A "Second-Class Right" For "Second-Class Citizens"

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A “SECOND-CLASS RIGHT” FOR “SECOND-CLASS CITIZENS”

Benjamin A. Rice*

ABSTRACT

In McDonald v. City of Chicago, the Supreme Court countenanced against treating the Second Amendment as a “second-class right.” Against this admonition, congressional defunding of federal restorative programs has rendered the amendment a second-class right for an ever-increasing and much-maligned group of people: those who have been adjudicated as mentally ill. In a majority of states, those who have been involuntarily committed at any point in their lives to a mental health institution lose the right to bear arms for life. Taking guns out of the hands of those who have enjoyed decades of good mental health after a brief stint of treatment stigmatizes all who have battled mental illness and unfairly treats them as “second-class citizens,” undeserving of their constitutionally guaranteed rights.

This Comment seeks to show that even in the ever-evolving jurisprudence of the Second Amendment, the lifetime ban currently imposed on this group fails under all forms of constitutional analysis. This Comment updates current scholarship by addressing two as-of-yet undiscussed circuit court cases and looking to the ascendent “historical approach” to Second Amendment challenges, in which courts look to the text, history, and tradition of the right to determine constitutionality. Then, it looks to tiered scrutiny, proposing that courts examine challenges to the current effective ban under the lens of strict scrutiny and disproving the oft-cited government interests.

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I. INTRODUCTION

Until immigrating to the United States at age two, Duy T. Mai lived in a Thai
refugee camp.¹ Since then, he has lived the quintessential American success
story: Mai graduated from a prestigious west coast university with a 3.7 GPA in
microbiology, and he later completed post-graduate studies on cancer research,
receiving a graduate degree in microbiology.² After obtaining his second degree,
Mai moved to the state of Washington to research virology at a number of

¹ Mai v. United States (Mai II), 974 F.3d 1082, 1084 (9th Cir. 2020) (Bumatay, J.,
dissenting) (denying rehearing en banc).
² Id.
prestigious research centers throughout the state. In his home life, Mai is a father of two, he remains close to his extended family, and he regularly volunteers near his home.

But like more than seventeen million Americans, Mai has a history of depression. In 1999, at age seventeen, Mai was involuntarily committed to a mental health hospital for treatment, for which a state court adjudicated him as mentally ill and dangerous. Mai’s brief brush with depression thankfully passed. The following year, his commitment ended, and he has not needed treatment since. According to Mai, he has since completely recovered and no longer takes medication to control his previous condition. In support of his claim, it should be noted that Mai’s academic successes occurred after his commitment. Despite his post-commitment successes, his onetime brush with depression has irreversibly changed his legal status: his involuntary commitment means that both Washington and federal law bar him from legally purchasing a firearm.

Undeterred, in 2014 Mai started the tortuous process of recouping his Second Amendment rights and reestablishing his name in the eyes of the law. In that year, he petitioned a Washington state court to restore his firearm rights to permit him to purchase a firearm for self-defense. To augment his petition, Mai gathered supportive declarations from medical and psychological experts testifying to his condition. The state court granted his petition under state law, stating plainly that “[Mai] no longer presents a substantial danger to himself, or the public.” Mai’s rights, at least under state law, were restored.

His rights under federal law have been another story altogether. After the restoration of his state rights, Mai attempted to pass a required background check to purchase a firearm but later received a phone call from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) notifying him that the restoration of his state rights did not nullify his ban under 18 U.S.C. § 922(g)(4), which prohibits possession of firearms by those who have been involuntarily committed to a mental institution. The current federal statutory scheme permits states to opt in to a program in which their state reviewing bodies may lift the

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3. Id.
4. Id.
6. Mai v. United States (Mai I), 952 F.3d 1106, 1110 (9th Cir. 2020).
8. Id. at 8.
9. Id. at 7.
12. Appellant’s Opening Brief, supra note 7, at 8.
13. Id.
14. Id.
15. Mai v. United States (Mai I), 952 F.3d 1106, 1110 (9th Cir. 2020).
federal ban on their citizens. But Washington, like the majority of states in 2020, has not elected to opt in to the program. Effectively, because of a short, involuntary commitment more than twenty years ago, Mai can never purchase a firearm under federal law. The law stands on the shaky premise that once mentally ill, always mentally ill, and stigmatizes those like Mai who have overcome their bouts with depression.

Unable to take advantage of restorative programs, Mai brought a Second Amendment suit in federal court to reestablish his rights, but he has lost in each of his cases. His legal struggles highlight two areas for concern in modern Second Amendment jurisprudence. First, the court’s analysis of his challenge to § 922(g)(4) differs greatly from two factually similar cases outside of the Ninth Circuit where Mai brought his challenge, highlighting the bare unpredictability of modern Second Amendment jurisprudence. Second, and more narrowly, the effective lifetime ban on firearm possession by those involuntary committed for old and nonextant mental health concerns is unconstitutional under any of the current competing Second Amendment analyses.

In Part II, this Comment will outline current Second Amendment jurisprudence. Part III will address Mai’s case and two other as-applied challenges to § 922(g)(4) that have reached the federal courts of appeals, all of which have resulted in different holdings. Part IV will show that the statute, as it stands, fails under the ascendental historical approach advanced by originalist judges since then-Judge Kavanaugh’s dissent in *Heller v. District of Columbia*, and Part V will show the same under the widely used tiered scrutiny approach.

**II. THE CURRENT STATE OF SECOND AMENDMENT JURISPRUDENCE**

The Second Amendment provides that, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The amendment is no model for clarity—one Second Amendment scholar noted that “[i]t’s almost as if James Madison, the author of the amendment, had just discovered this wonderful new thing, the comma, and wanted to put it in there as many times as possible.” For most part of its history, clauses and commas befuddled anyone trying to make sense of the amendment, and only a handful of Supreme Court cases shed any light on the one-sentence amendment.

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17. See infra Part II.D.1.
20. See infra Parts III.A–III.B (discussing the two cases).
21. U.S. CONST. amend. II.
A. MILLER TO HELLER

Not until the 2008 decision in District of Columbia v. Heller did the Supreme Court attempt to delineate the amendment’s scope. Until Heller, debate raged over whether the Second Amendment protects an individual right to keep and bear arms or, instead, a collective right protecting firearm use only in connection with militia service. In Heller, Justice Scalia resolved the individual- or collective-rights debate in favor of the former interpretation. Writing for the five-justice majority, Justice Scalia penned a well-researched originalist analysis of the Second Amendment, looking to dictionary definitions contemporary to the Constitution’s ratification, post-English Restoration militia laws, and late eighteenth-century state constitutions to conclude that the right conferred was, indeed, an individual one. To Justice Scalia, the amendment’s prefatory clause—providing that “[a] well regulated Militia being necessary to the security of a Free State”—serves only to announce the purpose for which the right to keep and bear arms was originally codified, and not to limit the operative clause to a collective right protecting only those serving in the militia. Next, highlighting the importance of self-defense weapons in the history of the Second Amendment, the majority held that the District of Columbia’s blanket ban on handgun possession, including those held in the home for self-defense, was constitutionally forbidden. The holding failed to settle the Second Amendment debate.

