PRIOR INVOLUNTARY INSTITUTIONALIZATION DOES NOT JUSTIFY A LIFETIME SECOND AMENDMENT BAN: AN ORIGINALIST APPROACH TO 18 U.S.C. § 922(g)(4)

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Once mentally ill does not mean always mentally ill. This underlying premise is not only scientifically accepted,[1] but has been long recognized in the history and tradition of our common law.[2] However, rather enigmatically, two circuit courts have deviated from this long-held understanding to find that once an individual has been classified as mentally ill, that classification is permanent.[3] This flawed understanding has not only created a rupture in our Second Amendment jurisprudence, but it has also produced a significant circuit split between three circuits,[4] in which neither the conclusions nor analyses are uniform. Notwithstanding the judicial disarray, federal law historically—and currently—poorly addresses this issue as well.[5]

Federal law categorically prohibits the possession of a firearm from an individual "who has been adjudicated as a mental defective or who has been committed to a mental institution."[6] The United States deems this class of individuals worthy of a lifetime Second Amendment ban with only two avenues for relief: one that is nullified;[7] and the other that bestows broad

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[1] *See generally* Mike Slade & Eleanor Longden, *Empirical Evidence About Recovery and Mental Health*, BMC PSYCHIATRY, Nov. 2015, at 10–11, https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-015-0678-4#citeas [https://perma.cc/5DZC-VYVR].

[2] *See* ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 73 (1807) ("[a] lunatic is never to be looked upon as irrecoverable."); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *304 ("[T]he law always imagines, that [a lunatic's] accidental misfortunes may be removed.").

[3] *See* Beers v. Att'y Gen. U.S., 927 F.3d 150, 156 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020); Mai v. United States, 952 F.3d 1106, 1121 (9th Cir. 2020).

[4] *See generally* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016).

[5] *See* discussion *infra* Section II.

[6] 18 U.S.C.A. § 922(g)(4) (Westlaw through Pub. L. No. 117-102).

[7] Under 18 U.S.C. § 925(c), a person who is prohibited from possessing a firearm may petition the Attorney General for relief from such a prohibition and the Attorney General may grant such relief "if it is established to his satisfaction 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

discretionary authority upon federal judges that has resulted in non-uniform and arbitrary judicial opinions.[8] While this statute is imposing, it certainly does not lack justification. There is without a question a valid governmental interest and objective in protecting the citizens through crime reduction and suicide prevention. This objective, however, cannot be reached by categorically denying a constitutional right to a classification of individuals without due process.

This Article uses an originalist approach to demonstrate that the classification of "mentally ill" is not a permanent and static one; rather, it is fluid and subject to transformation and development. With this main premise in mind, this Article critiques the insufficient statutory response to this issue and offers an originalist judicial approach to resolving the circuit split. In the end, this Article offers a solution that safeguards the constitutional rights of an individual, ensures that due process rights are feasible, and preserves the governmental interest of reducing crime and preventing suicides.

I. ALL ROADS LEAD TO *HELLER*

A modern Second Amendment analysis must begin with the Supreme Court's decision in *District of Columbia v. Heller*.[9] In *Heller*, the Court struck down a District of Columbia statute that prohibited the possession of handguns in the home.[10] Justice Scalia, writing the majority opinion, found that the Second Amendment protects an individual right to possess a firearm.[11] He also found that right was primarily about individual self-defense in the home where the defense of self, family, and property is critical.[12] *Heller* not only had a crucial impact on public policy, but also offered a unique perspective into modern constitutional interpretation—as Professor Solum puts it, "[g]iven the sparse precedent, *Heller* offered an opportunity that is rare in contemporary constitutional jurisprudence: the Justices were asked to write on a slate that was almost clean."[13]

With this clean slate, the *Heller* Court stated that the Second Amendment protects the interests of "law-abiding, responsible citizens to use arms in

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interest." § 925(c) (Westlaw through Pub. L. No. 117-102). However, in 2008, Congress defunded this statutory procedure and, accordingly, an individual cannot utilize this process. S. REP. NO. 102-353, at 13 (1992).

[8] *See generally* 34 U.S.C.A. § 40915 (Westlaw through Pub. L. No. 117-102); McDougall v. Cnty. of Ventura, No. 20-56220, 2022 WL 176419, at *19 (Jan. 20, 2022) (VanDyke, J., concurring) (stating "our current Second Amendment framework is exceptionally malleable and essentially equates to rational basis review.").

[9] *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 924 (2009) ("Collectively, the opinions in *Heller* represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court.").

[10] District of Columbia v. Heller, 554 U.S. 570, 634–36 (2008).

[11] *Id.*

[12] *Id.* at 628.

[13] Solum, *supra* note 9, at 925.

defense of hearth and home."[14] However—and most importantly for this Article—the Court did not stop there. The Court further pronounced four possible limits to its holding:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[15]

Facially, this statement sets limitations to the general holding in *Heller*, but rather interestingly, Justice Scalia provided no authority to support this statement. This dictum is commonly referenced as the "Four *Heller* Exceptions."[16] A circulating belief is that the language was included in the opinion to secure Justice Kennedy's fifth vote.[17]

II. THE PRESUMPTIVE VALIDITY OF 18 U.S.C. § 922(G)(4)

The federal statute in question, 18 U.S.C. § 922(g)(4), prohibits individuals "who ha[ve] been adjudicated as a mental defective or who ha[ve] been committed to a mental institution" from possessing a firearm.[18] Because this is a statute that prohibits the mentally ill from possessing a firearm, it is one that—according to *Heller*—is presumptively valid. However, this statute is fundamentally unsound. The statute does not provide criteria for determining whether an individual fits within this prohibition. Thus, in practice, it categorically treats any individual who has ever been involuntarily institutionalized as permanently mentally ill.[19] As expansive as this statute appears, compelling governmental interests exist to justify such a prohibition. The two most prominent government interests are reducing crimes and preventing suicides.[20] Therefore, there is at least a prima facie case for imposing a permanent ban, however, that prima facie case quickly crumbles because of the lack of due process.

If a previously committed individual wants to purchase a firearm, that individual only has two opportunities to challenge the lifetime ban. First, they

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[14] *Heller*, 554 U.S. at 635.
[15] *Id.* at 626–27.
[16] *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).
[17] *See* Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009); Solum, *supra* note 9, at 972–73.
[18] 18 U.S.C.A. § 922(g)(4) (Westlaw through Pub. L. No. 117-102).
[19] *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688 (6th Cir. 2016).
[20] *See id.* at 684; Mai v. United States, 952 F.3d 1106, 1116 (9th Cir. 2020).

may apply to the Attorney General to seek relief.[21] The Attorney General delegated the authority to make these determinations to the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").[22] At first glance, this channel of relief appears to be an appropriate means to make such determinations—for example, it even includes the availability of judicial review in federal district court.[23] This channel is, however, nonexistent. In 1992, Congress defunded the relief-from-disabilities program, noting that the mechanism for reviewing these applications was a "very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made."[24]

The second means for relief is through a qualified relief-from-disabilities program offered by one of the qualified states. In 2008, Congress authorized federal grants to encourage states to supply current and accurate information to federal firearm databases.[25] Eligibility for the federal grant was made contingent on states creating a relief-from-disabilities program that would allow individuals burdened by § 922(g)(4) to apply to have their rights reestablished.[26] Under this program, a state could grant an individual relief if it finds that the "person's record and reputation, are such that the person 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."[27] The major issue here is nonuniformity. In 2016, only thirty-one states received federal funds for these programs.[28] Therefore, if you are an individual living in a state without a qualified relief-from-disabilities program and you are prohibited from possessing a firearm under § 922(g)(4), there are no means for relief, besides challenging the constitutionality of the statute in federal court.

The repercussions of § 922(g)(4), i.e., the categorical Second Amendment ban, combined with the total absence of satisfactory, uniform due process procedures, are difficult to ignore. Congress has failed to properly address this issue. Moreover, as discussed in Sections III and IV of this Article, the answer to this issue is not found in the courts either.

