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SHOOTING *HELLER* IN THE FOOT?: APPLYING AND MISAPPLYING *DISTRICT OF COLUMBIA V. HELLER*'S "PRESUMPTIVELY LAWFUL" DICTA IN *UNITED STATES V. SKOIEN*

Abstract: On July 13, 2010, an en banc panel of the U.S. Court of Appeals for the Seventh Circuit in the case of *United States v. Skoien* upheld 18 U.S.C. § 922(g) (9), a federal ban on the possession of firearms by domestic violence misdemeanants, against a Second Amendment challenge. In reaching its holding, the Seventh Circuit declined to follow either of two analytical frameworks that lower courts have applied to Second Amendment challenges since the U.S. Supreme Court's groundbreaking 2008 ruling in *District of Columbia v. Heller*. This Comment argues that, although the *Skoien* en banc opinion ignores an important piece of the *Heller* Court's dicta, its analysis is generally faithful to *Heller* and should serve as a model for other courts of appeals until the Supreme Court provides additional guidance.

INTRODUCTION

In 2008, in *District of Columbia v. Heller*, the U.S. Supreme Court held that the Second Amendment protects an individual's right to bear arms in the home for self-defense.¹ *Heller* triggered a salvo of litigation challenging federal firearms regulations on the grounds that those regulations violate the Second Amendment.² *Heller* did not, however, adopt a standard of scrutiny or establish a framework for analyzing Second Amendment challenges, and lower courts have therefore had difficulty resolving those challenges.³ The clearest guidance *Heller* provided was enumerating, in dicta, a list of firearms regulations that are

¹ See 554 U.S. 570, 635 (2008); see also U.S. CONST. amend. II.

² See, e.g., *United States v. Smith*, No. 2:10-cr-00066, 2010 WL 3743842, at *3 (S.D. W. Va. Sept. 20, 2010).

³ Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 547-48 (2009) (noting that *Heller* did not establish a standard of review); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1550 (2009) (noting that *Heller* did not establish an analytical framework).

“presumptively lawful” under the Second Amendment.⁴ *Heller* did not explain why these regulations are presumptively lawful⁵

In 2010, in *United States v. Skoien* (*Skoien II*), the U.S. Court of Appeals for the Seventh Circuit, sitting en banc, upheld 18 U.S.C. § 922(g)(9), a statute prohibiting domestic violence misdemeanants from owning firearms, against a Second Amendment challenge.⁶ This Comment examines how federal courts apply the Supreme Court’s presumptively lawful dicta in *Heller* to Second Amendment challenges to § 922(g)(9), and evaluates whether the approaches comport with the *Heller* opinion.⁷ Part I identifies three approaches lower courts have taken when interpreting the *Heller* dicta.⁸ Part II examines how each approach applies the *Heller* dicta.⁹ Part III evaluates whether lower courts are on target in applying the *Heller* Court’s dicta, or are instead shooting *Heller* in the foot.¹⁰ The Comment concludes that the *Skoien II* court’s approach is on target in applying *Heller*’s “longstanding” language, but misses the mark in applying *Heller*’s “presumptively lawful” language.¹¹

I. THREE APPROACHES TO SECOND AMENDMENT ANALYSIS AFTER *DISTRICT OF COLUMBIA V. HELLER*

A. District of Columbia v. Heller’s *Lack of an Analytical Framework*

In 2008, in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual’s right to keep and bear arms in the home for self-defense.¹² The Court held that two District of Columbia laws effectively banning handgun use would be unconstitutional under any standard of scrutiny.¹³ The Court did not

⁴ *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”); see *id.* at 627 n.26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”); Gould, *supra* note 3, at 1550.

⁵ See *Heller*, 554 U.S. at 626–27.

⁶ *United States v. Skoien* (*Skoien II*), 614 F.3d 638, 639 (7th Cir. 2010) (en banc).

⁷ See *infra* notes 12–106 and accompanying text.

⁸ See *infra* notes 12–53 and accompanying text.

⁹ See *infra* notes 54–86 and accompanying text.

¹⁰ See *infra* notes 87–106 and accompanying text.

¹¹ See *infra* notes 96–106 and accompanying text.

¹² *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); see also U.S. CONST. amend. II.