For all that Justice Scalia did to clarify the rights debate, he left open the question of how to address future Second Amendment challenges. Answers to whether Justice Scalia prescribed a constitutional analysis for future challenges in his opinion are up-for-debate at best. Questions on the proper analysis are further complicated by the debate over how much deference to give Heller’s “presumptively lawful” bans. In noting the limits of the Second Amendment right at the end of the opinion, Justice Scalia gave his blessing to bans on possession by the mentally ill by giving it the label of presumptively lawful, but the claim went unsupported. In effect, the unsubstantiated sentence excuses

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25. Justice Scalia used Samuel Johnson’s eighteenth-century dictionary to define both “arms” and “keep.” Id. at 581–82 (quoting 1 DICTIONARY OF THE ENGLISH LANGUAGE 106, 1095 (4th ed. 1773) (rept. 1978)).
26. Id. at 593–95.
27. Id. at 600–03.
28. Id. at 595.
29. Id. at 595, 599.
30. Id. at 624–25 (quoting State v. Kessler, 614 P.2d 94, 98 (Or. 1980)) (“In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.”).
31. Id. at 635.
32. Id. at 626–27, 627 n.26.
33. See id. (listing other presumptively lawful prohibitions in addition to the ban on possession by formerly mentally ill individuals, including bans on the possession of “dangerous
§ 922(g)(4)’s ban. Certainly, those who are currently mentally ill might be required to face some hurdles in firearm possession, but did Justice Scalia give a nod to lifetime bans based on little more than a period of mental illness in a person’s youth? Such a position is unlikely, given that the late justice’s opinion amounts to a sixty-three-page screed against a complete handgun ban. But the lack of a clearly defined analysis coupled with unsubstantiated dicta leaves a tangle of unsettled questions on Second Amendment doctrine, especially as it relates to the presumptively lawful categorical bans.

The confusion has played out in the “presumptively lawful” ban under § 922(g)(4). In fact, many post-Heller challenges to § 922(g)(4), though containing largely identical facts, have seen different results.34 Factoring in dissenting and concurring opinions, the list of hypothesized ways to resolve these as-applied challenges proves mind-numbingly complex and leaves even judges confused.35 To be sure, the Court has granted certiorari to a number of Second Amendment cases post-Heller, but none have resolved the debate surrounding the proper analysis,36 and lower courts have had to make sense of Heller on their own.

B. Tiered Scrutiny or “Text, History, and Tradition”?

“In Heller’s wake, two opposing points of view have emerged regarding [the] proper” analysis for Second Amendment challenges.37 All circuits have filled the gap by opting for a two-tiered analysis first pioneered by the Third Circuit in United States v. Marzzarella.38 Under this approach, courts first ask what level of scrutiny applies based on whether the statute burdens the Second Amendment’s core of lawful self-defense39 and then analyze the statute under

and unusual” weapons, possession by felons, and the carrying of weapons in certain sensitive places); see also McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (reaffirming the list of presumptively lawful regulatory measures and explicitly extending the Second Amendment to the states through the Fourteenth Amendment).

34. E.g., Mai v. United States (Mai I), 952 F.3d 1106, 1109, 1121 (9th Cir. 2020) (finding that § 922(g)(4) withstands intermediate scrutiny as applied to the plaintiff); Beers v. Att’y Gen. United States, 927 F.3d 150, 159 (3d Cir. 2019), cert. granted, judgment vacated sub nom. Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.) (disposing of the challenge and upholding the statute under the first step of tiered scrutiny); Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II), 837 F.3d 678, 699 (6th Cir. 2016) (en banc) (applying intermediate scrutiny, finding that the plaintiff has a viable claim, and remanding to the district court).

35. In the en banc opinion of Tyler, Judge Gibbons writes that “as [she] read[s] the opinions . . . at least twelve of [them] agree that intermediate scrutiny should be applied.” Tyler II, 837 F.3d at 699 (emphasis added).


39. Marzzarella, 614 F.3d at 89–90. The Court in Heller stated that “[M]ost [Americans] undoubtedly thought [the Second Amendment] even more important for self-defense and hunting,” and the interest in self-defense “was the central component of the right itself.” District of Columbia
the requisite scrutiny.\textsuperscript{40} Despite the lack of direction in \textit{Heller}, the court in \textit{Marzzarella} read the landmark case to suggest such a tiered approach.\textsuperscript{41} Though it enjoys dubious approval in \textit{Heller}, the approach presents a familiar analysis to judges used to analyzing tiered scrutiny in other constitutional claims.

C. “TEXT, HISTORY, AND TRADITION”: THE HISTORICAL APPROACH

By contrast, the historical approach resolves Second Amendment challenges by combing historical sources and striking down statutes for which no analogy can be found.\textsuperscript{42} The approach has not seen widespread approval in majority opinions, but a growing number of originalist judges have advocated its approach in dissents or concurrences, such that it may see approval over tiered scrutiny in the future. Advocates of the historical approach make much of Justice Scalia’s keen eye to the history of the Second Amendment in \textit{Heller} when determining the scope of the right. They further maintain that Justice Scalia’s dive into the history of the amendment amounts to an analysis for lower courts to emulate in future cases that leaves no room for interest balancing.\textsuperscript{43}

In 2011, then-Judge Kavanaugh on the D.C. Circuit took up the flag for the historical approach and argued for its adoption in his dissenting opinion in \textit{Heller II}.\textsuperscript{44} His dissent is frequently seen as the genesis of the revolt against tiered scrutiny.

Three years after \textit{Heller}, \textit{Heller II} concerned the District of Columbia’s renewed attempt to regulate firearm possession. Following the first \textit{Heller} case, the D.C. Council passed a slew of regulations that required firearm registration\textsuperscript{45} and prohibited broadly defined categories of assault weapons\textsuperscript{46} and large-capacity magazines.\textsuperscript{47} Although the registration requirements provided the avenue to gun ownership that \textit{Heller} required, they created a protracted process for ownership that included, among other requirements, sufficient eyesight,\textsuperscript{48} a knowledge of local firearm laws,\textsuperscript{49} fingerprinting,\textsuperscript{50} and continued background checks.\textsuperscript{51} The assault-weapons ban was sweeping, covering certain semi-automatic rifles, pistols, shotguns, and all semi-automatic firearms that included pistol grips or thumbhole stocks.\textsuperscript{52} The regulations, at least ostensibly, complied...
with *Heller* in that they provided Dick Heller and other D.C. residents an avenue for legal ownership of firearms for the purpose of self-defense. Even so, Heller and the co-plaintiffs in the case were each denied possession of certain weapons after compliance with the application process, and they brought suit against the regulations’ barriers to ownership and the outright ban on certain classes of weapons.53

Dick Heller—often lionized by Second Amendment proponents for his successes in his first challenge54—was unable to repeat his earlier Supreme Court victory, losing at the D.C. Circuit on his Second Amendment arguments against assault-weapon and high-capacity-magazine bans.55 Judge Douglas H. Ginsburg looked to the freshly minted *Heller* opinion in support of the contention that the plaintiffs’ Second Amendment right was not without bounds.56 He then applied the widely accepted two-step analysis to the Second Amendment issue, looking to *Heller* to aid in determining the requisite level of scrutiny.57 Judge Ginsburg eventually settled on intermediate scrutiny but remanded the case to the district court to develop a fuller record on the novel requirements’ relation to government interests.58 The opinion was par for the course for current Second Amendment cases: the majority looked to *Heller*, and then it applied tiered scrutiny.

