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Constitutional Law—Sixth Circuit Declared Law Prohibiting Possession of Firearms by Individuals with History of Institutionalization Unconstitutional—Tyler v. Hillsdale Cnty. Sheriff’s Dep’t, 775 F.3d 308 (6th Cir. 2014).

Michael A. Rando*

The Second and Fourteenth Amendments of the United States Constitution require federal and state lawmakers to create legislation that properly regulates gun possession.\(^1\) One such regulation targets both the mentally ill and those who have been previously institutionalized for a mental illness.\(^2\) In Tyler v. Hillsdale Cnty. Sheriff’s Dep’t,\(^3\) the Sixth Circuit considered the constitutionality of a federal statute, 18 U.S.C. §922(g)(4), which prohibited those who have been committed to a mental institution from purchasing a firearm.\(^4\) The court held that the governmental interest in keeping firearms out of the hands of the mentally ill was not sufficiently related to depriving those who are now mentally healthy, but who were committed to a mental institution in

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\(^1\) See U.S. CONST. amend. II. “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.” Id. See also 18 U.S.C. § 922 (2012) (listing regulations to the right to bear arms); Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008) (listing Constitutional “presumptively lawful regulations” to the right to bear arms). The Second Amendment affords the right to bear arms to individual citizens; however, it is a limited right, subject to both federal and state laws, which restrict who may carry a weapon, when they may carry it, and what weapon they may carry. See Heller, 554 U.S. at 626.

\(^2\) 18 U.S.C. § 922(g)(4). “It 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 effect in commerce any firearm.” Id.

\(^3\) 775 F.3d 308 (6th Cir. 2014), vacated and reh’g en banc granted (6th Cir. Apr. 21, 2015).

\(^4\) Tyler, 775 F.3d at 308. The court considered the constitutionality of 18 U.S.C. § 922(g)(4) as it applied to Tyler, a man who had been institutionalized for less than one month, 28 years before trying to purchase a firearm. Id.
Clifford Tyler, a seventy-three-year-old resident of Michigan, underwent an emotionally devastating divorce in 1986 at the age of forty-five. Tyler felt “overwhelmed” by the divorce, and found himself depressed, sleep deprived, and even suicidal at times. Worried for his safety, Tyler’s daughters contacted the police, who responded and took the proper steps to have Tyler psychologically evaluated. Tyler appeared at a probate court commitment hearing after psychological evaluations showed that he required mental health treatment. The probate court found that hospitalization was necessary and committed him to a mental health institution for a period not to exceed 30 days. Tyler remained at the institution for several weeks and declined medication.

After returning home, Tyler remained in the workforce for another nineteen years, never once reporting another depressive episode. In 2011, Tyler attempted to purchase a firearm, but was unable to do so because the Federal Bureau of Investigation’s (“FBI”) National Instant Criminal Background Check System (“NICS”)

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5 Id. at 344. The court decided that depriving the mentally healthy of purchasing a firearm was not in line with the Second Amendment, notwithstanding a distant episode of commitment to a mental facility. Id.
6 Tyler, 775 F.3d at 313. Tyler’s wife of twenty-three years abruptly served him with divorce papers after allegedly running away with another man and depleting Tyler’s finances. Id. at 314.
7 Id. On one occasion, Tyler’s daughters found him sitting in “the middle of the floor at home pounding his head.” Id.
8 Id. Tyler was transported to the sheriff’s office, where authorities promptly contacted his oldest daughter to assist them in moving along with the necessary steps towards a psychological evaluation. Id.
9 Tyler, 775 F.3d at 314.
10 Id. The probate court found by “clear and convincing evidence” that Tyler required treatment because he was mentally ill and could be reasonably expected to either seriously injure himself or others, as he had engaged in acts supportive of that expectation. Id.
11 Id. Upon commitment, Tyler purportedly had bruises on his head and face, and while committed, he was depressed, sobbing, shaking, not sleeping and having suicidal thoughts. Id.
12 Id. (indicating that Tyler no longer experienced a depressive episode).
indicated that he had been previously committed to a mental institution. In 2012, Tyler underwent another psychological evaluation, in hopes of buying a firearm, which determined there was no evidence of mental illness and that his prior involuntary commitment was a result of his divorce.