¹³ See *Heller*, 554 U.S. at 574–75, 628–29, 635. The Court struck down one law banning handgun possession in the home, and another requiring that arms kept in the home must

adopt a standard of review or establish a framework for analyzing Second Amendment challenges, but ruled out rational basis scrutiny or an interest-balancing test.¹⁴ In dicta, the Court provided a nonexhaustive list of "longstanding" regulations that are "presumptively lawful" under the Second Amendment,¹⁵ including 18 U.S.C. § 922(g)(1) which bans felons from owning firearms.¹⁶ The Court did not explain what it meant by "longstanding" or "presumptively lawful," or why these attributes made the laws constitutional.¹⁷

Lower courts considering Second Amendment challenges to 18 U.S.C. § 922(g) have had trouble divining an analytical framework from the Supreme Court's analysis in *Heller*,¹⁸ and generally turn to the Court's "presumptively lawful" dicta for guidance.¹⁹ Courts have taken three approaches when applying the *Heller* Court's dicta:²⁰ the analogy or "safe harbor" approach, the independent justification approach, and the unique Seventh Circuit en banc majority approach.²¹

be locked. *Id.* The Court did not address the constitutionality of a third law that required handguns to be licensed. *Id.* at 630–31.

¹⁴ *Heller*, 554 U.S. at 628 n.27 (rejecting rational basis), 634–35 (rejecting interest balancing).

¹⁵ *Id.* at 626–27, 627 n.26 (calling the felon ban a "presumptively lawful regulatory measure[]") and noting that the presumptively lawful list "does not purport to be exhaustive").

¹⁶ See 18 U.S.C. § 922(g)(1) (2006) (banning felons from owning firearms); 18 U.S.C. § 3559(a) (2006) (defining a federal felony as an offense punishable by more than a year in prison); *Heller*, 554 U.S. at 626–27 & n.26.

¹⁷ See *Heller*, 554 U.S. at 626–27, 628 n.27; Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1564 (2009) ("The Court didn't give any substantive explanation for why the types of laws mentioned in the [presumptively lawful] list were constitutional aside from a description of them as 'longstanding.'").

¹⁸ See Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1431 (2009) (noting that the *Heller* Court "offered little guidance concerning [Second Amendment] decision rules"); Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2042 (2008) (calling *Heller* "reticent[t]" concerning a standard of review); Winkler, *supra* note 17, at 1567 (noting that the presumptively lawful list is "offered up . . . without any reasoning or explanation"); Anderson, *supra* note 3, at 547–48 (noting that the *Heller* majority did not identify what standard it was using).

¹⁹ See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (citing *Heller*, 128 S. Ct. at 2816–17) (calling the standard of scrutiny issue a "complex and unanswered question" and instead analyzing a challenge to 18 U.S.C. § 922(g)(9) by comparing that provision to the presumptively lawful list); see also Winkler, *supra* note 17, at 1566–67 (noting, in 2009, that nearly every Second Amendment challenge had been decided on the basis of *Heller's* dicta).

²⁰ See *infra* notes 22–53 and accompanying text.

²¹ See *United States v. Chester (Chester I)*, 367 F. App'x 392, 396 (4th Cir.) (per curiam), *vacated*, 628 F.3d 673 (2010) (noting that, when *Chester I* was decided, courts had employed two approaches to Second Amendment challenges); see also *United States v.*

B. Three Approaches to Interpreting the Dicta in *Heller*

1. Approach One: Analogy to the *Heller* Court's "Presumptively Lawful" Dicta

A majority of published lower court decisions have determined the constitutionality of § 922(g)(9) by comparing that section to the firearms laws that *Heller* called "presumptively lawful"²²—the "analogy" or "safe harbor" approach.²³

The 2010 opinion by the U.S. Court of Appeals for the Eleventh Circuit in *United States v. White* exemplifies the analogy approach.²⁴ In *White*, the court upheld § 922(g)(9) on the grounds that it applies only to violent offenders and is therefore narrower than the presumptively lawful § 922(g)(1), which bans firearm possession for both violent and nonviolent offenders.²⁵ Because Congress designed § 922(g)(9) specifically to prevent violent offenders from owning guns, and that provision is more narrow than the general felon ban in § 922(g)(1), the Eleventh Circuit saw "no reason to exclude § 922(g)(9)" from the *Heller* list of presumptively lawful regulations.²⁶ The *White* panel addressed *Heller's* "longstanding" prong by explaining that it was upholding § 922(g)(9) even though that section was passed "relatively recently."²⁷ The U.S. Court of Appeals for the Tenth Circuit upheld § 922(g)(9) without discussion in an unpublished order.²⁸

2. Approach Two: "Independent Justification"

A three-judge panel of the Seventh Circuit in *United States v. Skoien* (*Skoien I*) rejected the analogy approach, holding that each federal fire-

Skoien (Skoien II), 614 F.3d 638, 639–42, 645 (7th Cir. 2010) (en banc) (employing a unique approach).