A. Statutory History of § 922(g)(4) and Firearm Prohibition

The statutory history of gun control regulation is paramount to the understanding of this issue. Firearm possession is as old as America itself, and the regulation of firearm possession is near equal in historical stature. Gun laws were not only "ubiquitous, numbering in the thousands, but also spanned every conceivable category of regulation," from gun acquisition, possession,

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[21] § 925(c) (Westlaw through Pub. L. No. 117-102).
[22] 28 C.F.R. § 0.130(a)(1) (2015), WL 28 CFR § 0.130(a)(1).
[23] § 925(c).
[24] *See Tyler*, 837 F.3d at 682 (quoting S. REP. NO. 102-353, at 13 (1992)).
[25] *Id.* at 682–83.
[26] *Id.*
[27] 34 U.S.C.A. § 40915(a)(2) (Westlaw through Pub. L. No. 117-102).
[28] *Tyler*, 837 F.3d at 683.

registration, to hunting and recreational regulations.[29] The first General Assembly of Virginia passed the country's first gun control law in 1619 when it met in Jamestown to enact legislation governing the new colony.[30] One of those legislative enactments was a gun control law, which stated,"[t]hat no man do sell or give any Indians any piece, shot, or powder, or any other arms offensive or defensive, upon pain of being held a traitor to the colony and of being hanged as soon as the fact is proved, without all redemption."[31]

While the fact that firearm regulation can be traced back to colonial times is significant, the quantity of firearm regulations during the colonial age is rather astonishing as well. For example, the colonies and states enacted over 600 laws specifically involving militia regulation.[32] During this time, the most common types of gun control laws regulated hunting, militias, gunpowder storage, and the firing of weapons.[33] Thus, it is a safe conclusion that gun possession was not only an important aspect of colonial life, but so was the regulation of those guns.

The first federal law regulating firearms dates back to just over 100 years ago when the Sixty-Sixth Congress imposed an excise tax on imported firearms and ammunition in 1919.[34] In 1934, in response to the "Tommy gun" era ushered in by notorious twentieth-century gangsters like Al Capone, the Roosevelt Administration enacted the National Firearms Act of 1934.[35] This statute, which levied a $200 tax on the manufacture or sale of machine guns or sawed-off shotguns, was the first federal statute enacted .[36] Just four years later, Congress enacted the Federal Firearms Act of 1938 which imposed a federal license requirement on gun manufacturers, importers, and those persons in the business of selling firearms.[37]

After thirty years, the Federal Firearms Act of 1938 was repealed and

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[29] Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 56 (2017).
[30] *Id.* at 57.
[31] *Id.*
[32] THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON *DISTRICT OF COLUMBIA V. HELLER* 225 (Saul Cornell & Nathan Kozuskanich eds., 2013).
[33] Mark Frassetto, Firearms and Weapons Legislation Up to the Early Twentieth Century 2 (Jan. 15, 2013) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991 [https://perma.cc/9E9P-BLYF]).
[34] *See* SARAH HERMAN PECK & MICHAEL A. FOSTER, FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS 1 (2019); *see also* 26 U.S.C.A. § 4181 (Westlaw through Pub. L. No. 117-102).
[35] *See* PECK & FOSTER, *supra* note 34, at 1–2.
[36] *See id.* at 1 (citing *History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), https://www.washingtonpost.com/national/history-of-gun-control legislation/2012/12/22/80c8d624-4ad3-11e2-9a42d1ce6d0ed278_story.html?utm_term=.e566a63e1095 [https://perma.cc/86Q7-JYSB]).
[37] *See* Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250; *see also Key Federal Regulation Acts*, GIFFORD L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/ [https://perma.cc/D3NR-N6LX].

superseded by the Gun Control Act of 1968.[38] After the assassination of Martin Luther King Jr., followed closely by the assassination of Robert F. Kennedy, societal attitudes towards gun control sprung to new heights.[39] Congress responded to this societal shift by passing the Gun Control Act of 1968, which increased the criminal penalties available for violations and established procedures for obtaining relief from firearm disabilities.[40]

The 1993 Brady Handgun Violence Prevention Act amended the Gun Control Act of 1968 by implementing a background checking system to assist states in vetting individuals for eligibility to possess a firearm.[41] The Brady Act categorized classes of individuals to whom the sale of firearms was prohibited. It included, for example, felons, individuals who were convicted of a misdemeanor crime of domestic violence, and individuals who were adjudicated as a mental defective or committed to any mental institution.[42]

The federal prohibition against the mentally ill's possession of firearms does not originate with the Brady Act, moreover, it does not share the same history as the general history of gun regulations. As UC Davis law professor Carlton Larson puts it, "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."[43] The first federal law appears to have originated with the Uniform Firearms Act of 1930, which prohibited the delivery of a pistol to any person of "unsound mind."[44]

The statutory history of firearm regulation is crucial to the understanding of this issue. Although the regulation of gun possession dates back to the colonies, the regulation of gun possession by the mentally ill is a relatively modern conception. Justice Scalia referenced the laws prohibiting felons and the mentally ill from possessing firearms as "*longstanding* prohibitions" that are presumptively valid.[45] It is an unfair practice to categorize felons and mentally ill individuals together.

The prohibition against felons possessing firearms arguably traces back to the eighteenth century. For example, in 1787, the State of New Hampshire recommended an amendment that read, "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[46] Or, at the Massachusetts Convention, Samuel Adams proposed language to limit the

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[38] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. ch. 44).

[39] Steven Rosenfeld, *The NRA Once Supported Gun Control*, SALON (Jan. 14, 2013), https://www.salon.com/2013/01/14/the_nra_once_supported_gun_control/ [https://perma.cc/K7PM-8B8F].

[40] PECK & FOSTER, *supra* note 34, at 2.

[41] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 110 Stat. 3009 (1993) (codified as amended in scattered sections of 18 U.S.C. ch.44).

[42] 18 U.S.C.A. § 922(g) (Westlaw through Pub. L. No. 117-102).

[43] Larson, *supra* note 16, at 1376.

[44] *Id.* at 1376–77.

[45] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (emphasis added).

[46] Larson, *supra* note 16, at 1375. Rebellion at the time was a felony. *Id.*

right to firearm possession to "peaceable citizens."[47] Arguably, these are originalist propositions, but one thing is likely—the prohibition against the mentally ill and the prohibition against felons simply do not share the same history.

There remain two unanswered questions. First, is there sufficient historical justification to find gun prohibitions against the mentally ill as longstanding and presumptively valid? And second, if so, do these presumptively valid prohibitions apply only to individuals who are presently mentally ill, or does it include all individuals with a record of past involuntary commitment? This Article takes the approach that, presuming there are historical justifications for the prohibitions, the prohibitions cannot constitutionally apply to individuals who are not presently mentally ill. However, this is an issue that has perplexed the courts.

III. CIRCUIT SPLIT

The Sixth, Third, and Ninth Circuits disagree on how to interpret § 922(g)(4).[48] This split is partially due to the implementation of the contemporary framework the courts have fashioned for Second Amendment challenges—which is not a sufficient framework for the classification of plaintiffs who were previously civilly committed.[49] Another reason for the circuit disagreement is that every circuit to consider a § 922(g)(4) challenge—with the exception of the Third Circuit[50]—has applied intermediate scrutiny. Through this application, the Sixth Circuit and the Ninth Circuit analyzed relatively similar facts only to reach conflicting conclusions about whether the government established a reasonable fit between the government's interest in preventing suicide and reducing crime and § 922(g)(4)'s permanent and categorical Second Amendment prohibition against those with prior involuntary commitments.[51] The particularities and facts of each case highlight the practical consequences of the circuits' disagreement.

A. Tyler v. Hillsdale County Sheriff's Department

Clifford Tyler was a seventy-four-year-old Michigan citizen.[52] In 1985, Tyler's wife of twenty-three years "ran away with another man, depleted Tyler's finances, and then served him with divorce papers."[53] Tyler was emotionally devastated from the ordeal and upon the request of his daughter, local police transported him to the sheriff's department for a psychological

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[47] *Id.* at 1374.
[48] *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016); Beers v. Att'y Gen. U.S., 927 F.3d 150, 156 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020); Mai v. United States, 952 F.3d 1106, 1121 (9th Cir. 2020).
[49] *See* discussion *infra* Section IV.
[50] *See Beers*, 927 F.3d at 158.
[51] *Tyler*, 837 F.3d at 699; *Mai*, 952 F.3d at 1121.
[52] *Tyler*, 837 F.3d at 683.
[53] *Id.*

evaluation.[54] A probate court committed Tyler to an in-patient facility, where he stayed for approximately two to four weeks.[55] After his discharge, Tyler returned home, remarried in 1999, successfully held a job for the next nineteen years, maintained a close relationship with his daughters, never reported another depressive episode, and even repaired his relationship with his ex-wife.[56]

In 2011, twenty-six years after his commitment, Tyler unsuccessfully tried to purchase a firearm after a background check indicated his previous commitment to a mental institution.[57] Because Michigan was not a state with a qualifying § 40915(a)(2) state program,[58] the only avenue of relief for Tyler was to directly challenge the constitutionality of § 922(g)(4).[59] In 2014, in a panel-decision, the Sixth Circuit determined that strict scrutiny was the appropriate standard governing § 922(g)(4) constitutionality.[60] The panel found § 922(g)(4) was unconstitutional as it applied to Tyler.[61]

Two years later, the Sixth Circuit reviewed this decision sitting en banc. The court determined intermediate scrutiny was the appropriate scrutiny to apply, but still found that § 922(g)(4) was unconstitutional as it applied to Tyler.[62] Six concurring judges agreed that the statute was unconstitutional as-applied,[63] whereas the dissenting judges believed the government met its burden under intermediate scrutiny.[64] Ultimately, after analyzing statistical links between gun violence, mental health, and institutionalization, the majority concluded that the government failed to establish a reasonable fit between reducing crimes and preventing suicide and the § 922(g)(4) Second Amendment prohibition.[65] Around the same time, the Third Circuit reached a different conclusion on this issue.