Upon learning that he was part of a class of people prohibited from owning a firearm, Tyler filed suit alleging that the enforcement of U.S.C. § 922(g)(4) violated his Second Amendment rights. The district court held that the right to bear arms did not extend to persons in Tyler’s predicament and that § 922(g)(4) would survive intermediate scrutiny. The district court reasoned that keeping firearms away from those who had been institutionalized was “reasonably related” to the government’s stated interest in preventing gun violence. On appeal, the Sixth Circuit rejected the district court’s decision, and determined that strict scrutiny was the appropriate test and

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13 Tyler, 775 F.3d at 314-15. Due to 18 U.S.C. § 922(g)(4), Tyler could not purchase a firearm because the NICS disclosed an instance of past commitment to a mental institution. Id.

14 Id. at 314. The psychologist’s report indicated that Tyler had no criminal history, and no mental illness since his depressive episode in 1985. Id. Tyler submitted a psychological evaluation to add additional information about his 1985 depressive episode. Id.

15 See 18 U.S.C. § 922(g)(4) (2012) (prohibiting those who have been committed to a mental institution from purchasing firearms); Tyler, 775 F.3d at 315. Tyler stated that “the federal disability scheme” was an infringement on his right to keep and bear arms under the Second and Fourteenth Amendments, and that the scheme violated equal protection under the Due Process Clause of the Fifth and Fourteenth Amendments. Tyler, 775 F.3d at 315. Michigan lacked any procedure for a person who was once declared mentally ill for escaping that title in regards to owning a firearm. Id.


17 Tyler, 775 F.3d at 315 (using the rational basis test, which is a lower standard of review). The court stated it would use intermediate scrutiny but used a “reasonable relation” test. Id.
therefore § 922(g)(4) was unconstitutional as it applied to Tyler.\(^\text{18}\)

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."\(^\text{19}\) The Supreme Court determined that although this language confers on an individual the right to keep and bear arms, it is not an unlimited right.\(^\text{20}\) While courts have often opined on what weapons may be carried, where they may be carried, when they may be carried, and why they may be carried, they have rarely opined on who may carry.\(^\text{21}\) As far as who may carry, federal law bans certain classes of people from owning firearms, including those who have been confined to a mental institution or adjudicated as "mental defective."\(^\text{22}\)

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\(^{18}\) Id. at 344-45. "The government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights." Id. See also Furda v. State, 997 A.2d 856, 887-88 (Md. Ct. Spec. App. 2010) (describing what Congress defines as commitment versus an emergency evaluation).

\(^{19}\) U.S. Const. amend. II.

\(^{20}\) See Dist. of Columbia v. Heller, 554 U.S. 570, 571 (2008). The language structure of the Second Amendment is "unique in our Constitution," but does confer "an individual right to keep and bear arms." Id. at 595. Just as the First Amendment's right to free speech is not unlimited, nor is the Second Amendment's right to bear arms; for instance, it does not guarantee a right to bear arms for "any sort of confrontation." Id. at 595. The right to bear arms is also limited by the type of weapon, as "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." Id. at 621-22. Further, there are location restrictions on the Second Amendment's right to bear arms, such as laws forbidding carrying firearms in places such as government buildings and schools. Id. at 626.

\(^{21}\) See e.g., United States v. Chovan, 735 F.3d 1127, 1146 (9th Cir. 2013) (Bea, J., concurring). "The who' of the Second Amendment remains a sticking point." Id. See also United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012) "The right to bear arms, however venerable, is qualified by what one might call the "who, what, where, when, and why . . . Our issue concerns the who." Id. (internal quotation marks omitted). See also Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. REV. 1443, 1493-1515 (2009) (explaining bans on the right to bear arms for certain classes of people such as felons and illegal immigrants).