While Heller’s second attempt failed to overturn the laws at issue, then-Judge Kavanaugh’s full-throated dissent has ensured that the case has a spot in the canon of gun-rights cases. Judge Kavanaugh disagreed with both the result of the case and the application of tiered scrutiny. To him, the proper route for Second Amendment analyses lies in the “text, history, and tradition” of the amendment and in appropriate historical analogues for novel weapons regulations, rather than judicial “re-calibrat[ion]” of the scope of the right through tiered scrutiny.59 Central to Judge Kavanaugh’s argument is that the historical test, which he underhandedly calls “the *Heller* test,” is “more determinate and ‘much less subjective’ because ‘it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague . . . [p]rinciples whose combined conclusion can be found to point in any direction the judges favor.’”60 To him, his approach precludes judicial subjectivity. Under such an approach, Judge Kavanaugh would have held that the statutes at issue were unconstitutional because they were neither longstanding nor sufficiently

55. *Heller II*, 670 F.3d at 1264.
56. *Id.* at 1252.
57. *Id.* at 1252–53.
58. *Id.* at 1253, 1258–60.
59. *Id.* at 1271 (Kavanaugh, J., dissenting).
60. *Id.* at 1274 (quoting McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring)).
rooted in text, history, and tradition of the Second Amendment.\textsuperscript{61}

\subsection{Section 922(g)(4)’s Effective Lifetime Ban}

Debate over the proper analysis has raged across Second Amendment challenges, but especially so in challenges to §922(g)(4). Congress passed this and other gun-control statutes in 1968 in an effort to stem the number of high-profile shootings that had marked the decade. Just five days after Lee Harvey Oswald assassinated President Kennedy in 1963 with a mail-order rifle, Senator Thomas Dodd from Connecticut led the charge for gun control by introducing legislation to restrict sales of firearms through the mails.\textsuperscript{62} Though the efforts of the initial Dodd bill came to nothing, Senator Dodd continued to introduce legislation at the request of President Johnson.\textsuperscript{63} Comprehensive legislation finally saw widespread support in 1968 after two more high-profile killings: the Gun Control Act of 1968 (GCA) passed the Senate the month after the slaying of Martin Luther King, Jr. and passed the House the day after the assassination of Robert F. Kennedy.\textsuperscript{64} Congress declared that the GCA’s purpose was “to provide support to [f]ederal [and] [s]tate . . . law enforcement officials in their fight against crime and violence.”\textsuperscript{65} To that end, the GCA expanded the categories of congressionally defined groups proscribed from firearm possession, including felons and the mentally ill.\textsuperscript{66}

Including a ban on possession by the mentally ill, perhaps in some ways precipitated by the violence of the mid-1960s, extended the list of prohibited classes past pre-GCA regulations. Senator Dodd blamed violent television programs, extremist organizations, and the ease with which Americans can obtain firearms as contributing to a “sickness of violence.”\textsuperscript{67} Sickness, a byword for mental illness, was thus squarely within the GCA’s sights. No doubt Senator Dodd was thinking of “sick” assassins like Lee Harvey Oswald and James Earl Ray in his remarks.

In order to hinder the sickness of violence, §922(g)(4) provides that “[i]t shall be unlawful for any person who has been adjudicated as a mental defective or who has been committed to a mental institution” to possess or receive any firearm.\textsuperscript{68} The ATF regulations expand on the statute, defining one as “[a]djudicated as mental defective” if there has been a determination by a legal body that “a person, as a result of marked subnormal intelligence, or mental

\begin{itemize}
  \item \textsuperscript{61} \textit{Id.} at 1285.
  \item \textsuperscript{66} Zimring, supra note 64, at 149.
  \item \textsuperscript{67} 114 CONG. REC. S16649 (daily ed. June 11, 1968) (statement of Sen. Dodd).
  \item \textsuperscript{68} 18 U.S.C. § 922(g)(4).
\end{itemize}
illness, incompetency, condition, or disease” is a “danger to himself or others” or “[l]acks the mental capacity to contract or manage his own affairs.”69 The term “[c]ommitted to a mental institution,” at issue in the Mai case, includes involuntary commitments to mental institutions for mental defectiveness, mental illness, or “other reasons, such as for drug use.”70

1. The Relief Program

Of crucial importance to the statute’s unconstitutionality, the ban on firearm possession by those who have been adjudicated mentally ill was never meant to be permanent. The framers of the GCA had the foresight to provide an outlet for those barred by §922(g)(4) to reattain their Second Amendment rights through application to the Attorney General.71 Such outlet, codified at 18 U.S.C. §925(c), grants to the Attorney General the ability to grant “relief from the disabilities imposed by Federal laws” after reviewing the circumstances of the applicant’s record and deciding “that the applicant will not be likely to act in a manner dangerous to public safety.”72 The Attorney General later delegated the authority to review these claims to the director of the ATF.73 In 1992, however, Congress defunded the program,74 and for fifteen years thereafter, all people like Mai were left without an avenue to regain their Second Amendment rights.

In 2008, there was renewed hope for those like Mai wanting to restore their rights: that year Congress punted the issue of adjudicating relief to the states. In changes to the National Instant Criminal Background Check System (NICS) scheme,75 Congress gave states the power to grant relief from §922(g)(4)’s ban if an authorized state body found that the individual would not pose a danger to public safety.76 States that created relief-granting bodies in compliance with Congress’s scheme became eligible for grant funding to assist in implementing such bodies.77 The congressional punt has proven only somewhat successful. The availability of grant funds has only attracted a handful of states: in 2020, only twenty-two states received funding.78 In all other states, formerly involuntarily committed persons are unable to regain their Second Amendment rights via any federal or state statutory or administrative route. The only option left for this class of individuals is to bring an as-applied Second Amendment challenge to the statute, a costly and flawed solution. Some applicants that have

69. 27 C.F.R. § 478.11 (2019).
70. Id.
72. 18 U.S.C. § 925(c).
73. 28 C.F.R. § 0.130(a)(1) (2015).
76. Id.
77. Id. § 301, at 2571.
78. See NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020, supra note 18.
brought Second Amendment claims have indeed received a federal reinstatement of rights. In a minority of cases, judges have interpreted “involuntary commitment” under § 922(g)(4) narrowly to avoid the deprivation of rights. In others, judges have found the statute unconstitutional as applied. Although promising, adjudication of these claims on an as-applied basis is too costly for many potential plaintiffs, would clog federal dockets, and on a more fundamental level, serves as an unwieldy vehicle through which American citizens should be forced to rely to reinstate their rights.

III. RECENT AS-APPLIED CASES AGAINST SCHEME OF § 922(G)(4) IN THE CIRCUIT COURTS

These challenges to § 922(g)(4)’s effective lifetime ban have been met with mixed results. As mentioned, the three factually similar post-**Heller** challenges to § 922(g)(4) that have reached the federal circuit courts have reached markedly different conclusions. This Part will discuss the three cases and their outcomes.

A. SIXTH CIRCUIT: **TYLER v. HILLSDALE COUNTY SHERIFF’S DEPARTMENT**

The Sixth Circuit was the first circuit post-**Heller** to wrestle with a Second Amendment challenge to § 922(g)(4) in **Tyler v. Hillsdale County Sheriff’s Department**. The state of Michigan’s failure to implement a relief program meant that Tyler was unable to purchase a firearm, but the district court dismissed his suit for failure to state a claim under the Second Amendment. In the panel decision on appeal, Judge Boggs disagreed with the lower court’s analysis. He settled on tiered scrutiny in keeping with the circuit’s precedent on Second Amendment challenges to categorical bans. Bound by the use of tiered scrutiny, Judge Boggs was free to choose the level of scrutiny as a matter of first impression for the circuit. Noting what he called “intermediate scrutiny’s shaky foundation in Second Amendment law” and that the strongest argument in its favor amounted to nothing more than its popularity among circuits in other categorical bans, Judge Boggs opted to examine the as-applied challenge under