B. Beers v. Attorney General United States

When Bradley Beers returned home from college in winter 2005, he confided to his mother that he was contemplating suicide.[66] His mother, concerned for his safety, admitted him to a hospital where a Pennsylvania court

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[54] *Id.*
[55] *Id.*
[56] *Id.* at 683–84.
[57] *Id.* at 684.
[58] *See* discussion *supra* Section II.A.
[59] *Tyler*, 837 F.3d at 684.
[60] *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't., 775 F.3d 308, 328 (6th Cir. 2014), *reh'g en banc granted, vacated*, 837 F.3d 678 (6th Cir. 2016).
[61] *Id.* at 344.
[62] *Tyler*, 837 F.3d at 699 (plurality opinion).
[63] *Id.* at 699–714 (citing to the six concurring opinions).
[64] *Id.* at 720 (Moore, J., dissenting).
[65] *Id.* at 693–99.
[66] Complaint for Declaratory Judgment and Injunctive Relief at 7, Beers v. Att'y Gen. U.S., 927 F.3d 150 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020) (E.D. Pa. Dec. 15, 2016) (No. 16-6440).

would twice extend his involuntary commitment.[67] Beers last received mental health treatment in 2006, and in 2013, a physician opined that Beers was "able to safely handle firearms again without risk of harm to himself or others."[68] Sometime after his release, Beers attempted to buy a firearm, but he was denied because a background check revealed his previous involuntary commitment.[69] Beers subsequently filed a complaint in federal district court, alleging that § 922(g)(4) was unconstitutional as applied to his circumstances.[70]

The district court found that § 922(g)(4) did not impose a burden on conduct within the scope of the Second Amendment and was therefore constitutional.[71] In 2019, in a panel decision, the Third Circuit affirmed the judgment of the district court and found that § 922(g)(4) was constitutional as applied to Beers.[72] In a relatively brief analysis, the Third Circuit found that § 922(g)(4) did not burden conduct falling within the Second Amendment and that "neither passage of time nor evidence of rehabilitation" could restore his Second Amendment rights.[73]

C. Mai v. United States

In 1999, a Washington court involuntarily committed seventeen-year-old Duy Mai to a mental health institution after he threatened himself and others.[74] Mai's commitment lasted approximately nine months.[75] After his release, Mai earned a master's degree, secured gainful employment, and had two children.[76] In 2014, the King County Superior Court restored Mai's firearm rights, under Washington state law.[77] However, when Mai attempted to purchase a firearm, a federal background check indicated Mai's prior involuntary commitment, and he was denied the firearm.[78]

Mai filed a complaint in federal district court, alleging the government violated his Second Amendment right to bear arms and his Fifth Amendment right to due process by prohibiting him from possessing a firearm.[79] The district court dismissed the complaint, holding that § 922(g)(4) did not violate the Second Amendment.[80] In 2020, in a panel decision, the Ninth Circuit

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[67] Beers v. Att'y Gen. U.S., 927 F.3d 150, 152 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 153.
[71] *Id.*
[72] *Id.* at 159.
[73] *Id.* at 158–59.
[74] Mai v. United States, 952 F.3d 1106, 1110 (9th Cir. 2020).
[75] *Id.*
[76] *Id.*
[77] Appellant's Opening Brief at 8, Mai v. United States, 952 F.3d 1106 (9th Cir. 2019) (No. 18-36071).
[78] *Id.* at 9.
[79] *Mai*, 952 F.3d at 1112.
[80] *Id.*

affirmed.[81] The Ninth Circuit analyzed evidence showing statistical links between gun violence and suicide with the mentally ill and concluded that "although the evidence suggests that Plaintiff's increased risk of suicide decreases over time, nothing suggests that it ever dissipates entirely."[82] Therefore, the court found that the governmental interests of reducing crime and preventing suicides was a significant public benefit and, accordingly, a reasonable fit was established.[83] On September 10, 2020, the Ninth Circuit denied en banc review over eight dissenting judges.[84]

IV. THE CONSTITUTIONAL ANALYSIS CURRENTLY APPLIED IS FLAWED FOR THIS TYPE OF CLASSIFICATION

To resolve a Second Amendment challenge, the circuit courts implement a two-step framework.[85] First, the court asks, "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."[86] This first step is a textual and historical inquiry. If the government can establish that the challenged law regulates activity falling outside the scope of the right as historically understood, then the regulated activity is protected and not subject to Second Amendment review.[87] If the challenged regulation burdens conduct historically understood to be within the scope of the Second Amendment, then the court must determine and apply an appropriate form of means-end scrutiny.[88]

As mentioned earlier in this article, the Brady Act prohibits the possession of a firearm by other categories of individuals more than just the mentally ill, such as felons[89] or domestic violence offenders.[90] This Second Amendment framework works effectively when it is tailored around those types of categories because felons and domestic violence offenders are static and invariable classifications. A convicted felon cannot deviate from that status unless they are pardoned,[91]or receive an expungement.[92] When a felon or a domestic violence offender brings a Second Amendment challenge, there is no

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[81] *Id.* at 1121.
[82] *Id.* at 1118.
[83] *Id.* at 1121.
[84] Mai v. United States, 974 F.3d 1082, 1083 (9th Cir. 2020).
[85] *See, e.g.*, Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017); 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. Reese, 627 F.3d 792, 800 (10th Cir. 2010).
[86] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016) (quoting *Greeno*, 679 F.3d at 518).
[87] Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019).
[88] United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).
[89] 18 U.S.C.A. § 922(g)(1) (Westlaw through Pub. L. No. 117-102).
[90] § 922(g)(9).
[91] *See, e.g.*, KAN. STAT. ANN. § 22-3701 (West, Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on Mar. 10, 2022).
[92] *See, e.g.*, KAN. STAT. ANN. § 21-6614 (West, Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on Mar. 10, 2022).

question to the classification at issue because a felon cannot deviate from their felon status. The felon, in that case, would not present evidence that they are not a felon. Rather, they would present evidence that they are not a danger to themself or a risk to society to surpass constitutional scrutiny.

Mental illness is not a similar status that cannot be deviated from. If an individual suffers from mental illness once, that does not mean they are mentally ill forever. According to BioMedCentral Psychiatry, using the criterion of "permanent disability" in a mental health context is toxic and inappropriate.[93] Moreover, the United States Department of Health and Human Services asserts that people with mental health problems can get better and that many do recover completely.[94] The American Psychiatric Association ("APA") takes the position that a hospital commitment *per se* is an insufficient justification for gun disqualification.[95] This position is mainly based on evidence that shows marginal correlation between violence and mental illness.[96]

If an individual is barred by § 922(g)(4) and wants to bring a constitutional challenge, federal law treats that individual as permanently mentally ill.[97] While this logically, and scientifically is not compatible, the courts continue to follow the same two-step constitutional framework mentioned above. In making this constitutional determination, the courts weigh statistical links between mental illness, involuntary institutionalizations, and gun violence.[98] However, instead of initially determining whether the individual is in fact presently mentally ill, courts utilize a presupposed assumption of mental illness because of the statutory language that was utilized in § 922(g)(4). Therefore, it is illogical to permanently categorize individuals with a one-time involuntary commitment, and then deprive them of their rights. The logic does not follow; neither does the science.

The condition of being mentally ill is not perpetual. Individuals can recover. Congress and the courts should not treat it as a permanent condition. This is a characterization issue, not a constitutional issue. If the government is going to permanently deprive individuals of a constitutional right, those individuals should have the opportunity to present evidence that they are not presently mentally ill. Because there is not a sufficient method in place for individuals to make this showing, the courts simply treat mental illness similarly to felon status and apply the same framework. Doing so, as highlighted above, has ruptured the courts.

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[93] Slade & Longden, *supra* note 1, at 10.

[94] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 711 (6th Cir. 2016) (Sutton, J., concurring).

[95] Debra A. Pinals, Paul S. Appelbaum, Richard Bonnie, Carl E. Fisher, Liza H. Gold & Li-Wen Lee, *American Psychiatric Association: Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services*, 33 BEHAV. SCI. & L. 195, 196 (2015).

[96] *See generally* Tori DeAngelis, *Mental Illness and Violence: Debunking Myths, Addressing Realities*, MONITOR ON PSYCH., Apr./May 2021, at 31–36.