\(^{22}\) 18 U.S.C. § 922(g)(4) (2012). It is unlawful for anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" to purchase or own a firearm. Id. The Heller Court maintained that such longstanding prohibitions on the possession of firearms by the mentally ill amount to "presumptively lawful regulatory measures." Heller, 554 U.S. at 635. Although the Heller decision seems to fly in the face of the regulatory measures prohibiting the
Prior to the Supreme Court's *Heller* decision, courts viewed the right to bear arms as a collective right that only allowed the right to bear arms for collective needs, such as maintaining a militia. This collectivist model, spearheaded by a reasonableness legal standard, led the Supreme Court and many other state and federal courts to uphold gun regulations in almost every instance. This changed in 2008 when the *Heller* Court invalidated a District of Columbia law that banned the possession of handguns in homes. Part of the Court's holding in *Heller* conferred upon the individual the right to mentally defective from possessing firearms, it is an "assurance" that its decision should not be taken to cast doubt upon the longstanding prohibitions against felons and the mentally ill possessing firearms. *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010). See generally *Heller*, 554 U.S. at 626-27 (reiterating the Supreme Court's view that the Second Amendment has its limits). "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 sales of arms." *McDonald*, 561 U.S. at 787.

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23 See Stephen Kiehl, *In Search Of A Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1133-34 (2011) (describing pre-and post-*Heller* approaches to Second Amendment challenges). See also *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007) (explaining "Federal appellate courts have largely adopted the collective right model"); *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (noting "[t]he Second Amendment affords only a collective right to own or possess guns"). Prior to *Heller*, it was observed that while most appellate courts took the collective rights approach, some state appellate courts used more of a "balancing" test, with at least seven state appellate courts endorsing the individual right to bear arms, and ten following the collective rights model. Kiehl *supra*, at 1134 n.34.

24 See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 718 (2007) (noting that between WWII and 2007, only six gun control laws were overturned). Gun control laws, short of being completely arbitrary or actually nullifying the right to bear arms, consistently survived the reasonableness test under the collectivist view; a view which is decidedly tipped in favor of the government. *Id.* at 717-18. "The large-scale problem of violence in society, which includes (but is not limited to) gun violence, virtually always overwhelms the individual challenger's interest in self-defense or recreation." *Id.* at 718. Under this view, "any [gun control measure] imposes a restraint or burden upon the individual, but the interest of the governmental unit is, on balance, manifestly paramount." *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976). As noted by the Illinois Supreme Court, the right to bear arms is subject to "substantial infringement." *Kalodimos v. Vill. Of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984).

25 *Heller*, 554 U.S. at 635. The Court found the statute containing a prohibition against wielding a lawful firearm in one's home for "immediate self-defense" purposes violated the Second Amendment right to bear arms. *Id.* Assuming a person is not disqualified from exercising his Second Amendment rights for some other reason, the district must permit him to register his handgun and issue him a license to carry it in his own home. *Id.*
bear arms, thus departing from the collectivist model.\textsuperscript{26} The Supreme Court in \textit{McDonald v. Chicago} extended \textit{Heller} even further when it held that the individual right to possess a handgun in the home for self-defense is applicable to the states through the Fourteenth Amendment.\textsuperscript{27} While both opinions created "presumptively lawful" Second Amendment laws, neither provided a concrete standard of review with which to analyze new or existing regulations regarding the individual right to bear arms.\textsuperscript{28}

\textsuperscript{26} \textit{Id.} at 595. The Court conducted a historical inquiry into the original understanding of the Second Amendment, leading to the decision that the Amendment "conferred an individual right to keep and bear arms," and that the right "belongs to all Americans," and not only members of a militia. \textit{Id.} at 581. While emphasizing that its holding did not invalidate all gun regulations, it noted that the Second Amendment was "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." \textit{See} \textit{Kiehl}, \textit{supra} note 23, at 1138. \textit{Heller} specifically stated that "dangerous and unusual" weapons would still be outlawed, as would possession of firearms by certain classes of people, such as felons and the mentally ill. \textit{Heller}, 554 U.S. at 571.

