reason behind section 922(g)(9)’s enactment was the concern that states do not effectively charge domestic violence offenses as felonies, thereby allowing such “at-risk” persons to own firearms. As Senator Lautenberg expressed:

Under current Federal law, it is illegal for persons convicted of

64. See *United States v. Huddleston*, 415 U.S. 814, 825 (1974) (noting that Congress passed the Gun Control Act of 1968 to keep firearms from classes of persons it considered dangerous); *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1021–22 (E.D. Wis. 2008) (explaining that “[laws] barring felons and the mentally ill from access to weapons have historically been based on the society determination that such individuals pose a particular danger”). See also S. REP. NO. 90-1501, at 22 (1968) (describing the purpose behind the Gun Control Act of 1968 as preventative by keeping “firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency”); 114 CONG. REC. 13, 219 (1968) (Congress sought to keep firearms “out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow”).

65. See discussion *supra* Part III.B.1.

66. See *Luedtke*, 589 F. Supp. 2d at 1021–22 (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995)). See also discussion *supra* Part III.B.1.

67. No. 08-CR-212, 2008 WL 4610318, at *3 (E.D. Wis. Oct. 15, 2008).

68. See *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1233–34 (D. Utah 2009). But as the court in *Engstrum* noted, “not all domestic violence misdemeanants have shown that they cannot control themselves or are prone to fits of violent rage.” *Id.*

felonies to possess firearms, yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. . . . This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievable enough, against their own loved ones.⁶⁹

But such a broad interpretation of comparability raises concerns, especially in light of *Heller*'s focus on originalism and framers' intent. Under such reasoning, a court may uphold, with little to no scrutiny,⁷⁰ a newly created prohibition on the possession of firearms, so long as Congress's stated purpose behind the prohibition is to prevent so-called "dangerous" persons from possessing such firearms.

The reasoning is circular because essentially the courts are broadly deferring to Congress, rather than scrutinizing congressional limitations to the individual right to bear arms. Lower courts interpret *Heller* as permitting prohibitions on firearm possession by classes of persons similar to felons and the mentally ill. But in determining which classes of persons qualify, lower courts routinely take congressional statements concerning these classes of persons at face value. In light of *Heller*, lower courts should at least provide some level of scrutiny when determining the validity of such prohibitions, or actively inquire into the comparability of classes—courts should by no means avoid both these tasks.

3. LONGSTANDING PROHIBITIONS—QUALIFICATION IN TEMPORAL TERMS

In order to fully interpret *Heller*'s use of the phrase "longstanding prohibitions," one must also trace the reasoning behind state gun control legislation along with the fairly recent history of federal gun control laws. This Part argues that the prohibition on the possession of firearms by domestic violence misdemeanants under section 922(g)(9) cannot be

69. 142 CONG. REC. S10, 377-01 (1997). But Congress also noted that section 922(g)(9) would "not make life better for many women who are abused, even when guns are in the home. . . . [because] most domestic violence is not even reported"). This statement suggests that section 922(g)(9)'s prohibition on the possession of firearms by domestic violence misdemeanants is both over and underinclusive—it is overinclusive because it broadly prohibits all such misdemeanants from gun possession, failing to distinguish between levels of dangerousness or the gravity of offense, and it is underinclusive because if spouses fail to report most incidents of domestic violence, then a significant amount of domestic abusers still possess the right to possess a firearm. Such results are absurd.

70. See discussion *infra* Part IV.

considered “longstanding” under any definition of the term.⁷¹

a. State Regulation of Firearms Ownership

Debates over the regulation of firearms date back to the early decades of the nineteenth century, where Americans first developed an individualist view of the rights to bear arms. It was during this time that state legislatures first began weighing their concerns over the carrying of concealed weapons against individual rights to bear arms in self-defense.⁷² In 1813, Kentucky distinguished itself as the first state to regulate the possession of concealed weapons.⁷³ Louisiana, Indiana, and New York followed suit in the years to come, with New York’s Governor deeming the practice of carrying concealed weapons a “threat to public liberty.”⁷⁴

Much like the debate leading up to the Court’s decision in *Heller*, “[t]he enactment of these early gun control statutes prompted a backlash that produced . . . [a] systematic defense of an individual right to bear arms in self-defense.”⁷⁵ In response to such hasty enactment of arms regulations, other states amended their constitutions, broadening provisions to allow for an individual right to bear arms, albeit under limited circumstances.⁷⁶

But the individual right to bear arms, developing under state constitutional law, was merely one theory that developed during this era, another involved the idea that the individual right to bear arms was not contingent on notions of self-defense, but rather on the ability of the individuals to rise up and bear arms in revolt against their government.⁷⁷