²² See *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (citing *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009)); *United States v. Wyman*, No. CR-08-154-B-W, 2009 WL 426293, at *1 (D. Me. Feb. 20, 2009); *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at *4–5 (E.D. Wis. Oct. 15, 2008); *Booker*, 570 F. Supp. 2d at 163–64; see also Winkler, *supra* note 17, at 1566–67 (noting that courts decide challenges to all provisions of § 922(g), not only § 922(g)(9), by analogy to the *Heller* dicta).

²³ The labels for this approach derive from the fact that courts employing it either reason by analogy, or simply treat the *Heller* list as a "safe harbor" for similar laws. See *Chester II*, 628 F.3d at 679.

²⁴ 593 F.3d at 1205–06.

²⁵ *Id.*

²⁶ *Id.* at 1206.

²⁷ *Id.*

²⁸ See *In re United States*, 578 F.3d at 1195.

arms law must be independently justified under a heightened level of scrutiny.²⁹ Steven Skoien was convicted of misdemeanor domestic battery in 2006 and was prohibited from possessing firearms under § 922(g)(9).³⁰ Probation agents found a shotgun in Skoien's pickup truck in 2007 and a grand jury indicted him for possessing a firearm after conviction of a misdemeanor crime of domestic violence, in violation of § 922(g)(9).³¹

Skoien argued that applying § 922(g)(9) to him violated his Second Amendment rights.³² The district judge interpreted the *Heller* dicta to mean that persons forfeit their Second Amendment rights when they commit serious crimes and held that § 922(g)(9) was constitutional under even the highest standard of scrutiny.³³

Skoien appealed to the Seventh Circuit.³⁴ The Seventh Circuit panel refused to apply the analogy approach,³⁵ opining that it would be a mistake to uphold a gun law by comparison to the *Heller* dicta.³⁶ Instead, the panel concluded that gun laws (apart from complete bans like the one in *Heller*) must be "independently justified."³⁷

The three-judge panel proposed a two-step inquiry for determining whether a firearms regulation is independently justified.³⁸ First, trial courts should determine whether the regulated conduct (here, owning a gun after a misdemeanor domestic violence conviction) is

²⁹ See *United States v. Skoien (Skoien I)*, 587 F.3d 803, 808, 815 (7th Cir. 2009), *vacated*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010).

³⁰ *Id.* at 806. The terms of Skoien's probation also prohibited him from owning a gun. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 806–07. This disposition does not fall into any of the three approaches that this Comment identifies, though it comports with a strand of analysis identified by the three-judge panel in *Skoien I*. See *supra* notes 22–32 and accompanying text; *infra* notes 34–53 and accompanying text. Although *Heller* did not explain why the presumptively lawful regulations are constitutional, the *Skoien I* panel identified two rationales. See 587 F.3d at 808. First, the laws could be constitutional because certain persons forfeit their Second Amendment rights altogether—for example, serious criminals or the mentally ill. See *id.* Under this rationale, the individual does not enjoy Second Amendment rights at all and any regulation on his ownership of firearms would be constitutional. See *id.* The second rationale is that, if the Second Amendment does protect the individual's rights, a law is constitutional if it passes a heightened level of scrutiny. See *id.* This distinction may become important as Second Amendment doctrine continues to develop, but this Comment does not directly address it.

³⁴ 587 F.3d at 807.

³⁵ *Id.* at 808.

³⁶ *Id.* Courts employing the analogy approach do uphold § 922(g)(9) by comparing it to the *Heller* list. See *Booker*, 570 F. Supp. 2d at 163–65; *supra* notes 22–28 and accompanying text.

³⁷ *Skoien I*, 587 F.3d at 808.