\textsuperscript{27} \textit{McDonald}, 561 U.S. at 742.

\textsuperscript{28} \textit{See id.}; \textit{Heller}, 554 U.S. 570. The \textit{Heller} Court limited its holding to its own facts by setting no specific standard of review for Second Amendment challenges, and instead noted the "presumptively lawful" regulations such as felons being unable to possess weapons and no weapons being allowed in schools. \textit{Heller}, 554 U.S. at 626-27. "Since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." \textit{Id.} Justice Roberts questioned any need to place the Second Amendment within the confines of a specific constitutional analysis during oral argument for \textit{Heller}.

Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these--how this restriction and the scope of this right looks in relation to those?
Some commentators view *Heller* as the prologue and *McDonald* as the first battle in a long war that will determine the parameters of the right to bear arms and the correct standard of review to utilize when the right is at issue. Rather than interpreting *Heller* in a way that provides a standard of review, post-*Heller* and *McDonald* cases base their

as bans on possession of guns by felons and laws prohibiting guns in sensitive places such as schools—would likely fail a strict scrutiny test.” *Id.* “It is doctrinally impossible to conclude that strict scrutiny governs Second Amendment claims, while also upholding the presumptively lawful exceptions specified in *Heller.*” F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller* and *Judicial Ipsi Dixit*, 60 Hastings L.J. 1371, 1379 (2009). Kiehl concisely explains how the different Supreme Court Justices do and do not reconcile the 14th Amendment with the right to own firearms:

While a majority of the Court agreed that the Second Amendment applies against the states, the Court could not agree on which provision of the Fourteenth Amendment applies the Second Amendment against the states. Justice Alito, writing for the plurality, stated that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment. Justice Thomas concurred in the judgment, stating that he believed the Fourteenth Amendment’s Privileges or Immunities Clause made the right enforceable against the states through the Second Amendment. In a concurrence, Justice Scalia defended the majority’s reliance on history to find the right to keep and bear arms to be fundamental, and he criticized the dissenting Justices for favoring “a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”

Justice Stevens dissented, arguing that using a rigid historical test to determine fundamental rights was unfaithful to the Constitution. He stated that the Framers assigned to future generations the task of giving concrete meaning to the term “liberty” and that liberty does not include the right to keep and bear arms. Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, also dissented, finding that Heller’s conclusion that self-defense was the central component of the Second Amendment right to keep and bear arms was based on a misreading of history. Justice Breyer wrote that “the Framers did not write the Second Amendment in order to protect a private right of armed self-defense,” and there is no evidence that such an idea is deeply rooted in the nation’s history or tradition. Therefore, he wrote, the Second Amendment is not a fundamental right and ought not be incorporated.

Kiehl, supra note 23, at 1139 n.81 (internal citations omitted).

29 See Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald*, 21 Cornell J.L. & Pub. Pol’y 489, 507-08 (2012) (analyzing the Second Amendment in a post-*McDonald* world). *McDonald* could be “merely the beginning of active judicial involvement in the administration of the nation’s gun laws” and there is an assumption that there is more litigation to come. See also Brannon Denning & Glen Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & Pol. 273, 301 (2011). The decisions in *Heller* and *McDonald* opened up a steady stream of litigation, with many decisions already existing, and likely great refinement to come over many years. See also Rostron, supra note 28, at 725.
decisions upon *Heller*’s pre-approved categorical distinctions of Second Amendment rights.\textsuperscript{30} One of these “presumptively lawful” laws is The Federal Gun Control Act of 1968, which states that it is unlawful for any person “who has been adjudicated as a mental defective” or “has been committed to a mental institution” to purchase or possess a firearm.\textsuperscript{31} While most of the states follow this federal statute, some are even more restrictive regarding gun ownership by the mentally ill.\textsuperscript{32} Without a blanket standard of review to apply to firearm possession laws, including those that restrict the mentally ill from possession, courts are left to form and apply their own standards.\textsuperscript{33}

\textsuperscript{30} See *Heller*, 554 U.S. at 626-27 (describing the pre-approved categorical distinctions). In an explanation of the “presumptive regulations” in *Heller*, the Court stated:

[The *Heller* decision] did not cast doubt on such longstanding regulatory measures as “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.” We repeat these assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.