The Reconstruction era, however, popularized a competing theory of Second Amendment jurisprudence—collective rights theory.⁷⁸ In 1911, this theory provided the most basic rationale for New York’s passage of comprehensive gun control regulation—the Sullivan law, which

71. It is worth noting that some lower courts seem to be misapplying *Heller*’s standard. Rather than requiring a prohibition to meet each prong of the *Heller* test—comparability of classes and temporal comparability—some courts have explained that a prohibition qualifies as longstanding under *Heller* by meeting either prong of the test. See *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1021 (E.D. Wis. 2008) (explaining that “the Lautenberg Amendment does not represent a longstanding prohibition,” but maintaining that “a useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition against the possession of firearms by” domestic violence misdemeanants.)

72. SAUL CORNELL, *A WELL REGULATED MILITIA*, 137–38 (2006).

73. *Id.* at 141.

74. *Id.*

75. *Id.* at 138.

76. *Id.* at 142–44.

77. *Id.* at 152–53.

78. *Id.* at 187–88.

restricted both possession of firearms in certain locations, including an individual's home, and also "instituted a license requirement for the ownership of handguns."⁷⁹

Supporters of the collective rights theory won the debate, and gun control regulations became commonplace to the point where "[i]t is estimated that there are more than 20,000 federal, state, and local gun control laws" in existence now.⁸⁰ Current state gun control laws generally include prohibitions on the possession of firearms by minors, licensing requirements, prohibitions on the purchase of certain kinds of firearms, and regulations on the carrying of concealed weapons, to name a few.⁸¹ As to restricted classes of persons, states typically prohibit felons from possessing firearms, but do not extend such prohibitions to addicts and mentally ill persons.⁸²

b. Federal Regulation of Firearms Ownership

The early decades of the twentieth century brought the federal government into the realm of gun control legislation, with passage of the National Firearms Act of 1934, which regulated the purchase of certain kinds of guns through heavy taxation on the sales of such guns.⁸³ In 1938 Congress passed the Federal Firearms Act, the first legislation of its kind seeking to "prevent the criminal class from using firearms."⁸⁴

These initial gun control statutes remained the "only federal firearms legislation" until the passage of the Gun Control Act of 1968 ("GCA").⁸⁵ Because of its focus on regulating the possession of firearms by particular classes of individuals, the GCA offers considerable insight into our analysis. A distinct purpose behind the GCA was to "keep[] firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency."⁸⁶ The GCA

79. *Id.* at 197.

80. WARREN FREEDMAN, *THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION* 73 (1989).

81. See HARRY L. WILSON, *GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS* 86 (2007).

82. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 326 (2005).

83. JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 20–21 (2002).

84. JACOBS, *supra* note 83, at 21. Congress aimed to regulate possession of firearms by specific classes of persons—"those who posed an unacceptably high risk of misusing a firearm." At the time, the act prohibited fugitives, indicted persons, and persons "*convicted of a crime of violence*" from purchasing a firearm. *Id.* at 22. (emphasis added).

85. FREEDMAN, *supra* note 80, at 74.

86. *Id.*; JACOBS, *supra* note 83, at 24; JOHN M. BRUCE & CLYDE WILCOX, *THE CHANGING POLITICS OF GUN CONTROL* 184 (1998). *But see In re United States*, 578 F.3d 1195, 1195 (10th Cir. 2009) (Murphy, J., dissenting) (stating that "it is not at all clear [that Congress's] finding regarding the dangerous of domestic violence misdemeanants is constitutionally sufficient to warrant a blanket ban on firearm possession").

expanded the FFA by prohibiting gun ownership by four classes of persons: minors, persons adjudicated mentally incompetent, felons and fugitives, and addicts and unlawful users of controlled substances.⁸⁷ Essentially the GCA “was of limited use in making firearms more difficult for ineligible classes to obtain, but . . . [in fact] made it possible to convict persons ineligible to have guns if they were later apprehended with a firearm.”⁸⁸

At the most basic level, one can assume that the GCA’s prohibitions on the possession of firearms by these classes of persons would qualify as “longstanding” for two reasons. Primarily, such prohibitions would likely be considered longstanding because of their longevity—having remained viable law for over forty years. Secondly, these prohibitions are arguably longstanding because they were the first such ownership prohibitions enacted by the federal government.