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79. Franklin v. Sessions, 291 F. Supp. 3d 705, 723–24 (W.D. Pa. 2017) (avoiding the “seriousness of these constitutional issues” with regards to a lack of review in Pennsylvania through the canon of constitutional avoidance); United States v. Rehlander, 666 F.3d 45, 49 (1st Cir. 2012) (“[W]e now conclude that section 922 should not be read to encompass a temporary hospitalization attended only by the ex parte procedures of section 3863.”).
82. Id. at 313–15.
84. **Tyler I**, 775 F.3d at 317–18 (citing United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).
85. Id. at 311.
86. Id. at 330.
87. Id. at 324.
strict scrutiny. He subsequently held that Tyler had stated a claim and remanded to the district court. Judge Boggs’s opinion rankled his Sixth Circuit colleagues, who reviewed the case en banc. The en banc panel agreed that reversing the district court was proper, but it disagreed with Judge Boggs’s choice of strict scrutiny. In the first step of tiered scrutiny—whether the statute burdened conduct protected by the Second Amendment—the en banc panel rejected the government’s argument that Heller’s presumptively lawful language meant that § 922(g)(4) was per se constitutional. Instead, the court rightfully noted that the presumptively lawful category rested on ambiguous historical support, and it found that previously committed persons “are not categorically unprotected by the Second Amendment.” Consequently, § 922(g)(4), at least as applied to Tyler, burdened his Second Amendment right. Second, the en banc majority reasoned that risks inherent in firearms distinguish Second Amendment claims from other rights that use strict scrutiny, and it instead settled on the “near unanimous preference for intermediate scrutiny.” Noting that Tyler had a “viable claim” under the Second Amendment and citing an incomplete record, the court remanded the case to the district court for resolution.

In total, six concurrences and one dissent trade punches on the correct analysis, highlighting the judicial confusion post-Heller. In the same vein as Judge Kavanaugh’s dissent in Heller II, Judge Batchelder advocated for the historical approach in concurrence because, to her, two-step analyses “fail[] to give adequate attention to the Second Amendment’s original public meaning.” Regardless, the majority opinion’s evenhanded approach that held Tyler had stated a claim in Tyler II provides the best approach of the three circuit-level opinions to ensure that plaintiffs have at least some avenue for a restoration of rights. Further, the opinion leaves little doubt as to the proper analysis for future as-applied challenges to § 922(g)(4) within the Sixth Circuit: judges are to employ a two-step analysis and use intermediate scrutiny.

B. THIRD CIRCUIT: BEERS V. ATTORNEY GENERAL UNITED STATES

In the case of Beers v. Attorney General United States, the Third Circuit, like the Sixth before it, looked to a two-step inquiry to resolve the as-applied challenge to § 922(g)(4). The Third Circuit, though, employed a novel form of

88. Id. at 328.
89. Id. at 344.
90. Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II), 837 F.3d 678, 699 (6th Cir. 2016).
91. Id. at 688–90.
92. Id. at 690.
93. Id. at 691.
94. Id. at 692.
95. Id. at 699.
96. Id. at 699–721.
97. Id. at 702 (Batchelder, J., concurring).
the two-step inquiry tailored specifically to categorical bans that replaces the first step of the inquiry with a two-part question. Under the Third Circuit’s formulation, the challenger must (1) identify the traditional justifications for the exclusion of his class from Second Amendment protections, and (2) present facts about himself that distinguish him from persons of the historically barred class. 99 This approach, the Binderup approach, explicitly invites challengers to present their medical histories as testament to their reformed status and serves as an ostensibly sympathetic route for the restoration of rights.

But the Third Circuit’s opinion was anything but plaintiff-friendly. In the first step of the Binderup approach, the Third Circuit read the history of the rights of the mentally ill to say something entirely different than did the Sixth Circuit before it. Whereas the Sixth Circuit read history to stand for the proposition that mental illness did not conclusively justify a lifetime ban, 100 the court in Beers concluded that the historical practice of disarming potentially dangerous persons justified § 922(g)(4). 101 The panel downplayed the novelty of bans on firearm possession by the mentally ill by noting that similar laws would have been unnecessary in the eighteenth century, when judicial officials were free “to lock up . . . individuals with dangerous mental impairments” because they posed a danger to the public. 102 In such a system, the mentally ill would have been unable to access firearms without the need for statutes. 103 By analogy, the court reasoned that “if taking away a [mentally ill person]’s liberty was permissible, then . . . the lesser intrusion of taking his . . . firearms” should be no cause for concern. 104 The court then looked to whether Beers had sufficiently distinguished himself from the historical group, decided that he had not, and upheld the lower court’s rejection of his challenge. 105

C. NINTH CIRCUIT: MAI V. UNITED STATES

The majority opinion from the Ninth Circuit’s iteration of an as-applied challenge to § 922(g)(4) presents yet another different outcome from a largely similar factual scenario. In reviewing Mai’s Second Amendment challenge to the federal statute, the Ninth Circuit, like the two circuits before it, employed a two-step analysis. 106 Under the first step, Mai urged the Ninth Circuit to follow Tyler II’s lead by finding that mental illness does not justify a lifetime ban and, consequently, that the statute burdened his Second Amendment right. 107 The

99. Id. at 155 (quoting Binderup v. Att’y Gen. United States, 836 F.3d 336, 346–47 (3d Cir. 2016)).
100. Tyler II, 837 F.3d at 689–90.
101. See Beers, 927 F.3d at 157–58.
102. Id. at 158 (internal quotations omitted) (citing Carlton F.W. Larson, Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit, 60 HASTINGS L.J. 1371, 1377–78 (2009)).
103. See id.
104. Id. (internal quotations omitted) (quoting Jefferies v. Sessions, 278 F. Supp. 3d 831, 841 (E.D. Pa. 2017)).
105. Id. at 158–59.
106. Mai v. United States (Mai I), 952 F.3d 1106, 1113 (9th Cir. 2020).
107. Id. at 1114.
court declined to decide one way or the other on the issue, however, and assumed without deciding that the statute burdened his rights.\textsuperscript{108} Although the court noted in Mai’s favor that “[t]hose who are no longer mentally ill . . . unquestionably pose less of a risk of violence” compared to when they were institutionalized,\textsuperscript{109} it shot down the challenge under intermediate scrutiny because of the government’s interests in preventing crime and suicide.\textsuperscript{110}

In his dissenting opinion from the denial to rehear the *Mai* case en banc, Judge Bumatay took issue with the holding of the case and the application of tiered scrutiny, penning a strident but well-researched dissent arguing that the text, history, and tradition of the Second Amendment supported Mai’s contention that he should be allowed to own a firearm.\textsuperscript{111} The forcefulness of the dissent makes it a viable alternative to tiered scrutiny, and yet another potential candidate for as-applied challenge analyses.

D. TAKING STOCK

It is difficult to explain the three divergent majority opinions. Out of the three final opinions, *Tyler II* takes the most plaintiff-friendly approach and suggests unconstitutional application, *Beers* expresses hostility towards restoration of rights for the once involuntarily committed, and *Mai I* gives deference to government interests. All three cases use a form of tiered scrutiny and settle on intermediate scrutiny, but Beers failed to pass step one, Mai failed to pass step two, and Tyler stated a viable claim under both steps such that it was necessary to remand. The spectrum of possibilities only increases when factoring in the cases’ dissents, concurrences, and nonfinal judgements.

The Sixth Circuit in *Tyler II* came closest to correctly recognizing that the effective lifetime ban under § 922(g)(4) is an unconstitutional infringement on the Second Amendment rights of those who have enjoyed years of good mental health after involuntary commitment. Such a ban fails under the historical approach advanced by then-Judge Kavanaugh, and it is too broad to survive tiered scrutiny, as will now be demonstrated in turn.