\textsuperscript{31} See 18 U.S.C. § 922(g)(4) (2012) (barring some individuals with mental illness from possessing or transporting firearms across interstate lines). See also 27 C.F.R. § 478.11 (2010). A person is adjudicated as a mental defective when it is found that he “as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease: is a danger to himself or to others; or lacks the mental capacity to contract or manage his own affairs.” *Id.*

\textsuperscript{32} See Fredrick Vars & Amanda Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 12 (2013) (discussing state laws relating to the mentally ill possessing and purchasing handguns). Likely, the most restrictive gun law regarding the mentally ill is in Hawaii, prohibiting gun possession by anyone who “is or has been diagnosed as having a significant behavioral, emotional, or mental disorder.” *Haw. Rev. Stat.* § 134-7(c)(3) (2011).

\textsuperscript{33} See e.g., Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (applying intermediate scrutiny to a Second Amendment challenge); Kachalsky v. County of Westchester, 701 F.3d 81, 93-94 (2d Cir. 2012) (applying a form of heightened scrutiny when not burdening self-defense in the home); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (using an important governmental interest” standard); United States v. Marzzarella 614 F.3d 85, 97 (3d Cir. 2010)
One such test is the Greeno test, under which the court will decide if the challenged law burdens conduct that falls within the scope of the Second Amendment as it is historically understood; if it burdens the conduct, it is unconstitutional, but if it does not burden the conduct, then the court applies the appropriate level of scrutiny.\(^\text{34}\)

In *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, the court grappled with whether to apply intermediate scrutiny or strict scrutiny to Tyler's Second Amendment challenge.\(^\text{35}\)

Adopting the Greeno two-step approach and moving through the first step, the court determined that the law did not burden conduct that fell within the Second Amendment because there was no eighteenth-century precedent for limiting the Second Amendment rights of those previously institutionalized.\(^\text{36}\) The court then moved to the second step of the Greeno test and looked to the validity of the government's justification for

(applying intermediate scrutiny only when the law does not severely limit possession); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (endorsing a 7th Circuit proposed "hybrid test" between intermediate and strict scrutiny); United States v. Davis, 406 Fed. App'x 52, 53-54 (7th Cir. 2010) (applying *Heller*’s presumptively valid regulations rule); United States v. Skoien, 614 F.3d 638, 646 (7th Cir. 2010) (Sykes, J., dissenting) (applying intermediate scrutiny to a federal firearm restriction); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to a federal firearm restriction); United States v. Erwin, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at *5-6 (N.D.N.Y. 2008) (implicitly applying strict scrutiny to a Second Amendment challenge). See also Kiehl, supra note 23, at 1145-50 (discussing how courts reconcile Second Amendment challenges post-*Heller* and post-*McDonald*). See also United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (adopting a two-step approach to resolve second amendment challenges). The first step asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment, as historically understood in 1791, and the second step is applying the appropriate level of scrutiny to the challenged law. *Id.*

\(^\text{34}\) *Id.* Greeno leaves its analysis at "appropriate level of scrutiny," choosing not to decide whether intermediate or strict scrutiny is the appropriate test. *Id.*

\(^\text{35}\) *Id.* at 322-30 (analyzing the difference between the two kinds of scrutiny and which should apply). The court cites *Heller*, stating that the rational basis test has already been ruled out as a possibility. *Id.* at 322-23.