³⁸ *Id.* at 808–09.

protected by the Second Amendment as it was “publicly understood when the Bill of Rights was ratified.”³⁹ Second, if the law regulates conduct that falls within the scope of the Amendment, the court must apply the proper level of means-ends scrutiny.⁴⁰ The panel determined that intermediate scrutiny should apply to Skoien’s challenge,⁴¹ vacated Skoien’s conviction, and remanded to allow the government to prove its burden under intermediate scrutiny.⁴² The U.S. Court of Appeals for the Fourth Circuit adopted the independent justification approach in *United States v. Chester* in 2010.⁴³

3. Approach Three: The *Skoien* En Banc Analysis

The Seventh Circuit reheard Skoien’s case en banc in 2010 and affirmed the trial court decision.⁴⁴ The *Skoien II* court borrowed from the analogy and independent justification approaches in applying the *Heller* dicta.⁴⁵ First, the court borrowed the historical prong of the independent justification analysis⁴⁶ and held that the Second Amendment, as historically understood, barred certain criminals from owning firearms.⁴⁷ Second, the *Skoien II* court turned to *Heller*’s “longstanding” and “presumptively lawful” language, concluding that *Heller* does not foreclose § 922(g)(9)’s constitutionality.⁴⁸ The court borrowed the logic of the analogy approach to interpret “presumptively lawful,” reasoning that § 922(g)(9) is more narrow than the “presumptively lawful”

³⁹ *Id.* This historical prong, designed to capture the Second Amendment’s meaning at the time it was ratified, attempts to pay homage to the *Heller* Court’s historical and textual analysis of the Second Amendment. See *Chester II*, 628 F.3d at 678–79. If the government establishes that the Second Amendment does not protect the regulated conduct, the court’s inquiry ends and the law is constitutional. *Id.*

⁴⁰ *Skoien I*, 587 F.3d at 809.

⁴¹ *Id.* at 812.

⁴² *Id.* at 806, 815. The panel determined that the government had not carried its burden under intermediate scrutiny, but remanded because the government had no way of knowing that it would be required to pass intermediate scrutiny. *Id.* at 815.

⁴³ See *Chester II*, 628 F.3d at 680 (“Thus, a two-part approach to Second Amendment claims seems appropriate under *Heller*, as explained by . . . Judge Sykes in the now-vacated [*Skoien I*] panel opinion . . .”).

⁴⁴ *Skoien II*, 614 F.3d at 639–40, 645.

⁴⁵ See *id.* at 639 (citing *Heller*, 554 U.S. at 626–27); *infra* notes 46–50 and accompanying text.

⁴⁶ See *supra* note 39 and accompanying text.

⁴⁷ *Skoien II*, 614 F.3d at 640; see also Robert L. Tsai, *John Brown’s Constitution*, 51 B.C. L. REV. 151, 161 (2010) (“Even a radical defender of gun possession such as John Brown envisioned that the [Second Amendment] privilege would not be unlimited.”).

⁴⁸ *Skoien II*, 614 F.3d at 640–41.

§ 922(g)(1).⁴⁹ The court applied "longstanding" by reasoning that it would make no sense to strike down § 922(g)(9) merely because of its age.⁵⁰

The *Skoien II* panel next addressed the appropriate standard of scrutiny for Second Amendment challenges to § 922(g)(9), adopted intermediate scrutiny,⁵¹ and devoted the rest of its opinion to demonstrating that § 922(g)(9) is substantially related to an important government objective.⁵² The Seventh Circuit in 2011 reaffirmed the *Skoien II* court's approach in *United States v. Donovan*.⁵³

II. UNDERSTANDING THE *HELLER* DICTA

Thus far, this Comment has established that lower courts rely on the *Heller* Court's "presumptively lawful" dicta in disposing of Second Amendment challenges to 18 U.S.C. § 922(g)(9), and has described three approaches courts have taken when applying the dicta.⁵⁴ Nearly every court to consider a challenge to § 922(g)(9) focuses on two phrases from the *Heller* Court's dicta: longstanding and presumptively lawful.⁵⁵ This Part examines how each approach interprets these two aspects of the *Heller* dicta.⁵⁶

⁴⁹ *Id.*; see *supra* notes 25–27 and accompanying text.

⁵⁰ 614 F.3d at 640–41. The *Skoien II* en banc majority's exact language reads "It would be weird to say that § 922(g)(9) is unconstitutional in 2010 but will become constitutional by 2043, when it will be as 'longstanding' as § 922(g)(1) was when the Court decided *Heller*." *Id.* at 641.

⁵¹ *Id.* at 641–42. The court briefly analogized to First Amendment jurisprudence, but ultimately adopted intermediate scrutiny because the government conceded that some form of strong showing should apply: "The United States concedes that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective. The concession is prudent, and we need not get more deeply into the 'levels of scrutiny' quagmire" *Id.* (internal citations omitted).