IV. SECTION 922(G)(4) PROVES UNCONSTITUTIONAL UNDER THE HISTORICAL APPROACH

Judges looking to the text, history, and tradition of the Second Amendment should strike down these as-applied challenges as unconstitutional. To repeat, no circuit court has adopted this approach, but it has enjoyed ascendent levels of approval in dissent such that it may feature in a majority opinion in the future.

\textsuperscript{108} Id. at 1114–15.
\textsuperscript{109} Id. at 1121.
\textsuperscript{110} Id. at 1116.
\textsuperscript{111} Mai v. United States (*Mai II*), 974 F.3d 1082, 1085–88 (9th Cir. 2020) (Bumatay, J., dissenting).
A. HISTORY OF STATUTES BANNING POSSESSION

Put bluntly, laws banning possession by the involuntarily committed do not enjoy a historical pedigree, with one commentator noting that “[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership.”\textsuperscript{112} The closest historical support lies in two state laws from the 1880s, which do not specifically target the mentally ill but rather ban possession by those of an “unsound mind.”\textsuperscript{113} Such laws did not see wider approval until the 1930s when a small number of states adopted the American Bar Association’s Uniform Firearms Act, which “prohibited delivery of a pistol to any person of ‘unsound mind.’”\textsuperscript{114} In addition to a flimsy pedigree, these statutes may not even serve as proper analogues. As another scholar has noted, the definition of unsound mind suggests a permanent condition instead of a temporary one, like mental illness, which can often be remedied with medical assistance.\textsuperscript{115}

As discussed in Part II, supra, the history of § 922(g)(4) is not longstanding: Congress passed § 922(g)(4) in the late 1960s, a mere forty years before Heller. Even then, the ban was not meant to be permanent, as the relief scheme gave those categorically banned the opportunity to prove their return to mental sanity.\textsuperscript{116} Only in 1992 did the ban become effectively permanent, and even then, the changes to the scheme were intended to keep guns out of the hands of felons, not the mentally ill.\textsuperscript{117}

B. HISTORICAL ANALOGIES

If no direct historical precedent can be found, judges are next to “reason by analogy from history and tradition.”\textsuperscript{118} To be sure, finding a direct analogue for § 922(g)(4) is likely fruitless because, as the court in Beers noted, such bans were historically unnecessary owing to the practice of institutionalization in the colonial and early periods of America,\textsuperscript{119} which obviated the need for statutes

\textsuperscript{112}. Larson, supra note 102, at 1376.
\textsuperscript{114}. Larson, supra note 102, at 1376–77. Pennsylvania, for example, adopted the uniform statute in the 1930s. Mai II, 974 F.3d at 1089.
\textsuperscript{115}. Nash E. Gilmore, A Bridge Over Troubled Water: The Second Amendment Guarantee for the Previously Mentally Institutionalized, 86 Miss. L.J. SUPRA 1, 26 (2017) (citing Unsound Mind, BLACK’S LAW DICTIONARY (2d ed. 1910)) (noting that the Black’s Law definition of “unsound mind” refers to “an adult who from infirmity of mind is incapable of managing himself or his affairs”).
\textsuperscript{116}. See supra Part II.
\textsuperscript{117}. See Gilmore, supra note 115, at 22–23 (discussing what Gilmore calls the accidental restriction). Gilmore notes that Senate hearings reveal a concern with felon possession. \textit{Id}. In those hearings, Senator Simon stated that “[t]he goal of this provision has always been to prohibit convicted felons from getting their guns back . . . .” \textit{Id}. at 23 n.119 (quoting 142 CONG. REC. 27,066 (1996)).
\textsuperscript{118}. Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1275 (D.C. Cir. 2011).
on societal behavior. In the Enlightenment period, the asylum quickly became
the primary approach to treat the mentally ill. As the Beers court noted,
judicial officials in this asylum-based system were free “to ‘lock up’... indi
individuals with dangerous mental impairments,” such that laws on firearm
possession were unnecessary. Institutionalization became “an object of
praise” in the eighteenth century and continued as the dominant remedy for
mental health until the mid-twentieth century, when doctors came to see
medication as the primary means of combating mental illness. In sum, there
simply was no need for statutes on how to deal with the mentally ill at the time
of our nation’s founding until some 200 years had elapsed.

Instead, one must look to historical analogy, for which institutionaliza-
tion is the proper analogue to modern bans on possession by the mentally ill. In the
period of institutionalization, the loss of rights associated with mental illness
lasted only as long as a person’s commitment. Judge Bumatay notes in his Mai II
dissent that a Lockean understanding of reason and rights can shed light on
the historical relationship between temporary commitment and the
commensurate loss of rights. To Locke, rights attach to those who have
attained “reason,” and those rights can be stripped only for the duration that a
person has lost reason. The link therein to mental health lies in the fact that
colonial health experts treated mental illness as a temporary loss of reason. State laws on the subject are in accord. Early Virginia laws limited rights to
“lunatics” only “during their state of insanity.” As one treatise puts it, “a
lunatic [was] never to be looked upon as irrecoverable.”

Although no direct historical analogue exists, a Lockean understanding of
rights supports the idea that a loss of rights should last no longer than the period
of loss of reason. Using such an approach as our historical analogue in the
absence of similar statutes, then, § 922(g)(4) is unconstitutional.

V. TIERED SCRUTINY

Courts, at least for the foreseeable future, are much more likely to resolve
challenges to § 922(g)(4)’s prohibition on firearm possession by the mentally ill
on the basis of tiered scrutiny. All circuits currently employ some form of

121. Beers, 927 F.3d at 158 (citing Larson, supra note 102, at 1377–78).
122. O’REILLY & LESTER, supra note 120, at 36–40.
123. See Heller II, 670 F.3d at 1275.
124. Mai v. United States (Mai II), 974 F.3d 1082, 1089 (9th Cir. 2020) (Bumatay, J.,
dissenting).
125. Id. (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1691), reprinted in 4 JOHN
LOCKE, THE WORKS OF JOHN LOCKE 207, 339, 342 (12th ed. 1824)).
126. Id.
127. Id. (citing 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF
REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED
STATES; AND OF THE COMMONWEALTH OF VIRGINIA 145 (1803)).
128. Id. (citing ANTHONY HIGHLMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 73
(1807)).
scrutiny for as-applied Second Amendment challenges to categorical bans, with the historical approach seeing daylight only in dissent. That being said, history has a place in the two-step analysis. In the words of the Ninth Circuit, the first step of the tiered-scrutiny analysis requires courts “to explore the amendment’s reach based on a historical understanding of the scope of the Second Amendment right.”\(^{129}\) The second step of the analysis, on the other hand, looks to the government interests in passing the statutes and the scientific data undergirding those interests.\(^{130}\)

**A. GOVERNMENT INTERESTS AT STAKE**

As-applied challenges to firearm bans under § 922(g) frequently feature litigants duking it out over medical studies to bolster, or undercut, alleged government interests. For § 922(g)(4) specifically, those interests are almost always prevention of crime and suicide.\(^{131}\) These interests are indisputably laudable, and few would likely take umbrage at their classification as compelling or legitimate.\(^{132}\) At the same time, the government must be able to establish a fit between those objectives and the current lifetime ban on the possession of firearms under § 922(g)(4)\(^{133}\) without resorting to “mere anecdote and supposition.”\(^{134}\) This the government cannot do. Studies often prove a higher short-term propensity for violence or suicide post-release for certain subsets of the community suffering from mental health conditions.\(^{135}\) But those trends are simply not borne out in studies of those who have enjoyed decades of good mental health after involuntary commitment. Upholding § 922(g)(4)’s ban despite that fact undercuts the Ninth Circuit’s “emphatic[]” rejection of “the notion that ‘once mentally ill, always so.’”\(^{136}\) In the words of the *Tyler II* court, the proffered studies do not justify a lifetime bar to a fundamental right for a person who was “involuntarily committed many years ago and who ha[s] no history of intervening mental illness, criminal activity, or substance abuse.”\(^{137}\) The ninetieth Congress would agree, since it never actually intended the GCA to be a lifetime ban on possession when it passed the Act in 1968.\(^{138}\)

\(^{129}\). *Mai v. United States (Mai I)*, 952 F.3d 1106, 1114 (9th Cir. 2020) (internal citation omitted).