\(^\text{36}\) *Id.* at 320. The government provided little evidence to show that the previously institutionalized are a class historically understood to be outside the scope of the Second Amendment, only citing a proposal offered by a Pennsylvania anti-federalist faction in the eighteenth century and an address given by Samuel Adams in 1787. *Id.* The court quoted United States v. Skoien, "legal limits on the possession of firearms by the mentally ill ... are of 20th Century vintage." *Id.* (citing Skoien, 614 F.3d at 641). "Ultimately, the government cannot establish that §922(g)(4) regulates conduct falling outside the scope of the Second Amendment as it was understood in 1791." *Id.* at 322.
regulating Second Amendment rights and decided whether strict or intermediate scrutiny was appropriate. After analyzing the multiple standards of review used by different circuit courts, the *Tyler* court decided to apply strict scrutiny for four reasons: (1) the right to bear arms is a "fundamental right necessary to our system of ordered liberty"; (2) the courts of appeals originally adopted the levels of scrutiny for the Second Amendment from the First Amendment, reflecting the preference for strict scrutiny; (3) the *Heller* Court rejected an "interest-balancing approach," suggesting intermediate scrutiny should not be employed; and (4) intermediate scrutiny has no basis in the Constitution.

In applying strict scrutiny, the court asserted that § 922(g)(4) furthered the compelling governmental interests of protecting the community from crime and preventing suicide. To withstand strict scrutiny, the law must be narrowly tailored to

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37 *Tyler*, 775 F.3d at 322. See infra note 38 (explaining the court's justification for deciding on the strict scrutiny test). *Tyler* also conceded that § 922(g)(4) furthers at least an important interest, although both the government and the court agreed that these interests are indeed "compelling" in terms of a strict scrutiny analysis. *Tyler*, 775 F.3d at 321. The government maintained that the standard should be intermediate scrutiny based upon the historical decision of *Heller*, where the Court recognized that prohibitions on the possession of firearms by felons and the mentally ill are presumptively lawful, as well as the fact that other courts have generally applied the same standard. *Id.* at 323-24. The court was not swayed by this argument as they concluded a preference in applying strict scrutiny to the law, albeit the minority view. *Id.* at 328. The court argued that strict scrutiny would be "more appropriate for assessing a challenge to an enumerated constitutional right, especially in light of *Heller* 's rejection of judicial interest-balancing." *Id.* at 329.

38 *Id.* at 324-28 (examining the level of scrutiny various circuit courts have applied and their approach). Although strict scrutiny is not always employed for fundamental rights, there is a presumption in favor of strict scrutiny. *Id.* at 326-27. "In those areas of constitutional law where the Supreme Court favors intermediate scrutiny, the Court has expressly indicated a reason for downgrading from strict scrutiny . . . . Absent this kind of express indication from the Court that a lower version of scrutiny is sometimes applicable in Second Amendment cases, we prefer strict scrutiny." *Tyler*, 775 F.3d at 327-28.

39 *Id.* at 331 (defining the interests of the government as beyond important, but rather "compelling"). See also supra note 38 (discussing the reasoning behind applying strict scrutiny).
achieve its interests. The court found that a law that prevented only a mentally ill person from possessing a firearm could survive strict scrutiny, but a law that prevented a person who was previously committed to a mental institution but who has no current mental illness from owning a firearm could not. The court further explained that Congress created a program that allows a person who is prohibited from firearm possession by § 922(g)(4) to regain his rights by showing he is unlikely to present a threat by owning a firearm. Since the program was not adopted by Tyler’s home state of Michigan, the court held § 922(g)(4) unconstitutional because it was not narrowly tailored to achieve a governmental interest, as it was overbroad and included those who no longer suffer from mental illness.

The Tyler court departed from most other circuits by applying strict scrutiny to the Second Amendment challenge instead of intermediate scrutiny or heightened

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40 See Tyler, 775 F.3d at 331 (interpreting “narrow tailoring” as “essentially a means-end calculation”). The court did not demand that the narrow tailoring of the population of “mentally ill” to be a “perfect fit,” but the court argued that any over-inclusion or under-inclusion would fail the “narrowly tailored” test. Id. at 332.