⁵² *Id.* at 641–45.

⁵³ See *United States v. Donovan*, No. 09-2346, 2011 WL 549676, at *2 (7th Cir. Feb. 16, 2011).

⁵⁴ See *supra* notes 12–53 and accompanying text.

⁵⁵ See *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008). Compare, e.g., *United States v. Skoien (Skoien II)*, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (applying a unique approach), with *United States v. Skoien (Skoien I)*, 587 F.3d 803, 810 (7th Cir. 2009) (applying the independent justification approach), with *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (applying the analogy approach).

⁵⁶ See *infra* notes 57–86 and accompanying text.

A. Longstanding

The *Heller* Court called 18 U.S.C. § 922(g)(1) longstanding, but did not explain what makes a law longstanding.⁵⁷ The *Skoien II* en banc majority suggested that longstanding could refer either to the statute's age or to the history of federal firearms bans.⁵⁸

1. Longstanding as Applied to the Challenged Statute's Age

First, the *Skoien II* en banc majority applied longstanding to compare the age of the felon ban and § 922(g)(9).⁵⁹ The Federal Firearms Act (the first federal gun ban and precursor to § 922(g)(1)) was enacted in 1938;⁶⁰ § 922(g)(9) was enacted in 1996.⁶¹ The majority refused to hold § 922(g)(9) unconstitutional merely because it is younger than the felon ban, noting that it would be “weird” to invalidate § 922(g)(9) based solely on its age.⁶²

Many courts employing the analogy approach uphold § 922(g)(9) as longstanding without inquiring into the law's age.⁶³ For example, the U.S. District Court for the District of Maine, in *United States v. Booker*, concluded that § 922(g)(9) was a longstanding prohibition because of its similarity to the felon ban, but did not discuss the relative ages of the bans.⁶⁴ The Eleventh Circuit acknowledged that § 922(g)(9) was passed “relatively recently,” but nonetheless held that the law is a presumptively lawful longstanding prohibition because longstanding laws did not treat domestic violence.⁶⁵

Courts using the independent justification approach also have not inquired into the felon ban's age.⁶⁶ This is likely the case, however, because both the Seventh Circuit *Skoien I* panel and the Fourth Circuit in *United States v. Chester* remanded for creation of a record and did not reach a substantive Second Amendment analysis.⁶⁷

⁵⁷ See *Heller*, 554 U.S. at 626–27, 627 n.26.

⁵⁸ See *Skoien II*, 614 F.3d at 640–41.

⁵⁹ See *id.*

⁶⁰ Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968); *Skoien II*, 614 F.3d at 640.

⁶¹ See Lautenberg Amendment, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996) (codified as amended at 18 U.S.C. §§ 921–922, 925 (2006)).

⁶² See *Skoien II*, 614 F.3d at 641.

⁶³ See, e.g., *Booker*, 570 F. Supp. 2d at 163–65.

⁶⁴ See *id.*

⁶⁵ *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010).

⁶⁶ See *Skoien I*, 587 F.3d at 810. See generally *United States v. Chester (Chester I)*, 367 F. App'x 392 (4th Cir. 2010) (per curiam).

⁶⁷ See *Skoien I*, 587 F.3d at 815; *Chester I*, 367 F. App'x at 398–99.

2. Longstanding as Applied to the Challenged Statute's History

The en banc majority in *Skoien II* also applied longstanding to refer to the felon ban's history.⁶⁸ The court concluded that historical evidence supports categorical prohibitions on gun ownership such as the felon ban based on two historical sources: founding-era state constitutions and a report of the Pennsylvania delegation to the Constitutional Convention.⁶⁹ The majority reasoned that, because these founding-era documents prohibited convicts and some other categories of persons from owning guns, categorical prohibitions on gun ownership such as the felon ban should be allowed today.⁷⁰

Courts employing the analogy approach have not inquired into the history of firearms regulations in America.⁷¹ They rely solely on the *Heller* Court's decree that the felon ban is presumptively lawful and do not inquire into § 922(g)(9)'s history.⁷²

Two judicial opinions employing the independent justification approach and numerous scholars have concluded that historical evidence might not support categorical prohibitions on gun ownership such as the felon ban.⁷³ These judges and scholars question whether gun control laws in effect when the Second Amendment was ratified prohibited convicts from owning guns.⁷⁴ The first federal gun ban, the Federal Firearms Act, was not enacted until 1938 and prohibited only violent

⁶⁸ See *Skoien II*, 614 F.3d at 640–41.