\(^{130}\). *Id.* at 1116–17.

\(^{131}\). See, e.g., *id.* at 1116; *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 331 (6th Cir. 2014).

\(^{132}\). *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“There is no doubt that preventing danger to the community is a legitimate regulatory goal.”); *United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (“Although the government’s interest need not be ‘compelling’ under intermediate scrutiny, cases have sometimes described the government’s interest in public safety in that fashion.”).

\(^{133}\). *Tyler I*, 775 F.3d at 331.

\(^{134}\). *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 694 (6th Cir. 2016) (internal quotations omitted) (quoting *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012)).

\(^{135}\). *Id.* at 694–96 (discussing research on formerly involuntarily committed people’s risk for violence and suicide risk).

\(^{136}\). *Mai I*, 952 F.3d at 1121.

\(^{137}\). *Tyler II*, 837 F.3d at 699.

\(^{138}\). *See supra* Part II.D.
1. Crime Prevention

Neither studies on the government interest of crime prevention nor scare tactics on the dangers posed by the mentally ill warrant a lifetime ban on firearm possession. Eliciting the names of mass shooters with histories of mental health problems, as the government did in *Tyler I*, does nothing to prove why all persons with past mental health problems deserve a lifetime ban and serves only to further stigmatize this class of Americans. The government in *Tyler I* unfairly drew parallels between the plaintiff and the Virginia Tech shooter, who had a mental health history that should have disqualified him from being able to pass a background check.\(^\text{139}\) In that case, a disconnect between state and federal reporting systems led to his being able to purchase the firearms that ultimately killed thirty-two students in 2007.\(^\text{140}\) This fact may underscore the importance of effective background check systems, but such an analogy to Tyler amounts to dishonesty. On the one hand, the Virginia Tech shooter had revered the Columbine massacre in middle school,\(^\text{141}\) written violent stories in his college English classes,\(^\text{142}\) and grown so hostile in class that his classmates stopped attending lectures.\(^\text{143}\) Tyler, by comparison, had a brief depressive episode in 1985 after his “wife of twenty-three years ran away with another man, depleted [his] finances, and then served him with divorce papers,” and for the next thirty years he experienced no problems.\(^\text{144}\)

Most medical studies are similarly ill-suited to justify lifetime bans. One frequently cited scientific study found an increased propensity for reported assaultive weapon use for 11.1% of former mental health patients compared to only 2.7% of the never-treated control group.\(^\text{145}\) Yet when the researchers adjusted their findings for psychotic symptoms, they found that “much of the difference between mental patient groups and the never-treated group in rates of relatively recent violent/illegal behavior can be explained by the level of psychotic symptoms.”\(^\text{146}\) In effect, the study only shows that those who have been committed and who are still exhibiting symptoms of mental health problems pose an increased risk. At any rate, the category of former patients in the study is overbroad, including any former patient who has not gone to mental health counseling in the past year,\(^\text{147}\) and is subsequently an inapt comparison for those


\(^{140}\) Id.


\(^{142}\) Id. at 41–42.

\(^{143}\) Id. at 42–43.

\(^{144}\) *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 683–84 (6th Cir. 2016).


\(^{146}\) Id. et al., supra note 145, at 288.

\(^{147}\) Id. at 280.
like Mai that have not needed counseling for decades. An often cited meta-
alysis of five studies shows that 0.3% of schizophrenics committed homicide
compared to 0.02% of the general population—a fifteen-fold increase. But
schizophrenia is a “lifelong brain disorder,” and while the study may weigh
against restoration of Second Amendment rights to schizophrenics, it does little
to prove the same for temporary depressive episodes. When looking to the
broader spectrum of mental health disorders, one study’s “most unexpected
finding” was the sharp decline in violent activity over time. In that same study,
when controlling for substance-abuse problems, the researchers found that “the
rates of violent acts perpetrated by involuntarily committed patients and the
general population [of the study’s community were] ‘statistically
indistinguishable.’” Not surprisingly, the authors of one law review article
wrote that, collectively, studies that track mental health patients without
substance-abuse disorders “suggest that only the seriously mentally ill or those
with psychosis are more violent.”

According to the studies, only certain subsections of the community afflicted
by mental health problems pose an increased risk. Those subsets are not
nebulous groupings or ill-defined categories, but rather they are those that suffer
from certain conditions like psychosis or schizophrenia, or suffer from comorbid
addictions like alcohol or drug decencies. With a thumbs-up from a physician
confirming a clean bill of mental health, there simply is no scientific basis
linking increased criminality to those like Mai or Tyler.

2. Suicide Prevention

The government’s interest in preventing self-harm among those with mental
health problems further buttresses Congress’s reasons for § 922(g)(4). Like
the prevention of crime, the interest here similarly enjoys Supreme Court
recognition. But like the shaky support from criminality studies, the studies
on suicide rates do not justify rigid lifetime bans on constitutional rights. For
example, one government-cited meta-analysis in Tyler II shows a suicide risk
for involuntarily committed patients at “thirty-nine times that expected,” but the

148. Seena Fazel, Gautam Gulati, Louise Linsell, John R. Geddes, & Martin Grann,
Schizophrenia and Violence: Systematic Review and Meta-Analysis, 6 PLOS MED. 1, 7 (Aug. 11,
2009).
150. Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II), 837 F.3d 678, 696 (6th Cir. 2016)
quoting Henry J. Steadman, Edward P. Mulvey, John Monahan, Pamela Clark Robbins, Paul S.
Appelbaum, Thomas Grisso, Loren H. Roth & Eric Silver, Violence by People Discharged from
Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods, 55 ARCHIVES
GEN. PSYCHIATRY 393, 400 (1998)).
151. Id. (emphasis added) (quoting Steadman et al., supra note 150).
152. Vars & Young, supra note 145, at 17.
153. See Tyler II, 837 F.3d at 696 (citing Steadman et al., supra note 150); Vars & Young,
supra note 145, at 17.
154. See, e.g., Mai v. United States (Mai I), 952 F.3d 1106, 1116 (9th Cir. 2020).
physician-assisted suicide)).
risks were highest following first admissions. In fact, suicide risk diminishes after the beginning of treatment, with “many papers” concurring in that point.

To be sure, mental health disorders and suicide rates share a disquieting relationship—at least “[n]inety percent . . . of suicide victims in the United States suffered from mental illness.” The same government-cited meta-analysis study found that suicide risk for individuals with psychiatric diagnoses was eleven times that of individuals without any diagnosis. But again, unqualified numbers may blur the reality of suicide in communities afflicted by mental health concerns. In the meta-analysis, the highest incidence of suicide occurred in the year immediately following consultation and in those with a history of suicide attempts, suggesting that the rates for people like Mai and Tyler are, in reality, much lower. The high incidence of suicide in the first year is borne out in a recent meta-analysis that shows drop-offs in suicide rates postdischarge.