41 Id. By disallowing the mentally ill from possessing firearms, the government advances the interests of protecting the community from crime and preventing suicide, whereas, on the other hand, these interests are not furthered by disallowing those who have been committed to a mental institution but are no longer mentally ill. Id. (arguing that “Congress . . . may cast a wider net than is necessary to perfectly remove the harm”). While a “prophylactic approach” may further the desire to keep firearms away from the mentally ill, Congress has previously determined that not all persons committed to a mental institution are so dangerous to support permanent deprivation of firearms to all members. Id. at 333.

42 Tyler, 775 F.3d at 334. Whereas roughly half the United States has adopted the federal program that offers relief from § 922, Michigan has not, and thus Tyler, having been institutionalized, has no legal way of regaining his right to bear arms in Michigan. Id. Tyler could potentially obtain relief if Michigan accepted federal grant money for the program, but where they do not, Tyler’s only chance to exercise his right to bear arms depends on whether he resides in a state that has adopted the state-run program. Id. If Tyler resided in a state that has adopted the relief program, he would be able to purchase a firearm after proving he is no longer mentally ill. Id.

43 Id. § 922(g)(4) lacked the narrowly tailored element as the law is applied to Tyler. “A law that captures only a small subset of [the mentally ill], or a law that captures the entire group but also significant number of non-mentally ill persons, would fail narrow tailoring.” Id. at 332.
The *Tyler* court turned *Heller* against itself, even though the court relied heavily on *Heller* to justify its decision to apply strict scrutiny. As noted, *Heller* set forth “presumptively lawful” regulations regarding the individual right to bear arms, which included prohibitions against felons’ ability to possess firearms and prohibitions against firearm possession in sensitive places such as schools. These “presumptively lawful” regulations would likely fall at the hands of the strict scrutiny test employed by the *Tyler* court, as they are not necessary to further a compelling government interest. A strict scrutiny test cannot be reconciled with *Heller*’s “presumptively lawful” regulations, whereas intermediate scrutiny would likely permit these “presumptively lawful” regulations.

The strict scrutiny analysis employed by *Tyler* will only promote further dissonance and confusion among the courts. While different circuits continue to use strikingly distinctive standards, our legal system runs the risk of very different state gun law interpretations, thus allowing the Second Amendment to be applied very differently.

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44 See supra note 33 (showing the constitutional approaches that various circuits have applied to Second Amendment challenges). See also *Tyler*, 775 F.3d at 328 (applying strict scrutiny rather than intermediate scrutiny to the Second Amendment challenge).

45 *Id.* at 328-29 (using *Heller*’s distaste for “interest-balancing” as reason not to apply intermediate scrutiny). See also supra note 38 and accompanying text (discussing the reasoning behind the *Tyler* decision to apply strict scrutiny); infra notes 47-49 (explaining the *Tyler* court’s decision and how it turns *Heller* against itself in the application of strict scrutiny).

46 *Heller*, 554 U.S. at 626. See also supra note 22 and accompanying text (discussing which regulations are “presumptively lawful”).

47 See supra note 28 and accompanying text (discussing the search for a Second Amendment standard and how *Heller*’s “presumptively lawful” regulations would likely not survive a strict scrutiny analysis.) See also United States v. Marzzarella, 595 F. Supp. 2d 604, 604 (W.D. Pa. 2009) (noting that the presumptive regulations discussed are inconsistent with an adoption of strict scrutiny).

48 See supra note 28 and accompanying text (discussing Second Amendment and how *Heller*’s “presumptively lawful” regulations would likely not survive strict scrutiny analysis).