This is not to suggest that solely the GCA’s original prohibitions may qualify as longstanding under the *Heller* list. The Court in *Heller* may have intended to protect a broader class of prohibitions from constitutional challenge. Such prohibitions are found with the 1986 McClure-Volkmer amendments to the GCA, the Firearms Owners’ Protection Act (“FOPA”) and include prohibitions on the possession of firearms by felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally incompetent, illegal aliens, persons dishonorably discharged from military service, and persons who have renounced U.S. citizenship.⁸⁹ Worth noting also is the fact that the FOPA provides that “all persons barred from receiving firearms may seek relief from the disability, including felons.”⁹⁰ Domestic violence misdemeanants under section 922(g)(9) are in fact barred from such relief.⁹¹

The Court in *Heller* could have practically only meant one of two things by its use of the term “longstanding.” First, the Court, consistent with its originalist rationale, may have intended for “longstanding prohibitions” to include those prohibitions on firearm possession contemplated by the framers. Under this framework, the prohibition on the

87. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 7 JOURNAL OF LEGAL STUDIES 133, 152 (1975). See also JACOBS, *supra* note 83, at 19 (explaining that “[u]p until now, the principal federal policy is that law-abiding adults should be allowed to purchase and possess firearms, at least in their homes, but that dangerous classes of people should be denied access to guns”).

88. Zimring, *supra* note 87, at 154.

89. FREEDMAN, *supra* note 80, at 74, JACOBS, *supra* note 83, at 27. See 18 U.S.C. 922(g)(1)–(7).

90. See 18 U.S.C. § 925(c) (2006); *Lovell v. U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco, & Firearms*, 867 F. Supp. 571 (W. D. Mich. 1994); FREEDMAN, *supra* note 80, at 75.

91. See § 925(a)(1).

possession of firearms by domestic violence misdemeanants would surely fail to qualify as longstanding. But this first interpretation seems somewhat narrow and politically troubling by leaving lower courts to inquire into the framers' intent to determine the constitutionality of particular firearm possession laws. A second, and more reasonable, interpretation is that the Court intended a more commonplace definition of "longstanding"—meaning simply a prohibition that has existed for a "long duration."⁹² Once again, section 922(g)(9) should not qualify.

Assuming that a lower court determines that domestic violence misdemeanants qualify as a class of persons comparable to felons—because of their propensity for danger—a court should not automatically find that section 922(g)(9) is a longstanding prohibition, subject to little or no scrutiny, under *Heller*. The best argument for including section 922(g)(9) as a longstanding prohibition is that its time of enactment is irrelevant, but once again such an interpretation renders portions of the Court's language in *Heller* superfluous.⁹³ Although the Court failed to define "longstanding," common sense suggests that a prohibition that came into existence barely a decade ago is not longstanding when compared to prohibitions that have existed for the past seventy years. Congress did not enact section 922(g)(9) until 1996. Such recent enactment militates against a finding that section 922(g)(9) qualifies as a longstanding prohibition under *Heller*.⁹⁴

As the Supreme Court explained in *Giles v. California*:

Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime . . . abridging the constitutional rights of criminal defendants is not in the State's arsenal.⁹⁵

While Congress may in fact have valid reasons for regulating the possession of firearms by domestic violence misdemeanants, such reasoning is insufficient to protect such legislation from constitutional scrutiny. Lower courts cannot continuously turn to *Heller* as a means of avoiding or quickly dismissing a Second Amendment challenge to section

92. See Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/longstanding> (last visited May 23, 2010).

93. See discussion *supra* Part III.

94. See *In re United States*, 578 F.3d 1195, 1195 (10th Cir. 2009) (Murphy, J., dissenting) (arguing that § 922(g)(9) is "not a longstanding statute prohibiting possession of a firearm" because it was only just enacted in 1996).

95. 128 S. Ct. 2678, 2693 (2008) (this case involved Sixth Amendment concerns over constitutionality rather than Second Amendment concerns).

922(g)(9) as if *Heller* unequivocally resolved the issue—the question remains confused.

IV. LEVELS OF SCRUTINY

As discussed in Section III, it is improper for the Eleventh Circuit to presume that section 922(g)(9) is valid based on the language from *Heller*. A survey of cases demonstrates that other courts have been evaluating the constitutionality of the statute under either intermediate scrutiny or intermediate scrutiny. It is clear that *Heller* rules out rational-basis review.⁹⁶ The Court stated that rational basis could not be used to “evaluate the extent to which a legislature may regulate a specific, enumerated right” Additionally, *Heller* makes clear that the district courts should not apply Justice Breyer’s balancing test.⁹⁷ This leaves intermediate and strict scrutiny.⁹⁸

The first option *Heller* left open is intermediate scrutiny. The Seventh Circuit applied intermediate scrutiny to a section 922(g)(9) challenge in *United States v. Skoien*.⁹⁹ In that case, Skoien was convicted of a section 922(g)(9) violation after his probation officer found a hunting rifle in his truck.¹⁰⁰ The court asked whether the government could establish that the statute was “substantially related to an important gov-

96. *Heller*, 128 S. Ct. at 2818, n.27 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)); see also *United States v. Skoien*, 587 F.3d 805 (7th Cir. 2010).