[97] *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1121 (9th Cir. 2020).

[98] *See, e.g.*, *id.* at 1115–21.

A. The Historical Treatment of Mental Illness and Step One

The first step the courts apply to Second Amendment challenges is asking, "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."[99] The circuit courts find no uniformity to this step. The Sixth Circuit found "ambiguous historical support" to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second Amendment historically understood and that people who were involuntarily committed are not categorically unprotected by the Second Amendment.[100] The Ninth Circuit decided not to indulge a historical inquiry and assumed, without explanation, that § 922(g)(4) burdened Second Amendment rights as historically understood.[101]

While neither the Sixth Circuit nor the Ninth Circuit were willing to fully commit that the statute burdened a Second Amendment right historically understood, the Third Circuit revamped in a different direction. In *Beers*, the Third Circuit concluded that § 922(g)(4) did not burden conduct falling within the scope of the Second Amendment.[102] The *Beers* court stated that "neither passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited.'"[103] The court does not refer to any eighteenth-century statute that excluded the mentally ill from the possession of a firearm but refers to an eighteenth-century statute that authorized judicial officials to lock-up so-called lunatics or other individuals with dangerous mental impairments.[104] The court then assumed that if restricting a lunatic's physical liberty was permissible, the lesser intrusion of taking their firearm would also be permissible.[105] The court concluded its analysis after step one.

There is a major issue with not only the *Beers* decision but also with the *Tyler* and *Mai* decisions. When addressing this issue, all three circuit courts predetermined that the burdened plaintiff falls within the classification of mentally ill because, at one point, they were all institutionalized. The *Beers* court references that in the eighteenth century, lunatics could be locked up, and thus, could also likely have their firearms removed. While there is no historical support for the conclusion that individuals who are *presently* mentally ill cannot possess a firearm, there is a strong inference, as the *Beers* court pointed out, that historically, they could not.

The issue with this reasoning is that the plaintiffs in all three cases were not *presently* mentally ill. In *Beers*, two years passed since the commitment.[106] In *Tyler*, over thirty years passed since the commitment,[107] and in *Mai*, roughly

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[99] *Tyler*, 837 F.3d at 685 (quoting *Greeno*, 679 F.3d at 518).
[100] *Id.* at 687–90.
[101] *Mai*, 952 F.3d at 1114–15.
[102] Beers v. Att'y Gen. U.S., 927 F.3d 150, 152 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020).
[103] *Id.* at 156 (quoting Binderup v. Att'y Gen. U.S., 836 F.3d 336, 350 (3d Cir. 2016)).
[104] *Id.* at 158.
[105] *Id.*
[106] *Id.* at 152.
[107] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 683–84 (6th Cir. 2016).

twenty years passed since the commitment.[108] It is unclear why the *Beers* court relied solely on a statute that involved individuals who were *presently* mentally ill and did not attempt to address whether individuals who were mentally ill once, but who have reclaimed their mental health by means of contemporary treatment or by duration of time, could possess a firearm.

To determine the outer limits and the contours of the Second Amendment, a court's analysis must emphasize the history and tradition enveloping that right because that is what the Supreme Court's Second Amendment line of cases demand.[109]

Section 922(g)(4) certainly does burden Second Amendment rights as historically understood. Individuals who were once mentally ill can return to normalcy and should have their rights restored. The treatment of mental illness and the restoration of rights of a mentally ill individual has a historically sound structure. It is important to recognize the treatment of the mentally ill throughout history to get a full understanding of this topic because this type of treatment did not transition well to the colonies. The treatment of mental illness traces back to the civilization of ancient Egypt, where priest-physicians would apply remedies such as herbs and oils to restore mentally ill patients.[110] In fourth century B.C. Greece, Hippocrates, the father of medicine, and other Greek physicians recognized mental illnesses as natural phenomena and treated them by confining these individuals in comfortable, sanitary, and well-lit places.[111]

The Twelve Tables of Rome, enacted in 449 B.C., contain the earliest legal reference to the mentally ill.[112] Under Roman law, a magistrate would designate a *curator* to supervise and protect mentally ill individuals.[113] The Romans did not treat mental illness as a permanent condition; rather, they recognized that mentally ill individuals could make legal testaments.[114] The Romans suspended the guardianship during the person's lucid moments and then reinstated it when the illness returned.[115] Moreover, the guardianship could be terminated either through the mentally ill individual's recovery or their death.[116]

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[108] Mai v. United States, 952 F.3d 1106, 1110 (9th Cir. 2020).

[109] *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. . . . We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie. . . . The Second Amendment is no different."); City of Chicago v. McDonald, 561 U.S. 742, 767 (2010) ("[W]e must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, . . . , or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.") (citations omitted).

[110] SAMUEL J. BRAKEL & RONALD S. ROCK, THE MENTALLY DISABLED AND THE LAW 1 (1961).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 2.

[116] *Id.*

Spain and France followed the Visigothic Code, which was promulgated under the Visigothic Kingdom sometime between A.D. 466 and 485 and subsequently adopted by King Reeceswind.[117] It provided that insane persons could not testify or enter into contracts, but they were allowed to have these rights during their lucid periods.[118] In England, between 1255 and 1290, King Edward I enacted the statute *De Praerogativa Regis*.[119] Under this statute, the king took custody of the lunatic's land and all its profits until the lunatic "came to right mind," upon which the land was returned.[120]

The most significant component of the lunacy reforms in Europe was the establishment of lunatic asylums.[121] Asylums and madhouses became a flourishing trade and by the end of the eighteenth century, there were approximately forty licensed madhouses in England and Wales.[122] The treatment of the mentally ill was therefore common practice. The treatment became more sophisticated, and the successful restoration and rehabilitation of the lunatic was the primary objective.[123] Most published accounts of the treatment outcomes in madhouses suggest that one-third to one-half of the patients were discharged as cured.[124]

In the mid-eighteenth century, European medical publications became prominent and one of the most popular was a publication titled *Primitive Physick* by John Wesley.[125] This book was reprinted several times in the colonies as a medical self-help book.[126] In the book, Wesley stated that madness, like other diseases and disorders, was a product of original sin, but that God also provided primitive remedies to cure the madness.[127]

The Enlightenment shaped new attitudes and reactions to the mad, making it one of the most important forces that influenced colonial life.[128] In 1751, Benjamin Franklin and thirty-two other prominent Philadelphian citizens petitioned the assembly for a charter to establish a mental health hospital.[129] The Pennsylvania Hospital was the first general hospital erected to receive and cure the mentally ill.[130] Over the following years, there was a steady increase in the number of mad patients admitted.[131] Because "only a few of the hospitalized mad patients were released as cured each year" a "West Wing"

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[117] *Id.* at 2, 2 n.9.
[118] *Id.* at 2.
[119] WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 473 (7th ed. 1956).
[120] BRACKEL & ROCK, *supra* note 110, at 2.
[121] Richard Hunter, *English Private Madhouses in the Eighteenth and Nineteenth Centuries*, 66 PROC. ROY. SOC. MED. 23, 23 (1972).
[122] *Id.* at 24.
[123] *Id.* at 27.
[124] *Id.*
[125] MARY DE YOUNG, MADNESS: AN AMERICAN HISTORY OF MENTAL ILLNESS AND ITS TREATMENT 73 (2010).
[126] *Id.*
[127] *Id.*
[128] *Id.* at 75.
[129] *Id.* at 79.
[130] *Id.* at 80–81.
[131] *Id.* at 80.

was opened in 1796 to accommodate eighty mad patients.[132]

Support for the treatment of the mentally ill was not limited to a small group of medical experts. The general public "not only supported these activities, but gradually adopted a more enlightened look," and the growing public acceptance of humane asylum care for the mentally ill became clear in the 1840s.[133] Thomas M. Cooley's 1868 *A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* is a commonly cited nineteenth-century treatise.[134] Justice Scalia referred to Cooley, in his *Heller* opinion, as the most famous legal scholar in the nineteenth century and called his treatise "massively popular."[135] The Seventh Circuit, relied on this treatise for the historical proposition that the Second Amendment ties to virtuous citizenry and that the government could disarm felons.[136] Cooley recognized that so-called lunatics could be excluded from certain civic rights:

> Certain classes have been almost universally excluded, — the slave, because he is assumed to be wanting alike in the intelligence and the freedom of will essential to the proper exercise of the right; the woman, from mixed motives, but mainly perhaps, because, in the natural relation of marriage, she was supposed to be under the influence of her husband, and, where the common law prevailed, actually was in a condition of dependence upon and subjection to him; the infant, for reasons similar to those which exclude the slave; the idiot, the lunatic, and the felon, on obvious grounds; and sometimes other classes for whose exclusion it is difficult to assign reasons so generally satisfactory.[137]

However, Cooley, accepted that these "excluded classes" could regain their civic rights:

> The infant of tender years is wanting in competency, but he is daily acquiring it, and a period is fixed at which he shall conclusively be presumed to possess what is requisite. The alien may know nothing of our political system and laws, and he is excluded until he had been domiciled in the country for a period judged to be sufficiently long to make him familiar with its institutions; races are sometimes excluded arbitrarily; and there have been times when in some of the States the possession of a certain amount of property, or the capacity to read,

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[132] *Id.*

[133] NORMAN DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES, 1788-1865 194 (1964).