In sum, studies on crime and suicide within the community of mental health disorders undoubtedly reveal troubling numbers across the board. But there lies the rub: across the board studies do not reflect statistics for people who are many years removed from their involuntary commitment and have suffered no symptoms since their initial episodes. In litigation, the government has, as of yet, been unable to prove the contrary. Given the paucity of data to justify the categorical and rigid lifetime ban on a constitutional right, as-applied challenges under the right facts prevail under any level of scrutiny.

B. STRICT SCRUTINY

Strict scrutiny is a high standard of review, which Justice Thomas has stated “automatically fatal in almost every case.” Laws that involve fundamental rights in due process claims, for example, are examined under

156. E. Clare Harris & Brian Barraclough, Suicide as an Outcome for Mental Disorders, 170 Brit. J. Psychiatry 205, 219–20 (1997) (discussing three studies from Northern Europe and one from America).

157. Id. at 223.

158. Vars & Young, supra note 145, at 21.

159. Harris & Barraclough, supra note 156, at 221 tbl.14h.

160. See id. at 221.

161. See Daniel Thomas Chung, Christopher James Ryan, Dusan Hadzi-Pavlovic, Swaran Preet Singh, Clive Stanton & Matthew Michael Large, Suicide Rates After Discharge from Psychiatric Facilities: A Systematic Review and Meta-Analysis, 74 JAMA Psychiatry 694, 697–98 (2017). Across all studies, the suicide rate in the first three months post-discharge was 1,132 per 100,000 person-years. Id. at 697. After ten years, the rates dropped to 277 per 100,000 person-years. Id. First-time admits to psychiatric facilities suffered from lower overall rates of suicide compared with their multiadmit peers (305 to 517 per 100,000 person-years, respectively), id. at 697–98, which could suggest an even lower incidence of suicide after ten years for those that visited facilities only once. See id. Though the author readily concedes that the numbers are troubling when compared to the global suicide rate of only 11.4 per 100,000 person-years, well-funded, state-sponsored review panels would likely be able to discern between high- and low-risk applicants from within the groups that suffer from the lowest rates. Id. at 695.

162. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (internal citations and quotations omitted).

strict scrutiny, and they pass muster only if the law is “the least restrictive means of achieving a compelling state interest.”\textsuperscript{164} Most circuit courts’ Second Amendment jurisprudence follows a model in which the decision between strict and intermediate scrutiny hinges on “the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”\textsuperscript{165}

The general consensus is that § 922(g)(4) is not subject to strict scrutiny. Only one court has applied strict scrutiny, but it was vacated in en banc review\textsuperscript{166}—no court has applied it since. Even so, judges have not shied from advocating its use in dissenting opinions.\textsuperscript{167} The argument goes that the statute’s effective lifetime ban not only strikes at the Second Amendment’s core interest in protecting the right for “law-abiding, responsible citizens to use arms in defense of hearth and home,” but that it guts it.\textsuperscript{168} What is more is that the statute’s effective ban targets a narrow class of individuals—the very reason for which the Court began building its heightened scrutiny jurisprudence in the first place.\textsuperscript{169} Finally, judges see strict scrutiny as being in accordance with the high pedestals on which both \textit{Heller} and \textit{McDonald} place the right.\textsuperscript{170}

In the event that a court examines the statute under strict scrutiny, it should fail because it is not narrowly tailored. As it stands, all formerly involuntarily committed persons in a majority of states are banned from owning firearms, even though studies show that not everyone in this group poses increased risks of suicide or crime. Congress recognized the overinclusivity of this ban when it passed the original GCA and included a fully funded relief program in order to separate those that no longer pose risks from those that do. Because Congress’s restorative outlet to avoid overinclusivity is now available in only a minority of states, in all other states the ban is overinclusive. NICS data published in 2021 reveals over 6.5 million persons are prohibited from purchasing firearms under § 922(g)(4).\textsuperscript{171} Some portion of that group can certainly petition state restorative bodies because they live in states with these programs, though the exact number is unclear because the NICS data is not subdivided by state. Yet data from states like Massachusetts, for example, illustrate the overinclusivity of the ban. The Commonwealth of Massachusetts does not receive federal funding to conduct

\begin{itemize}
  \item \textsuperscript{164} McCullen v. Coakley, 573 U.S. 464, 478 (2014).
  \item \textsuperscript{166} Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (\textit{Tyler I}), 775 F.3d 308, 330 (6th Cir. 2014), rev’d en banc, 837 F.3d 678 (6th Cir. 2016).
  \item \textsuperscript{167} Mai v. United States (\textit{Mai II}), 974 F.3d 1082, 1092 (9th Cir. 2020) (Bumatay, J., dissenting).
  \item \textsuperscript{168} \textit{Id.} (citing District of Columbia v. Heller (\textit{Heller I}), 554 U.S. 570, 635 (2008)).
  \item \textsuperscript{169} \textit{Id.} (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).
  \item \textsuperscript{170} The court in \textit{Tyler I} noted that “the Supreme Court has by now been clear and emphatic that the ‘right to keep and bear arms’ is a ‘fundamental right’ necessary to our system of ordered liberty.” \textit{Tyler I}, 775 F.3d at 326 (quoting \textit{McDonald} v. City of Chicago, 561 U.S. 742, 778 (2010)). It continued, “In our view, that strong language suggests that restrictions on that right trigger strict scrutiny.” \textit{Id.}
  \item \textsuperscript{171} \textit{Active Records in the NICS Indices}, FBI, \url{https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view} [https://perma.cc/6YC2-2M32] (July 31, 2021).
\end{itemize}
restorative bodies,\textsuperscript{172} despite suffering from some of the highest rates of involuntary commitment from those states studied.\textsuperscript{173} Without a restorative body, some 48,000 Massachusettsans lose their Second Amendment rights for life each year.\textsuperscript{174} What is more is that the number of Americans who lose their rights is on the rise. A recent study on rates of involuntary commitment—the first study of its kind—revealed an uptick in such commitments from 2012 through 2016 of 13.1%.\textsuperscript{175} With such an increase, more Americans each year will permanently lose their rights.

C. INTERMEDIATE SCRUTINY

The statute similarly fails under intermediate scrutiny.\textsuperscript{176} Courts that elect not to subject § 922(g)(4) to strict scrutiny will likely analyze it under intermediate scrutiny,\textsuperscript{177} as it curries favor with the majority of judges in federal circuits when reviewing Second Amendment challenges.\textsuperscript{178} Intermediate scrutiny is less exacting than strict scrutiny, requiring that the government set forth an “important governmental objective” and that the statute is “substantially related” to serve that interest.\textsuperscript{179} Due to its less exacting standard, intermediate scrutiny provides some wiggle room, and “the government need not prove that there is ‘no burden whatsoever on [the claimant’s] . . . right under the Second Amendment.’”\textsuperscript{180}