49 See supra note 33 (noting differences between many ways the Federal Circuit has evaluated Second Amendment challenges).
throughout the country.\textsuperscript{50} Tyler's decision to use strict scrutiny is only a symptom of the larger problem of the lack of any universal standard of review from the Supreme Court.\textsuperscript{51} This lack of a uniform standard will encourage litigation and provide opportunities for each circuit to create its own standard of review for Second Amendment cases.\textsuperscript{52}

Furthermore, the Tyler decision highlighted the lack of a relief program in Michigan for the previously institutionalized under § 922(g)(4).\textsuperscript{53} The court's reasoning was sound when it stated that § 922(g)(4) was overbroad by incidentally incorporating the past institutionalized who are no longer mentally deficient.\textsuperscript{54} If the court decided that § 922(g)(4) was constitutional when applied to Tyler, a mentally healthy man would not have been able to purchase a firearm.\textsuperscript{55} While Tyler's outcome was correct in that it allowed a mentally healthy man to purchase a firearm, the court was forced to make this decision by utilizing strict scrutiny because there was no relief from § 922(g)(4) in

\textsuperscript{50} See Sobel, supra note 29, at 492 (noting the uncertainty that Heller and McDonald have created). "The lower courts have been forced to find their own way." \textit{Id.} See \textit{supra} note 33 and accompanying text (discussing the results that different standards of review have on gun laws).

\textsuperscript{51} See \textit{supra} note 33 (noting differences between many ways the Federal Circuit has evaluated Second Amendment challenges).

\textsuperscript{52} See Sobel, \textit{supra} note 29, at 492-93 (describing the issues that arise from the lack of a universal Second Amendment standard). \textit{See also supra} note 33 and accompanying text (noting the differences between the many ways the Federal Circuit has evaluated Second Amendment challenges).

\textsuperscript{53} Tyler v. Hillsdale Cnty. Sherriff's Dep't, 775 F.3d 308, 311-13 (6th Cir. 2014) (defining a federally funded state program that offered assistance for prohibited individuals under § 922(g)(4)). \textit{See also supra} note 42 (referencing Michigan's absence of aforementioned federally-funded relief program, despite half of states creating such programs).

\textsuperscript{54} Tyler, 775 F.3d at 332-33 (discussing how § 922(g)(4) is overbroad by way of including the previously institutionalized as a class).

\textsuperscript{55} \textit{Id.} at 334 (discussing Tyler's "catch-22" trap resulting from lack of federal or state § 922(g)(4) program assistance). Tyler was put into a difficult position because the government stopped funding the federal relief-from-disabilities program in 1992 and Michigan chose not to accept inducement from federal grants to implement its own program. \textit{Id.}
Michigan. Adopting a relief program that can pass intermediate scrutiny is crucial in order to avoid categorizing the previously institutionalized who are perpetually mentally ill with those who have effectively recovered.

The Tyler court was faced with deciding whether strict or intermediate scrutiny should apply to a Second Amendment challenge. After applying the two-step Greeno test, the court determined strict scrutiny was the proper test. Not only did the use of strict scrutiny fly in the face of Heller's "presumptively lawful" regulations, but it also demonstrated a deep-seated need for Second Amendment consonance among the circuit courts.

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56 Id. at 328 (reasoning that a post-Heller strict scrutiny test was more appropriate for a § 922(g)(4) challenge). Section 922(g)(4) would likely survive an intermediate scrutiny test because the governmental interest of avoiding suicide among the mentally ill and preventing public harm creates a substantial enough connection to laws that prevent the mentally ill from possessing firearms. Id. See also Vars & Young, supra note 32, at 21 (analyzing potential connection between mental illness and increased risk of suicide under intermediate scrutiny).

57 See supra note 56 (describing how § 922(g)(4) may survive intermediate scrutiny test).

58 Tyler, 775 F.3d at 344 (providing the Tyler court's rationale behind applying intermediate or strict scrutiny test to Tyler's situation).

59 Id. at 318 (adopting the two-step Greeno approach despite restrictive language in Heller). See also supra notes 36-38 (analyzing the Tyler court's decision to apply strict scrutiny instead of intermediate scrutiny).

60 Tyler, 775 F.3d at 316 (finding Heller lacked exhaustive full scope analysis identifying individuals prohibited under the Second Amendment). See supra notes 48-50 and accompanying text (outlining the court's dissonance with the Heller decision).