[134] *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868).

[135] District of Columbia v. Heller, 554 U.S. 570, 616 (2008).

[136] Kanter v. Barr, 919 F.3d 437, 446 n.6 (7th Cir. 2019) (quoting COOLEY, *supra* note 134, at 29 (discussing how certain classes of people were "almost universally excluded" from exercising certain civic rights, including "the idiot, the lunatics, and the felon, on obvious grounds.")).

[137] COOLEY, *supra* note 134, at 29.

> were regarded as essential to satisfactory proof of sufficient freedom of action and intelligence.[138]

Cooley stated the principal concern with these excluded classes is the lack of "intelligence and the freedom of will essential to the proper exercise of the right."[139] Therefore, it is a logical proposition that if a lunatic was properly treated and recouped their intelligence and freedom of will, that individual could have purchased or possessed a firearm.

According to the Third Circuit, mentally ill individuals could not possess firearms in the eighteenth century because they were "considered dangerous to the public or to themselves."[140] The *Beers* court relied on two sources. First, an eighteenth-century statute that allowed judicial officials to "lock up" so-called lunatics or other individuals with mental impairments.[141] And second, the *Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents*, which stated that "citizens were excluded from the right to bear arms if they were a 'real danger of public injury.'"[142] Thus, the *Beers* Court makes a dark illustration that the state could easily remove the rights of the mentally ill. This is certainly an argument for individuals that are *presently* mentally ill, but completely dodges the question of individuals that were once mentally ill and recovered.

As mapped out in this article, a number of cultures and societies dating back to the ancient Egyptians recognized the restoration of rights to the mentally ill. This recognition carried over to the original public meaning within the American colonies. Blackstone recognized and explained that "the law always imagines, that [a lunatic's] accidental misfortunes may be removed."[143] Thus, the Third Circuit erred when it solely relied on sources that prevented the presently mentally ill from possessing firearms in the eighteenth century. It should have focused on an individual who was once mentally ill but regained his rights.

This was not a radical position in the eighteenth century. Take Britain for example. Historically, "buyers of any type of gun, from derringers to Gatling guns faced no background check, no need for police permission, and no registration."[144] Furthermore, criminologist Colin Greenwood wrote, "[a]nyone, be he convicted criminal, lunatic, drunkard or child, could legally acquire any type of firearm."[145] Also, according to Greenwood, even up until

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[138] *Id.* at 30.
[139] *Id.* at 29.
[140] Beers v. Att'y Gen. U.S., 927 F.3d 150, 157–58 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020).
[141] *Id.* at 158.
[142] *Id.* (quoting Binderup v. Att'y Gen. U.S., 836 F.3d 336, 349 (3d Cir. 2016) (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665 (1971)).
[143] BLACKSTONE, *supra* note 2, at *304.
[144] Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessors for Civil Liberties in America*, 22 HAMLINE L. REV. 399, 407 (1999).
[145] *Id.* (citing COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 18 (1971)).

the "early part of [the twentieth century] anyone, respectable citizen, criminal or lunatic, could walk into a gunshop and buy any firearm he wanted."[146]

Furthermore, consider the specific example of William Somervell from Scotland. Somervell was mentally ill, suffering from a "communication failure which caused him to become increasingly isolated from those around him."[147] Somervell's family employed Donald McDonald, an officer of the Highland Society, for fourteen months to attempt to restore his ability to interact.[148] Two months in, McDonald "claimed some success in teaching [Somervell] to march, to hold a knife and fork, *to fire a pistol and musket*, to shoulder a musket and to present arms."[149] This example shows a mentally ill individual learned to fire a gun during his treatment. Thus, an individual who was once mentally ill could have their rights restored—even in the context of firearms. Although this example is from Scotland, it still adds weight to the historical proposition that individuals that were previously mentally ill could undergo treatment and regain their rights to own a firearm.

To summarize, the founding generation understood the Second Amendment to protect the interests of "law-abiding, responsible citizens to use arms in the defense of hearth and home."[150] History indicates—evidenced by cultural practices from the Romans through eighteenth-century Europeans—that individuals that were once deemed as mentally ill or insane could regain their rights that were taken from them due to their mental health. Unfortunately, courts interpreting § 922(g)(4)'s Second Amendment prohibition against individuals "who ha[ve] been adjudicated as a mental defective or who ha[ve] been committed to a mental institution"[151] relied on historical evidence that supports the proposition that individuals who were *presently* mentally ill *may* have been barred from possessing a firearm.[152] These courts have not relied on historical evidence of individuals who regained their previously lost rights.

This Article argues an originalist position that during the founding generation individuals who were once mentally ill could recover from that mental illness and return to the core class of law-abiding, responsible citizens that the Second Amendment protected. Therefore, it was a constitutional right for an individual who was once deemed mentally ill, but recovered, to own and possess a firearm. In mapping out the contours of this right, an analysis emphasizing the history and tradition enveloping that right is essential because

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[146] SELECT COMMITTEE ON HOME AFFAIRS, APPENDICES TO THE MINUTES OF EVIDENCE, 1999-2000, HC 95-II, app. 8 (UK).
[147] R. A. Houston, *Therapies for Mental Ailments in Eighteenth-Century Scotland*, 28 J. ROYAL COLL. PHYSICIANS EDINBURGH 555, 562 (1998).
[148] *Id.* at 563.
[149] *Id.* (emphasis added).
[150] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
[151] 18 U.S.C.A. § 922(g)(4) (Westlaw through Pub. L. No. 117-102).
[152] *See, e.g.*, Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020).

that is what the Supreme Court's Second Amendment line of cases demand.[153]

The provided historical synopsis of the restoration of rights to those once deemed mentally ill, coupled with the proposed conclusion that these individuals can reestablish their Second Amendment rights, greatly calls into question the constitutionality of § 922(g)(4). As Judge Batchelder wrote, "[t]he key fact is that, at the time of the Founding, no fundamental right could lawfully be circumscribed to the extent that § 922(g)(4) regulates gun rights. . . . it does far more than 'infringe' upon that right, it extirpates it."[154] The provided historical synopsis provides strong weight that previously mentally ill but recovered individuals had the fundamental right to possess a firearm in the eighteenth century, which, now, § 922(g)(4) directly and categorically prohibits.

B. Heller's Historical Analysis Framework Should Prevail and Step Two

Section 922(g)(4) would likely be unconstitutional because it infringes on a class of individuals' fundamental right without uniform due process. Under *Heller's* text, history, and tradition approach, courts that are facing a constitutional challenge to § 922(g)(4) should undoubtedly find the statute unconstitutional because the historical analysis indicates that societies throughout history recognized the restoration of rights to mentally ill individuals—including the restoration of the fundamental right to carry a firearm. If it was socially acceptable for an individual in 1792, who was once mentally ill, but had recovered, to carry a firearm, then a judge employing a text, history, and tradition approach would certainly find § 922(g)(4) unconstitutional. However, the cases challenging § 922(g)(4) do not take this approach and instead apply the two-step framework discussed above.[155]

The circuit courts' contemporary two-step framework is fundamentally flawed in two ways. First, regarding the first step, the courts have either disregarded the historical analysis and assumed it was met,[156] or they relied on historical evidence that mentally ill individuals in the eighteenth century would be "locked up" if they were presently mentally ill.[157] This is a misrepresentation of plaintiffs' challenges to § 922(g)(4) in contemporary courts. Regarding step two, the courts implement an analysis that puts judges in a position where they must analyze empirical evidence involving mental health, firearms, and crime and suicide statistics. Thus, in turn, transitions the core of the analysis to a case-by-case determination rather than a historical inquiry.

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[153] *See Heller*, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) ("*Heller* makes clear that [the individual right to firearms for self-defense] is deeply rooted in this Nation's history and tradition.") (internal quotations omitted).

[154] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 707 (6th Cir. 2016) (Batchelder, J., concurring).

[155] *See* discussion *supra* Section IV.

[156] Mai v. United States, 952 F.3d 1106, 1115–15 (9th Cir. 2020).

[157] *Beers*, 927 F.3d at 158.