⁶⁹ *Id.* at 640 (citing 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 662, 665 (1971)).

⁷⁰ *Id.* The majority noted that both the state constitutions and the report allowed citizens to own guns but did not extend the right to convicts. *Id.*

⁷¹ See, e.g., *Booker*, 570 F. Supp. 2d at 163–65 (not exploring § 922(g)(1)'s history).

⁷² See, e.g., *White*, 593 F.3d at 1205–06 (reasoning that § 922(g)(9) should be included in the list of longstanding prohibitions because of the history of the problem of domestic violence rather than the history of the law).

⁷³ See *Skoien II*, 614 F.3d at 650 (Sykes, J., dissenting) (citing Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359–64 (2009); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 714–28 (2009)) (concluding that the historical evidence concerning firearms bans is inconclusive); *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (suggesting an independent justification approach); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1357 (2009) (noting an "absence of historical support" for categorical bans); Marshall, *supra*, at 708 ("[O]ne can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I."); Winkler, *supra* note 17, at 1563 (noting that the Founders did not impose gun control laws on people convicted of crimes).

⁷⁴ See Lund, *supra* note 73, at 1357; Marshall, *supra* note 73, at 707–13; Winkler, *supra* note 17, at 1563.

felons from owning guns;⁷⁵ this ban was only extended to encompass nonviolent felons in 1968.⁷⁶ Therefore, the felon ban prohibits persons convicted of “trivial” felonies such as tax evasion and antitrust violations from owning guns.⁷⁷ Independent justification opinions conclude that this historical evidence is inconclusive regarding whether the Second Amendment supports categorical bans;⁷⁸ some scholars go further and argue that the felon ban is facially invalid insofar as it prohibits nonviolent felons from owning guns.⁷⁹

B. “Presumptively Lawful”

Heller stated that the felon ban is presumptively lawful, but did not explain what it meant by “presumptively.”⁸⁰ The *Skoien* en banc majority interpreted that language to create a rebuttable presumption in favor of the regulation.⁸¹ The Seventh Circuit recently explained that, because *Heller* called the felon ban *presumptively* lawful, that provision could be vulnerable to an as-applied challenge and the court must inquire into the law’s constitutionality.⁸² In other words, if a challenged law is presumptively lawful by analogy to the *Heller* dicta, the law enjoys a presumption of constitutionality but must still be subjected to some level of scrutiny.⁸³

Courts using the analogy approach do not inquire into the meaning of presumptively lawful.⁸⁴ After determining that § 922(g) (9) is similar enough to the felon ban to be presumptively lawful, these courts end their inquiry.⁸⁵

⁷⁵ See Federal Firearms Act, §§ 1(6), 2(f), Pub. L. No. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968). Unlike the current felon ban, the Federal Firearms Act disqualified only those convicted of a “crime of violence,” which was defined as “murder, manslaughter, rape, mayhem, kidnaping [*sic*], burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.” *Id.*

⁷⁶ Lund, *supra* note 73, at 1357.

⁷⁷ Kates & Cramer, *supra* note 73, at 1362.

⁷⁸ *Skoien II*, 614 F.3d at 650–51 (Sykes, J., dissenting); *McCane*, 573 F.3d at 1048.

⁷⁹ Kates & Cramer, *supra* note 73, at 1363 (opining that federal statutes regulating gun possession appear to be invalid insofar as they seek to bar arms possession by those convicted of “trivial” felonies).

⁸⁰ See *Heller*, 554 U.S. at 627 n.26.

⁸¹ See *Skoien II*, 614 F.3d at 640–42 (holding that 18 U.S.C. § 922(g) (9) is presumptively lawful, then applying a standard of scrutiny to the provision).

⁸² *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

⁸³ See *id.*; accord *Skoien II*, 614 F.3d at 641–42.

⁸⁴ See, e.g., *Booker*, 570 F. Supp. 2d 163–64 (holding that 18 U.S.C. § 922(g) (9) is presumptively lawful, but failing to test the presumption).

⁸⁵ See *id.* (holding that § 922(g) (9) is presumptively lawful after examining *Heller*).