97. *Heller*, 128 S. Ct. at 2821, see also *Skoien*, 587 F.3d at 805.

98. There is another method for evaluating the constitutionality of gun control laws proposed by Professor Volokh. He suggests that courts should consider four categories for justifications on restrictions of the right to bear arms. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1446 (2009). Once the court evaluates the scope, burden, danger reduction, and government as proprietor, the court can determine whether it is proper to strike down the restriction. *Id.* at 1446–47. Professor Volokh addressed how his categories would apply to restrictions on specific classes of people, including the restriction on individuals convicted of domestic violence misdemeanors. *Id.* at 1497–1516. Because any total ban is a substantial burden, courts must look to scope or danger reduction justifications to determine the constitutionality of the restriction. *Id.* at 1497. A scope justification would require that those who enacted the constitutional provision meant to exclude certain individuals from the scope of the right. *Id.* Justification based on danger to society would mean that notwithstanding the text and original meaning of the provision, certain individuals are not trustworthy enough to own guns. *Id.* One district court has followed this approach when evaluating section 922(g)(8). *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1019 (E.D. Wis. 2008). See also *United States v. Hendrix*, No. 09-cr-56-bbc, 2010 U.S. Dist. LEXIS 33756 (W.D. Wis. Apr. 6, 2010) (applying the Volokh approach to 18 U.S.C. § 922(g)(3), which prohibits individuals who are unlawful users of marijuana or crack cocaine from possessing firearms). In *Luedtke*, the defendant argued that the court must apply strict scrutiny. *Luedtke*, 589 F. Supp. 2d at 1024. The court disagreed and found that because the *Heller* Court undertook a historical analysis of similar gun control restrictions, it was appropriate to compare “the challenged regulation to those deemed permissible under the Court’s historical analysis”. *Id.* at 1024–25.

99. *Skoien*, 587 F.3d. at 812.

100. *Id.* at 805.

ernmental interest.”¹⁰¹ The court found little question about the government’s interest in protecting individuals from gun-related domestic violence, the question was whether the blanket ban provided a reasonable fit for that objective.¹⁰² The court found that the “presumptively lawful” language from *Heller* prevents the application of strict scrutiny.¹⁰³ The Seventh Circuit will review the *Skoien* decision en banc.¹⁰⁴

The district court in Maine has also applied intermediate scrutiny to section 922(g)(9).¹⁰⁵ The court considered applying the presumption of constitutionality approach but was unsure whether to apply it because such an approach cannot be used for fundamental rights.¹⁰⁶ The court noted that it was unclear whether *Heller* created a fundamental right, and applied intermediate scrutiny in an “excess of caution.”¹⁰⁷

Finally, the Eastern District of Virginia, following the unpublished *Chester* opinion, has applied intermediate scrutiny.¹⁰⁸ In *United States v. Walker*, the court first determined that the statute is analogous to the presumptively lawful restrictions listed in *Heller*, and should be upheld for that reason alone.¹⁰⁹ The court then evaluated the constitutionality of the statute based on the unpublished recommendation from the Fourth Circuit.¹¹⁰ The court found that nothing in the *Heller* opinion indicated that strict scrutiny should be used, and that because Walker claimed he kept the gun for hunting, not for self-defense, intermediate scrutiny was most appropriate.¹¹¹ The parties stipulated that preventing domestic violence was an important government interest.¹¹² The court found that the government had met its burden by showing that the law “specifically targets violent offenders, in clearly defined domestic relationships, and addresses a ‘dangerous loophole’ identified by Congress.”¹¹³ Additionally, the court noted that intermediate scrutiny permits laws that are “somewhat over-inclusive.”¹¹⁴

Intermediate scrutiny has received some criticism. Professor

101. *Id.*

102. *Id.*

103. *Id.* at 811.

104. *United States v. Skoien*, No. 08-3770, 2010 WL 1267262 at *1 (7th Cir. Feb. 22, 2010).

105. *United States v. Pettengill*, No. CR-09-138-B-W, 2010 WL 374437 (D. Me. Feb. 1, 2010).

106. *Id.* at *7, n.8 (citing *Heller v. Doe*, 509 U.S. 312, 320–21 (1993)).

107. *Id.*

108. *United States v. Walker*, No. 3:09CR358-HEH, 2010 WL 1640340 (E.D. Va. Apr. 21, 2010).