This Section demonstrates that the current two-step analysis is behind the circuit split and unsuitable going forward. Moreover, this Section advocates the courts use a historical inquiry approach, rather than the current two-step approach, and why this likely is a more suitable standard—especially with the recent additions of Justice Kavanaugh and Justice Barrett to the United States Supreme Court.

1. The Current Two-Step Analysis

The circuit courts' current two-step analysis instructs that if the challenged statute burdens conduct that was within the scope of the Second Amendment as historically understood, courts must determine and apply an appropriate form of means-end scrutiny.[158] The two circuits that have reached step two have both applied intermediate scrutiny.[159] This approach places judges in a position where they must make an empirical determination after analyzing statistical links, data, graphs, and charts regarding firearms and the mentally ill. To make this empirical determination, the judges must find that the evidence presented to them demonstrates that § 922(g)(4) is a reasonable fit to the government's interest of preventing suicide and reducing crime.[160] The Sixth and Ninth Circuits have significantly disagreed on how to implement intermediate scrutiny. In both instances, the facts are relatively similar and the analyses are consistent. However, the conclusions are vastly different. In both *Tyler* and *Mai*, the courts explicitly recognized that the government's interests in reducing crime and preventing suicide were not only legitimate, but compelling.[161]

In *Mai*, the Ninth Circuit relied on only one source of scientific authority to conclude that § 922(g)(4) was a reasonable fit for the government's interest in preventing suicides.[162] The source was a 1997 article from the *British Journal of Psychiatry*, which stated that individuals released from involuntary commitment "reported a combined 'suicide risk *[thirty-nine] times* that expected.'"[163] Relying on this one scientific authority, the Ninth Circuit deferred to the congressional judgement that Mai had an increased risk of suicide. Therefore, the court concluded that the permanent Second Amendment prohibition was justified.

Notwithstanding the *Mai* court citing to only this single source of authority to justify this conclusion, the court's handling of the source was ineffective and unpersuasive. The court stated that the authority concludes that individuals released from involuntary commitment had a suicide risk thirty-nine times greater than the average population, thus "[t]hat extraordinarily increased risk of suicide clearly justifies the congressional judgment that those

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[158] United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).
[159] *Tyler*, 837 F.3d at 692; *Mai*, 952 F.3d at 1115.
[160] *See, e.g.*, *Mai*, 952 F.3d at 1120–21.
[161] *Tyler*, 837 F.3d at 693; *Mai*, 952 F.3d at 1116.
[162] *Mai*, 952 F.3d at 1116 n.5. The court did not address whether the statute was a reasonable fit for preventing crime.
[163] *Id.* (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205 (1997)).

released from involuntary commitment pose an increased risk of suicide."[164] While this is correct, it inadequately represents Mai's characteristics. Mai was seventeen-years-old when he was initially committed and was released from commitment in 2000.[165] Following his release, he earned a GED, a bachelor's degree, a master's degree, secured gainful employment, and fathered two children.[166] Approximately fifteen years passed between his release from commitment and his unsuccessful attempt to purchase a firearm.[167]

The study, however—and what the Ninth Circuit primarily relied on—analyzed an entirely different class of individuals than those sharing the characteristics of Mai. It found the following, "[t]hree papers reported on a total population of 14,000 of which 98% were followed for one year following commitment and 2% for 2.5-8.5 years. . . . Combining the studies gave a suicide risk 39 times that expected."[168] Otherwise put, the study was primarily—if not entirely—dedicated to studying individuals who had recently been released from commitment—not individuals, like Mai, who had been properly functioning in society for a significant period of time since their release from commitment. Mai's circumstances undoubtably do not fall in either of the categories relied upon in the study.[169] Thus, the thirty-nine times greater risk of suicide statistic is a precarious misrepresentation. Accordingly, the Ninth Circuit resoundingly erred in its empirical analysis.

The *Mai* court recognized the study was "not a perfect match" for the plaintiff's circumstances,[170] but concluded that Congress was still able to infer that an increased risk of violence continues after the time period analyzed in the study.[171] The court, however, found that recipients of other treatments such as "previously hospitalised patients" had a suicide risk of seven times of that expected up to fifteen years after release, and "community care patients" had a suicide risk of almost thirteen times that expected for up to twelve years after release.[172] According to the court, because none of the scientific evidence suggested that the plaintiff's suicide risk "dissipate[d] entirely" or that his "level of risk [was] nonexistent," the Second Amendment prohibition was justified.[173]

The purpose of this Article is not to analyze the weight of empirical evidence statistically linking mental illness, suicide, and firearms. Nor is it to criticize the court's implementation of that empirical evidence. Rather, it is to highlight the apparent shortcomings of the case-by-case determinations that the two-step analysis requires. This analysis places unelected and unqualified

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[164] *Id.*
[165] *Id.* at 1110.
[166] *Id.*
[167] *Id*.
[168] Harris & Barraclough, *supra* note 163, at 219–20.
[169] He was released from his involuntary commitment twenty years prior to his attempt to purchase a firearm. *See* Mai v. United States, 952 F.3d 1106, 1110 (9th Cir. 2020).
[170] *Id.* at 1117.
[171] *Id.* at 1118.
[172] *Id.*
[173] *Id.* at 1118–21.

judges in a position that requires them to analyze empirical evidence involving statistics between the mentally ill and firearms, resulting in significant consequences. Couple this empirical determination with the constitutional standard of intermediate scrutiny—where there only needs to be a reasonable fit—that accords significant discretion to the judges, which in turn, results in nonuniform conclusions.

The Ninth Circuit's holding in *Mai* is an exceptional example of the faulty and unsound framework the two-step analysis imposes. According to that court, because the plaintiff's risk of suicide was not "dissipate[d] entirely" or that it was not "nonexistent," the Second Amendment categorical prohibition was justified.[174] This is a higher standard than what federal law imposes.[175] Under the contemporary § 40915(a)(2) relief from disabilities programs, individuals burdened by § 922(g)(4), may be granted relief only if the "person's record and reputation, are such that the person 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."[176] The judicially manufactured "entire dissipation of risk" standard is a significantly higher standard than the "not likely to act in a dangerous manner" standard imposed by federal law. This unreasonably heightened standard taken together with only citing to one scientific authority that insufficiently embodied the characteristics of Mai, results in a distorted and unexplainable framework.

The Sixth Circuit's decision in *Tyler* likewise shows the unsuitability of this framework. The Sixth Circuit found that there was not a reasonable fit between § 922(g)(4) and the reduction of suicide or crime.[177] The court considered multiple sources in its analysis, but concluded that there was no indication of a "*continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse."[178] Notably, the court rejected the same *British Journal of Psychiatry* article's finding that individuals who have been involuntarily committed have a suicide risk thirty-nine times greater than the general population because it only analyzed patients that were recently released from commitment and did "not explain why a lifetime ban is reasonably necessary."[179]

The court also rejected a statistic that after the State of Connecticut began preventing individuals with prior commitments from purchasing guns, there was "a 53% reduction in rates of violent crime perpetrated by such individuals."[180] The court found this unpersuasive because the "data does not meaningfully compare previously committed individuals' propensity for

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[174] *Id.*
[175] *See* discussion *supra* Section II.
[176] 34 U.S.C.A. § 40915(a)(2) (Westlaw through Pub. L. No. 117-102).
[177] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016).
[178] *Id.* (emphasis in original).
[179] *Id.* at 696.
[180] *Id.* (quoting Brief for the States United to Prevent Gun Violence as Amicus Curiae at 11, Tyler v. Hillsdale Cnty. Sheriff's Dep't., 837 F.3d 678 (6th Cir. 2016) (No. 13-1867)).

violence with that of the general population."[181] Ultimately, the Sixth Circuit concluded that the government failed to present evidence that it is reasonably necessary to forever bar all previously institutionalized persons from owning a firearm.[182]

Faced with similar factual circumstances, applying the same framework, and analyzing similar empirical data, these courts reached vastly different conclusions. Reasonable minds can differ; however, this framework is not an advisable blueprint for resolving a determination involving a permanent deprivation of a fundamental constitutional right. Likened to this analogy of building a house: the contemporary two-step framework is a termite riddled foundation. The builders are judges, a group of lawyers with no experience in building houses. The application of the intermediate scrutiny standard is the supervisor who is not present at the building site but left instructions to the builders to find a reasonable fit. In some cases, the builders might construct a sturdy building with no concerns of potential collapse. But, in other cases, the building is frail, debilitated, and subject to concern. On a given extraordinarily windy day, one house might withstand the grueling wind gusts punishing the foundation and live to see another day, whereas the other house might crumble to the ground because its poorly built structure could not tolerate the outside pressures.

Subjecting enumerated constitutional rights to this case-by-case determination is improper and objectionable. Moreover, *Heller* explicitly rejected this approach. Justice Scalia wrote that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[183] The weaknesses of a case-by-case determination are demonstrated by the present circuit split. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,"[184] this two-step framework must be abandoned in favor of a historical inquiry approach.