Courts using the independent justification approach acknowledge that the regulations listed in the *Heller* dicta are presumptively lawful, but refuse to extend *Heller's* presumptively lawful language to other, non-enumerated provisions such as § 922(g)(9).⁸⁶

III. ARE LOWER COURTS FAITHFULLY APPLYING THE *HELLER* DICTA?

The previous Part of this Comment discussed how three post-*Heller* Second Amendment approaches apply that decision's "longstanding" and "presumptively lawful" dicta.⁸⁷ This Part compares the three approaches, evaluates their faithfulness in applying the *Heller* dicta, and concludes that the *Skoien II* decision represents the soundest application of the presumptively lawful dicta that any federal court of appeals has yet propounded.⁸⁸

The analogy approach makes little attempt to wrestle with the longstanding or presumptively lawful language, and therefore represents an incomplete approach to applying *Heller*.⁸⁹ For example, the Eleventh Circuit, in the 2010 case of *United States v. White*, acknowledged that § 922(g)(9) might not be longstanding, but ultimately dismissed this observation by interpreting longstanding to refer to the issue of domestic violence rather than § 922(g)(9), the law providing a remedy for that issue.⁹⁰ Other analogy approach courts simply uphold § 922(g)(9) without considering whether it is longstanding.⁹¹ Under the analogy approach, courts do not apply a legal presumption to the challenged regulation, or even inquire into what it means to be presumptively lawful; instead, they treat presumptively lawful regulations as immune to constitutional attack.⁹²

The independent justification approach attempts to wrestle with the longstanding and presumptively lawful language, but evaluating

⁸⁶ See *United States v. Chester (Chester I)*, 367 F. App'x 392, 397 (4th Cir. 2010) (per curiam) (citing *Skoien I*, 587 F.3d at 808); *Skoien I*, 587 F.3d at 808.

⁸⁷ See *supra* notes 54–86 and accompanying text.

⁸⁸ See *infra* notes 89–106 and accompanying text.

⁸⁹ See, e.g., *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

⁹⁰ *Id.* at 1205–06 (holding that 18 U.S.C. § 922(g)(9) is constitutional, though enacted recently, because "longstanding" laws were not solving the domestic violence problem). This interpretation, unlike the *Heller* Court's, applies longstanding to the problem rather than the challenged regulation. Compare *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008), with *White*, 593 F.3d at 1205–06.

⁹¹ See *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009); *United States v. Wyman*, No. CR-08-154-B-W, 2009 WL 426293, at *1 (D. Me. Feb. 20, 2009); *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at *4–5 (E.D. Wis. Oct. 15, 2008); *United States v. Booker*, 570 F. Supp. 2d 161, 162–64 (D. Me. 2008).

⁹² See, e.g., *White*, 593 F.3d at 1205–06.

that approach is difficult because it has only rarely been applied to a factual record by a majority opinion.⁹³ Independent justification opinions interpret *Heller's* longstanding language as applying to the felon ban's history, and conclude that historical evidence is inconclusive regarding whether the original understanding of the Second Amendment allowed categorical prohibitions on gun ownership.⁹⁴ Unlike analogy approach courts, courts employing the independent justification approach reject the idea that it is proper to uphold a law merely because it resembles a presumptively lawful law.⁹⁵

The en banc majority in *Skoien II* did not faithfully apply *Heller's* longstanding language as applied to the felon ban's age.⁹⁶ The court acknowledged that *Heller* called the felon ban longstanding, but refused to hold § 922(g)(9) unconstitutional merely because of its age.⁹⁷ This approach essentially reads longstanding out of *Heller* by acknowledging longstanding as a criterion but making no attempt to apply that criterion to § 922(g)(9).⁹⁸

The *Skoien II* decision also did not faithfully apply *Heller's* longstanding language as applied to the felon ban's history.⁹⁹ The majority cited several sources to support the proposition that categorical bans should be allowed under the original meaning of the Second Amendment, but its sources did not clearly support that proposition.¹⁰⁰ At

⁹³ *United States v. Chester (Chester I)*, 367 F. App'x 392, 398–99 (4th Cir. 2010) (per curiam) (vacating and remanding for creation of a record); *United States v. Skoien (Skoien I)*, 587 F.3d 803, 815 (same). In 2011, the Eleventh Circuit in *United States v. Masciandaro* applied an independent justification framework in evaluating a Second Amendment challenge to a regulation promulgated by the Secretary of the Interior; the regulation prohibits carrying or possessing a loaded weapon in a motor vehicle in a national park. See No. 09-4839, 2011 WL 1053618, at *1, *10–12 (11th Cir. Mar. 24, 2011) (inquiring as to whether the defendant's claim implicated the Second Amendment, then determining the appropriate level of constitutional scrutiny); see also 36 C.F.R. § 2.4(b) (2011).