Conceding that crime and suicide prevention constitute important government interests, the question becomes one of fit. As with the discussion of strict scrutiny, § 922(g)(4) is unconstitutional because of its overbreadth in classifying persons no longer exhibiting symptoms of their mental illness with those that are currently mentally ill, and imposing a lifetime ban on all. To be sure, overbreadth does not automatically render a statute unconstitutional under intermediate scrutiny. In fact, the Supreme Court’s formulation of intermediate scrutiny does not require the fit to be necessarily perfect, but the fit must nonetheless prove

\begin{itemize}
  \item \textsuperscript{172} NICS Act Record Improvement Program (NARIP) Awards FY 2009-2020, supra note 18.
  \item \textsuperscript{173} Gi Lee & David Cohen, Incidences of Involuntary Psychiatric Detentions in 25 U.S. States, 72 PSYCHIATRIC SERVS. 61, 65 fig.2 (2021).
  \item \textsuperscript{174} The rate of involuntary commitment in the state is around 700 per 100,000 persons per year. \textit{Id.} at 65. Census data reflects that the state’s population estimate as of 2019 was 6,892,503 persons. QuickFacts Massachusetts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/MA [https://perma.cc/4WWC-AYNZ]. Total population divided by 100,000 multiplied by 700 reveals that more than 48,000 residents in the state lose their rights each year.
  \item \textsuperscript{175} Lee & Cohen, supra note 173, at 63.
  \item \textsuperscript{176} See Keyes v. Sessions, 282 F. Supp. 3d 858, 878 (M.D. Pa. 2017); Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II), 837 F.3d 678, 699 (6th Cir. 2016) (declining to offer a final judgment of constitutionality, but suggesting that without further studies, § 922(g)(4) would fail intermediate scrutiny because “[t]here is no indication of the \textit{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”).
  \item \textsuperscript{177} The court in Tyler II, for example, did not consider the applicability of rational basis review after writing off strict scrutiny. Tyler II, 837 F.3d at 692 (“With strict scrutiny put aside, there is only one choice left: intermediate scrutiny.”).
  \item \textsuperscript{178} Ellis, supra note 38, 1343–47 (discussing all circuit courts’ approaches).
  \item \textsuperscript{179} Clark v. Jeter, 486 U.S. 456, 461 (1988).
  \item \textsuperscript{180} Tyler II, 837 F.3d at 693 (citations omitted).
\end{itemize}
substantial. Courts analyzing these as-applied challenges recognize that the fit between the statute and government interests is not substantial: in an as-applied challenge to § 922(g)(4), one federal district court noted that “[w]e have been presented with no evidence to indicate that disarming those who went through a period of mental illness and suicide attempts over a decade ago . . . reasonably fits within the governmental interest.”

D. EXTRA-JUDICIAL SOLUTIONS

Although the statute fails as it is applied to the formerly involuntarily committed under tiered scrutiny and the historical approach, relying on plaintiffs to bring as-applied challenges that will likely be appealed is a short-term fix that fails to correct the root of the problem. Only those that have the time and money to bring suit against the government can realistically bring these challenges that may go through years of litigation and rounds of appellate review. Even for those that have the resources, potential challengers may be disincentivized to disclose their history of mental illness in court.

A better solution lies in refunding the federal relief from-disabilities program that the GCA created in 1968. Such a system would foster uniformity and ensure that citizens of all states have a route to restore their Second Amendment rights. Alternatively, Congress could retool the current state incentive program to encourage more than just twenty-two states to participate. As other commentators have noted, the federal relief program “cost[s] the government $3,700 to process each application, which is a small amount of money . . . when weighed against protecting an individual’s right guaranteed to him by the Constitution.”

E. ENDING THE STIGMA

As a matter of policy, ending the effective lifetime ban may go hand-in-hand with reducing the stigma of mental illness. The stigma of mental illness both “denigrates the value of people who have a mental illness” and “creates inequities in funding and service delivery that undermine recovery and full social participation.” Studies on the topic link mental-illness stigma to a perception that those who are afflicted are “dangerous, unpredictable, different, and to be blamed for their condition.” Those that suffer feel the

181. See Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
183. Tyler’s challenge, for example, was heard on January 29, 2013. Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851 (W.D. Mich. Jan. 29, 2013). Not until three and a half years later did the Sixth Circuit hear the case en banc. Tyler II, 837 F.3d at 678. Even then, the court remanded the case. Id. at 699.
184. See supra Part II.D.
185. Gilmore, supra note 115, at 38.
187. Julie Chronister, Chih-Chin Chou & Hsin-Ya Liao, The Role of Stigma Coping and Social Support in Mediating the Effect of Societal Stigma on Internalized Stigma, Mental Health Recovery,
disapprobation: public disapproval can be associated with “lower self-esteem, depression, feeling misunderstood and ashamed, poor medication adherence, fewer successful social interactions, reduced help seeking, worse recovery, lower quality of life (QOL), fewer job opportunities, inadequate health coverage, and fewer leased apartments.”

In the wake of highly publicized shootings in the 2010s—Sandy Hook Elementary; Aurora, Colorado; and the Arizona attack that left six dead and U.S. Representative Gabrielle Gifford injured—pro-Second Amendment lobbying groups turned to the mentally ill as a scapegoat. The National Rifle Association’s Wayne LaPierre, in discussing a national database of the mentally ill, spoke about the existence of “genuine monsters [who are] so deranged, so evil, so possessed by voices and driven by demons, that no sane person can ever[] possibly comprehend them.” Efforts to curb violence are laudable, but such rhetoric does nothing but sensationalize the overstated link between mental illness and violence.

But societal distrust of the mentally ill can be mitigated through legislative reforms that improve protections for this class. In addition to righting a constitutionally impermissible wrong, requiring states to conduct holistic examinations of applicants seeking to regain their Second Amendment rights would reduce the feelings of being devalued, dismissed, and dehumanized by a system that codifies sentiments expressed by Wayne LaPierre. Repealing a law that casts all of those once adjudicated to be mentally ill into one category and replacing it with a system that looks at each person as an individual restores a sense of belonging and fitting with society. Psychiatric studies concur: lower rates of self-stigma (the internalization of society’s negative stereotypes) correlates to improved outcomes down the road.

VI. CONCLUSION

When Congress defunded the federal restorative program in 1992, it

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190. See supra Part V.A; Pinals, supra note 189, at 385–87.

191. See Arboleda-Flórez & Stuart, supra note 186, at 462.

192. See Janice Connell, Alicia O’Cathain & John Brazier, Measuring Quality of Life in Mental Health: Are We Asking the Right Questions?, 120 SOC. SCI. & MED. 12, 15 (2014).


194. See supra Part V.A; Pinals, supra note 189, at 385–87.

effectively created a lifetime ban on firearm possession by those that have, at some point in their lives, been involuntarily committed to a mental health institution. Such a ban upholds the misguided notion that "once mentally ill, always so"—a notion that is belied by studies on the governmental interests at stake.

Second Amendment jurisprudence stands on uncertain grounds in recent years given the unpredictability of judicial analysis. Justice Scalia’s pronouncement on the presumptive validity of statutes like § 922(g)(4) only serves to muddy waters. Simply put, the statute does not enjoy the historical pedigree that *Heller* assumed, and scientific studies call into question whether the statute serves the asserted governmental interests of suicide and crime prevention at all. Though it is perhaps high time that the Supreme Court takes up another Second Amendment case to pass judgment on the correct analysis of the right, courts in the immediate future should find that the statute offends a “fundamental right necessary to our system of ordered liberty” under either a historical or tiered-scrutiny analysis. Alternatively, Congress should retool the current restorative body framework to ensure that Americans in all states have access to some form of redress.

People like Mai and Tyler who have enjoyed many years of clean mental health since an involuntary commitment deserve to have their rights restored. The Second Amendment is not a second-class right, and formerly committed Americans are not second-class citizens—finding § 922(g)(4) unconstitutional would put into practice these two common-sense ideals.

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196. Mai v. United States (*Mai I*), 952 F.3d 1106, 1121 (9th Cir. 2020).
197. Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (*Tyler I*), 775 F.3d 308, 326 (6th Cir. 2014) (citing McDonald v. City of Chicago, 561 U.S. 742, 778 (2010)).