2. The Historical Inquiry Analysis is the Preferrable Framework

When presented with a Second Amendment challenge, the courts should center the core of the analysis on the original public meaning of the Second Amendment. This should be no different when presented with a challenge to § 922(g)(4). As discussed above, this article proposes that individuals who were once mentally ill but recovered can regain their rights, and thus be considered in the core class of citizenry the Second Amendment protected at the time of the founding. Using a historical inquiry analysis not only prevents the weaknesses of a judicial policymaking two-step framework, but conceives a durable, foundational framework that is grounded in the text, history, and tradition of the Second Amendment.

Although *Heller* did not specifically state that lower courts should not

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[181] *Id.*
[182] *Id.* at 698–99.
[183] District of Columbia v. Heller, 554 U.S. 570, 634 (2008).
[184] *Id.* at 634–35.

implement a means-ends analysis, both *Heller* and *McDonald* "put the historical inquiry at the center of the analysis, not at the margin."[185] Therefore, the lower courts' insistence on the two-step, case-by-case inquiry is misguided. Especially if "both *Heller* and *McDonald* indicate strongly that standards of scrutiny are just shorthand for unguided interest balancing."[186] This unguided balancing approach only produces significant judicial disagreement with the injustices falling on the plaintiffs.

Additionally, the historical inquiry approach is not merely an originalist analysis. The *Heller* opinion did not just look at the time of the founding, but also considered the history and tradition underlying the Second Amendment.[187] *McDonald* reiterates this approach. Justice Alito wrote, "*Heller* makes it clear that [the right of armed self-defense in the home] is 'deeply rooted in this Nation's history and tradition.'"[188] This combination of text, history, and tradition is important because it expands the analysis. *Heller* did not solely rely on founding-era evidence, rather, it analyzed and applied historical documentation all the way through the late nineteenth century—including the "massively popular" Thomas Cooley treatise.[189]

A historical inquiry analysis prevents judges from applying a discretionary interests-balancing approach that has resulted in significant disagreement. *Heller* also implicitly mandates this inquiry. Justice Breyer's dissent explicitly rejected strict scrutiny and rational basis scrutiny.[190] Rather, Justice Breyer advocated for a form of intermediate scrutiny approach, writing, "I would adopt such an interest-balancing inquiry explicitly."[191] The majority expressly responded to this advocation:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the

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[185] *Tyler*, 837 F.3d at 703 (Batchelder, J., concurring).

[186] Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 967 (2011).

[187] Jonathan E. Taylor, *The Surprisingly Strong Originalist Case for Public Carry Laws*, 43 HARV. J.L. & PUB. POL'Y 347, 348–50 (2020).

[188] McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (citations omitted).

[189] *Heller*, 554 U.S. at 614–19; *see also* discussion *supra* Section IV.A.

[190] *Id.* at 688–89 (Breyer, J., dissenting).

[191] *Id.* at 689. Justice Breyer relied on cases like Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997), in which the Court applied intermediate scrutiny. Justice Breyer endorsed this approach by stating that "a court, not a legislature, must make the ultimate constitutional conclusion, exercising its 'independent judicial judgment[.]'" *Id.* at 690 (quoting Randall v. Sorrell, 548 U.S. 230, 249 (2006) (opinion of Breyer, J.).

> people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.[192]

Justice Kavanaugh expressly endorsed the historical inquiry approach. Shortly after the Supreme Court's holding in *Heller*, the District of Columbia enacted a new gun law banning the possession of some semi-automatic rifles and requiring the registration of all guns possessed in the district.[193] Then-Judge Kavanaugh dissented from the D.C. Circuit's decision finding the newly enacted gun law constitutional.[194] According to Judge Kavanaugh, "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[195] Judge Kavanaugh disagreed with the majority's use of intermediate scrutiny because that is precisely what *Heller* rejected.[196] As discussed above, Justice Breyer advocated that a form of a intermediate scrutiny should be applied,[197] however, according to Judge Kavanaugh, the majority explicitly rejected Justice Breyer's argument because it was a "judge-empowering interest-balancing inquiry" and that no other enumerated constitutional right had a core protection subject to a freestanding interest-balancing approach.[198] Thus, in Judge Kavanaugh's view, *Heller* required a historical inquiry approach only and no form of a means-end scrutiny.[199]

It is less clear whether Justice Barrett would also endorse the historical inquiry approach, over the interest-balancing two-step approach. In 2019, the Seventh Circuit rejected an as-applied challenge to § 922(g)(1) and upheld the statute as constitutional.[200] The statute prohibited firearm possession by persons convicted of a felony.[201] The majority opinion applied the two-step framework and selected intermediate scrutiny as the appropriate means-end scrutiny.[202] The *Kanter* majority found that the government met its burden under intermediate scrutiny because § 922(g)(1) is substantially related to the governmental interest of keeping firearms away from those convicted of a serious crime.[203]

Then-Judge Barrett dissented from the majority's opinion, writing that the government failed to show, "by either logic or data," that § 922(g)(1) as applied to Kanter, substantially advanced the interest of protecting the public from gun violence.[204] Neither the majority opinion nor Judge Barrett's dissent

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[192] *Id.* at 634–35.
[193] Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1248–49 (D.C. Cir. 2011).
[194] *Id.* at 1269 (Kavanaugh J., dissenting).
[195] *Id.* at 1271.
[196] *Id.* at 1276–77.
[197] *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).
[198] *Heller II*, 670 F.3d at 1276–77 (Kavanaugh, J., dissenting) (quoting *Heller*, 554 U.S. at 634).
[199] Taylor, *supra* note 187, at 351.
[200] Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019).
[201] 18 U.S.C.A. § 922(g)(1) (Westlaw through Pub. L. No. 117-102).
[202] *Kanter*, 919 F.3d at 447–49.
[203] *Id.* at 451.
[204] *Id.* at 469 (Barrett, J., dissenting).

dove into the discussion of whether the two-step framework should even be applied. However, Judge Barrett did not adopt the framework along with the majority.[205] Judge Barrett first embarked in a significant historical inquiry of historical documentation and statutes and concluded that, "[h]istory does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons. But it does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous."[206]

After that historical inquiry, Judge Barrett implemented a form of interest-balancing without any express adoption of intermediate scrutiny.[207] Judge Barrett admitted that a "close means-ends fit" was required.[208] However, in a rather brief analysis she dismissed the government's evidence as it applied to Kanter because it "[fell] well short of establishing the 'close means-ends fit' required before the government may totally and permanently strip offenders like Kanter of the ability to exercise a fundamental right."[209] Justice Barrett would likely accept a historical inquiry approach rather than an interest balancing approach based on her *Kanter* dissent for two reasons. First, the dominating aspect of her dissent was a historical inquiry which led to the conclusion that dangerous felons, not categorically all felons, were historically prohibited from possessing a firearm. Second, the lack of an express adoption of intermediate scrutiny. While certainly unclear, there is some evidence that Justice Barrett would join her new colleague in recognizing the historical inquiry test weighing Second Amendment challenges.

V. PROPOSED RECOMMENDATION SUPPORTED BY CONTEMPORARY MEDICAL EVIDENCE

The proposed conclusion of this Article—that individuals can overcome their mental illness and have their Second Amendment rights restored, as supported by the historical inquiry discussed in Section IV.A. of this Article—coupled with the adoption of the historical inquiry as the sole test for Second Amendment challenges only resolves the legal disparities involved. As the Ninth Circuit noted, there is at least *some* risk of suicide for individuals who were once involuntarily committed.[210] Thus, it would be illogical to merely rely on a historical inquiry test to conclude that every person who was once involuntarily committed should be granted their Second Amendment rights. That would counterintuitively reverse the current effects of § 922(g)(4), which is an absurd conclusion. This Section highlights contemporary medical evidence, which remarkably the courts have ignored thus far, and proposes that

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[205] *Compare id.* at 453 ("I treat Kanter as falling within the scope of the Second Amendment and ask whether Congress and Wisconsin can nonetheless prevent him from possessing a gun."), *with id.* at 441 ("After *Heller*, we developed a two-step test for Second Amendment challenges.").
[206] *Id.* at 454.
[207] *See id.* at 465–69.
[208] *Id.* at 465 (quoting Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017)).
[209] *Id.* at 468.
[210] Mai v. United States, 952 F.3d 1106, 1118 (9th Cir. 2020).

every state should implement a § 40915 relief-from-disabilities program.