⁹⁴ *United States v. Skoien (Skoien II)*, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting); *Skoien I*, 587 F.3d at 810.

⁹⁵ See *Chester I*, 367 F. App'x at 397 (citing *Skoien I*, 587 F.3d at 808); *Skoien I*, 587 F.3d at 808–09.

⁹⁶ See 614 F.3d at 641.

⁹⁷ See *id.* at 640–41 (“It would be weird to say that 18 U.S.C. § 922(g)(9) is unconstitutional in 2010 but will become constitutional by 2043, when it will be as ‘longstanding’ as [the felon ban] was when the Court decided *Heller*.”).

⁹⁸ See *id.*

⁹⁹ See *id.* at 640–42.

¹⁰⁰ See *id.* at 640. The court first cited a report written by the dissenting minority of the Pennsylvania Convention which asserted that criminals may be disarmed. See *id.* (citing SCHWARTZ, *supra* note 69, at 665). This report, however, was a minority dissent, and did not make it into the Constitution. See *id.* But cf. Marshall, *supra* note 73, at 712–13. Second, the court cited a book, *The Founders' Second Amendment*, which noted that it was “understood” that

best, they demonstrated conflicting historical evidence that is too inconclusive to support categorical bans.¹⁰¹

The *Skoien II* en banc approach did, however, apply *Heller's* presumptively lawful language faithfully.¹⁰² *Heller* did not hold that the listed regulations were immune to Second Amendment challenges, but said only that they would enjoy a presumption of validity.¹⁰³ The en banc court applied intermediate scrutiny to § 922(g) (9) to test this presumption.¹⁰⁴ In a later case, the Seventh Circuit confirmed that even if a defendant falls within a presumptively lawful categorical ban, that ban must still satisfy intermediate scrutiny.¹⁰⁵ Applying intermediate scrutiny to the categorical bans properly reflects the *Heller* Court's dicta and avoids the analogy approach's pitfall of reading non-enumerated regulations into the dicta.¹⁰⁶

CONCLUSION

The *Supreme Court* in *Heller* made clear that the Second Amendment protects an individual right to keep and bear arms, but left it to lower courts to determine how to apply that right. Given this lack of clear guidance, lower courts, including the *Skoien II* en banc majority, have turned to *Heller's* list of presumptively lawful regulations for guidance. Courts have taken three approaches to applying the *Heller* Court's dicta: the analogy approach, the independent justification approach, and the *Skoien II* en banc majority's hybrid approach. The *Skoien II* en banc majority approach is generally faithful to *Heller's* dicta, and will likely serve as a model for other lower courts until the Supreme Court

criminals would be excluded from the Second Amendment, but did so in a single sentence buried within a larger argument that the Second Amendment protects an individual rather than a militia right. See *Skoien II*, 614 F.3d at 640. *But cf.* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 273 (2008). Third, the court cited C. Kevin Marshall's article, *Why Can't Martha Stewart Have a Gun?*, in upholding the felon ban, but the thrust of Marshall's argument is that no historical support exists for banning gun ownership by felons. See *Skoien II*, 614 F.3d at 640. *But cf.* Marshall, *supra* note 73, at 700–13. Fourth, the court cited Judge Timothy M. Tymkovich's concurrence in *United States v. McCane*, which questions the validity of categorical prohibitions on gun ownership. See *Skoien II*, 614 F.3d at 640. *But cf.* *United States v. McCane*, 573 F.3d 1037, 1047–50 (10th Cir. 2009) (Tymkovich, J., concurring).

¹⁰¹ See *supra* note 100.

¹⁰² Compare *Heller*, 554 U.S. at 626–27, 627 n.26, with *Skoien II*, 614 F.3d at 641–42.

¹⁰³ 554 U.S. at 627 n.26.

¹⁰⁴ *Skoien II*, 614 F.3d at 641–45.

¹⁰⁵ *Williams*, 616 F.3d at 692.

¹⁰⁶ Compare *Heller*, 554 U.S. at 626–27, 627 n.26, with *White*, 593 F.3d at 1205–06, and *Skoien II*, 614 F.3d at 640–42.

provides additional guidance concerning how to apply *Heller* to Second Amendment challenges.

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