109. *Id.* at *3.

110. *Id.* at *4.

111. *Id.* at *5.

112. *Id.*

113. *Id.*

114. *Id.*

Eugene Volokh argues that intermediate scrutiny is not an appropriate standard here because, first, it is likely that every gun control law serves some legitimate interest.¹¹⁵ Second, if the reasonable relationship must be proven through social science, then it will be impossible to prove.¹¹⁶ If the relationship must be only “intuitively persuasive,” then it will always be met.¹¹⁷ Some of these concerns were illustrated in *Walker*.

The second approach, a minority approach used by one district court, is strict scrutiny.¹¹⁸ The defendant challenged the statute as applied to him because it imposed an impermissible burden on his Second Amendment right because he kept the gun solely for the purpose of home defense.¹¹⁹ The court found that in *Heller* the Court declared the right of home defense to be a fundamental right.¹²⁰ The court based this finding on the language from *Heller* that provides “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.”¹²¹ The court applied strict scrutiny for two reasons: first, the right to keep and bear arms is a fundamental right after *Heller*, and the Tenth Circuit applies strict scrutiny to fundamental rights.¹²² Second, the Supreme Court categorized Second Amendment rights with other fundamental rights, which receive strict scrutiny review.¹²³

The court found the strict scrutiny standard was met in this case, but was careful to note that it may not be met in all such cases. The court found the government did have a compelling interest in protecting others in the household by preventing those who pose a risk of violence from possessing firearms.¹²⁴ The court noted that not all individuals who may be convicted under section 922(g)(9) pose a risk of violence and that even under strict scrutiny, such individuals should not be deprived of their Second Amendment rights.¹²⁵ The court found that the statute was narrowly tailored, but this was in part because the Tenth Circuit has specifically narrowed section 922(g)(9) to require physical force to be

115. Volokh, *supra* note 98, at 1470.

116. *Id.*

117. *Id.*

118. *United States v. Engstrum*, 609 F. Supp. 2d 1277 (D. Utah 2009). *See also United States v. Bena*, No. 10-CR-07-LLR, 2010 U.S. Dist. LEXIS 33945 (N.D. Iowa Apr. 6, 2010) (declining to select a level of scrutiny, but noting that 18 U.S.C. § 922(g)(8) would survive even strict scrutiny) *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1019 (E.D. Wis. 2008) (applying the Volokh approach, but noting that 922(g)(8) would survive strict scrutiny). *But see Skoien*, 587 F.3d at 811 n.5 (expressing doubt as to whether section 922(g)(9) could survive strict scrutiny).

119. *Id.* at 1230.

120. *Id.*

121. *Id.* (quoting *Heller*, 128 S. Ct. at 2798).

122. *Id.* at 1231.

123. *Id.*

124. *Id.* at 1233.

125. *Id.* at 1234.

more than physical contact.¹²⁶ It must have “some degree of power or violence.”¹²⁷ The court rejected the defendant’s argument that there must be an exception for home defense.¹²⁸ While expressing some concern that the statute might prevent an individual who does not pose a risk of violence from owning a gun, the court stated that it could not find as a matter of law that the defendant was entitled to a constitutional exception to section 922(g)(9).¹²⁹

Examining recent decisions makes clear that the Eleventh Circuit’s presumption of the constitutionality of section 922(g)(9) was not the only option. Numerous other federal courts have subjected the statute to constitutional muster, either strict or intermediate scrutiny. Based on the reasons discussed in Section III, the Eleventh Circuit should have followed one of these approaches in *White*.

V. CONCLUSION

The Eleventh Circuit’s decision in *United States v. White*, upholding the constitutionality of section 922(g)(9) in light of a Second Amendment challenge, is flawed in two primary respects. First, the court misinterpreted *Heller*’s list of exclusions to include section 922(g)(9) as a longstanding prohibition. The court based such reasoning on limited inquiry, stressing that domestic violence misdemeanants were a class of persons comparable to felons, but failing to acknowledge the temporal element required for a prohibition to qualify as “longstanding” under *Heller*. Second, and more problematically, the court further misconstrued *Heller*’s “presumptively lawful” language. In this respect, the court failed to acknowledge that constitutional challenges based on a fundamental right—such as the right to bear arms—demand judicial scrutiny. Although the Supreme Court has yet to establish the appropriate level of scrutiny in second amendment cases and despite a lack of consensus among the circuits, the Eleventh Circuit’s quick deference to Congress in *White* has its failings. Until the Supreme Court provides further guidance in the realm of Second Amendment jurisprudence, lower courts will continue to wrestle uncomfortably with such challenges.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1235.