A. American Psychiatric Association's Opposition to Per Se Disqualifications

The APA is the leading psychiatric organization in the world and is composed of 38,000 members involved in psychiatric practice, research, and academia.[211] The APA has an evident history of supporting strong gun-control policies.[212] For example, in 1993, the APA released a position statement that recommended "strong controls be placed on the availability of all types of firearms to private citizens."[213] However, the April 2007 Virginia Tech shooting marked a turning point in the APA's approach to gun violence especially regarding individuals with mental health histories.[214] The APA subsequently stated that a critical issue in contemporary firearm policy is the "selective and unfair denial of constitutional rights based on histories of mental health treatment."[215]

The APA's official position statement creates significant tension with current federal law. The APA states that "[r]easonable restrictions on gun access are appropriate, but such restrictions should not be based solely on a diagnosis of mental disorder."[216] Although not opposed to some sort of commitment-based Second Amendment disqualification, the APA is opposed to an involuntary commitment as a *per se* disqualification for firearm possession.[217] The APA further states that a "person whose right to purchase or possess firearms has been suspended on grounds related to mental disorder should have a fair opportunity to have his or her rights restored."[218] Thus, the APA's Position Statement is not only consistent with the Sixth Circuit's decision in *Tyler*, but goes beyond it.[219]

B. Consortium for Risk-Based Firearm Policy's Proposed Statutory Language

The Consortium for Risk-Based Firearm Policy ("Consortium") is a group of the nation's leading experts in gun violence and mental health.[220] The

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[211] *About APA*, AM. PSYCH. ASS'N, https://www.psychiatry.org/about-apa [https://perma.cc/U643-5ANW].
[212] *See* Richard J. Bonnie, Paul S. Appelbaum & Debra A. Pinals, *The Evolving Position of the American Psychiatric Association on Firearm Policy (1993-2014)*, 33 BEHAV. SCI. & L. 178, 178 (2015).
[213] *Id.* at 178–79.
[214] *Id.* at 182.
[215] *Id.* at 183.
[216] Pinals et al., *supra* note 95, at 196.
[217] Alan R. Felthous & Jeffrey Swanson, *Prohibition of Persons with Mental Illness from Gun Ownership Under Tyler*, 45 J. AM. ACAD. PSYCHIATRY L. 478, 482 (2017).
[218] Pinals et al., *supra* note 95, at 197.
[219] Felthous & Swanson, *supra* note 217, at 482.
[220] CONSORTIUM FOR RISK-BASED FIREARM POL., GUNS, PUBLIC HEALTH AND MENTAL ILLNESS: AN EVIDENCE BASED APPROACH FOR FEDERAL POLICY 2 (2013) [hereinafter CONSORTIUM], https://efsgv.org/wp-content/uploads/2014/10/Final-Federal-Report.pdf [https://pe

purpose of the Consortium is to advance evidence-based gun violence prevention policies recommendations.[221] The Consortium urges for an evidence-based approach for risk factors of violence, because "most violence is not committed by individuals diagnosed with a mental illness."[222] Factors that should be considered are alcohol abuse, drug abuse, and violent behavior.[223]

The Consortium noted a Connecticut study which found that "almost all (96%) violent crimes in this study population with serious mental illness were committed by individuals who did not have a federal *mental health* firearm disqualification in effect at the time of the crime. However, many of these individuals did have a disqualifying *criminal* record in effect."[224] Thus, the Consortium stated that enforcing a mental health disqualification is no substitute for the enforcement of criminal prohibitions and that gun seizure policies should be focused on dangerousness and history of violence, not mental health diagnoses *per se*.[225]

C. Other Medical Authorities' Support of a New Restoration Process

Jeffrey Swanson, of Duke University School of Medicine, and Alan Felthous, of Saint Louis University School of Medicine, agree with the APA's position that just a receipt of an involuntary commitment cannot be a dispositive reason for a Second Amendment prohibition.[226] Moreover, Felthous and Swanson agree with the APA's position, that one mere record of past involuntary commitment cannot be grounds for a permanent Second Amendment prohibition.[227] In another medical article, experts state that "there is little evidence as to whether, and how much, maintaining registries of people with certain mental health histories contributes to that goal [of preventing violence and suicides]."[228] That same article praises the Consortium's attempt to "shift the focus of policy discourse from histories of mental illness, *per se*, to the occurrence of adjudicated conduct indicative of elevated violence risk, such as conviction for violent misdemeanor or repeated convictions for driving under the influence of alcohol or drugs."[229]

D. Implementation of Relief-From-Disabilities Program in Every State

The proposed solution to this issue is simple. Every state should be

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[221] *Id.*
[222] *Id.* at 14.
[223] *Id.*
[224] *Id.* at 5.
[225] *Id.*
[226] Jeffrey W. Swanson & Alan R. Felthous, *Guns, Mental Illness, and the Law: Introduction to this Issue*, 22 BEHAV. SCI. & L. 167, 168 (2015).
[227] Felthous & Swanson, *supra* note 217, at 483.
[228] Debra A. Pinals, Paul S. Appelbaum, Richard J. Bonnie, Carl E. Fisher, Liza H. Gold & Li-Wen Lee, *Resource Document on Access to Firearms by People with Mental Disorders*, 33 BEHAV. SCI. & L. 186, 189 (2015).
[229] *Id.* at 190.

required to implement a relief-from-disabilities program that incorporates standards as proposed by medical professionals, rather than arbitrary congressional determinations. As of 2016, only thirty-one states implemented a relief-from-disabilities program under the statutory authority of § 40915.[230] However, that number is disputed—the Bureau of Justice Statistics reports that, as of 2015, only twenty-nine states had a program and only twenty-two states received NICS Improvement Act funding.[231] Thus, some individuals that do not live in one of these states and are burdened by a lifetime Second Amendment ban, have no means of challenging their lifetime ban, besides initiating a lengthy and expensive legal challenge in federal court.

Creating a uniform system in which every state can offer a fair hearing where an individual can present evidence that they are no longer a threat to society or themselves will help alleviate this issue. Moreover, the current standard of not "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"[232] need not be changed. The program would simply take into consideration medical experts' recommendations, as discussed above. For example, the Consortium has proposed model language for a new restoration process that is generally in line with the APA's official position.[233] If the individual disagrees with the program's determination, that individual can appeal the decision, where the courts can give due deference to the professional determination by only implementing a historical inquiry legal framework to ensure there are no constitutional issues. This proposed process would create uniformity and place the final determination in the hands of professionals who can properly weigh empirical evidence and determine whether the individual's Second Amendment rights should be restored. This would eliminate the need for a per se prohibition solely based on one receipt of prior involuntary commitment. It will also allow for important public policy decisions to be made through a fair hearing where professionals can rely on medical experts and can properly weigh the evidence presented. In doing so, it will limit the role of courts to only make constitutional determinations, rather than discretionary policy resolutions.

Under this system, Congress can delegate the authority to the states who can place experts, policymakers, and elected officials in the position to determine who warrants the restoration of rights. Allowing Congress to acquiesce to illogical statutes, like § 922(g)(4), is a fundamental aberration. If the State wants to justify a permanent deprivation of a fundamental individual right, there must be sufficient due process procedures that allow for an individual to challenge that deprivation. The absence of due process procedures in contemporary society is unacceptable. Implementing a relief-from-disabilities program in every state is a sufficient procedure to mitigate the overreaching of § 922(g)(4) because it will allow for timely, proper, and

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[230] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 683 (6th Cir. 2016).
[231] *Id.* at 683 n.2.
[232] 34 U.S.C.A. § 40915(a)(2) (Westlaw through Pub. L. No. 117-102).
[233] *See generally* CONSORTIUM, *supra* note 220.

equitable hearings where experts and elected officials can properly weigh empirical evidence. This is a far more democratic process than the process of federal judges weighing empirical evidence and attempting to find a reasonable fit. Once a hearing is conducted, the individual—or the State—could appeal that decision to the courts. Finally, this Article urges the courts to adopt the historical inquiry analysis when reviewing Second Amendment challenges. This will allow courts to adhere to the role of the judiciary by considering only historical Constitutional interpretation issues—as mandated by *Heller*.

VI. CONCLUSION

Once mentally ill does not mean always mentally ill. Implementing a per se Second Amendment prohibition against an entire class of individuals is not only unconstitutional but it is also scientifically unsupported. Societies dating back to ancient Rome recognized that individuals who were once mentally ill had the opportunity to have their rights restored. This historical understanding consistently carried through to societies including the American colonies. Congress cannot arbitrarily declare that every individual who has one receipt of a prior involuntary commitment is forever barred from possessing a firearm without giving a uniform process for challenging that determination. Notwithstanding, the courts must additionally adhere to their constitutional role, by limiting the judicial determination to a historical inquiry, rather than a discretionary policy decision. If a uniform system is put in place, where every state has a relief-from-disabilities program, and the courts heed to a history inquiry, giving due deference to the program's determination, the current circuit split and the unconstitutional treatment of an entire class of citizens will be resolved.