

DISPOSSESSION OF FIREARMS: CAUGHT IN THE CROSSFIRE OF LEGAL IMPOSSIBILITY

Andrew Lisenby*

ABSTRACT

The Gun Control Act of 1968 criminalizes possession of firearms or ammunition by anyone belonging to a class identified in 18 U.S.C. subsection 922(g) as a measure to reduce violent crime. Though people with a firearms disability lose the right of possession, such individuals still retain ownership rights and have a legal interest in property they may own. While the law arises from the Constitution's grant of congressional authority to regulate items transferred through interstate commerce, subsection 922(g) violates due process by failing to provide a mechanism of legal compliance. The language of the statute and common law principles of possession leave people who still possess firearms at the time of their disability stuck between violating the law by either retaining actual possession of prohibited items or constructively possessing the property during a transfer. This oversight in the statute violates the property rights of those who still retain a legal ownership interest in prohibited items, and spouses without a legal disability lose the ability to manage property in jurisdictions recognizing community property.

This Comment proposes updating the statutory language to include two additional provisions: (1) a grace period during which a person in a prohibited class could legally manage their property after gaining a firearms disability and (2) a rebuttable presumption against possessory interests for future acquisitions of prohibited property. The proposed solution would serve the public interest of dispossession of firearms by people who commit serious violations of the law while protecting constitutionally guaranteed property interests. Additionally, the proposed solution would address inequities in enforcement of the current statute and prevent needless additional harm to those passing through the criminal justice system and their families.

* J.D. Candidate, Texas Tech University School of Law, 2025; Bachelor of Science and Master of Arts in Psychology, Sam Houston State University. The author would like to thank Professor Brandon Beck, Professor Stephen Black, Dean Jack Nowlin, and Dean Jamie Baker for their help and guidance. The author would like to give special thanks to all the EPJ Members for being there throughout the writing process.

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I. INTRODUCTION

Husbands George and Charles have their home in Texas where they also keep their three firearms and assorted ammunition.¹ One day, George got an exciting new laser pointer and began pointing it at everything he could find.² George, forgetting himself in his glee, saw an airplane flying overhead and began waving his new laser in the air, attempting to point it at the distant target.³ Unfortunately for George, trying to point a laser at an airplane violates 18 U.S.C. Section 39A, a felony punishable by fine, up to five years in prison, or both.⁴ Federal agents quickly apprehended George, who pleaded guilty to the charge and received probation.⁵ Naturally, George and Charles will surely ask: What about the guns?⁶

Under the Gun Control Act of 1968 (GCA), when George was convicted for a crime punishable by over one year in prison—even though he pleaded guilty and only received probation—George joined a class of people prohibited from the possession or transfer of firearms or ammunition.⁷ Upon his conviction, the consequences of the GCA applied to George, and he could no longer possess, sell, or otherwise transfer any items identified in the statute.⁸ While many practicing attorneys would likely advise George to get rid of any prohibited items as quickly as possible himself or to give permission to someone else to do it for him, this commonly distributed advice would lead George to violate the statute.⁹ Because the GCA prohibits all forms of possession after conviction, the law does not provide any legal method for a person in a prohibited class to dispose of any firearms or ammunition of which they did not dispose prior to their judgment.¹⁰

The GCA's provision which criminalizes possession of firearms or ammunition after entry into a prohibited class violates principles of due process and property rights for affected people who possess firearms or ammunition at the time of conviction by not offering any legal method of compliance.¹¹ These problems further compound for legally disabled people

1. Author's original hypothetical.

2. *Id.*

3. *Id.*

4. 18 U.S.C. § 39A(a).

5. Author's original hypothetical.

6. *Id.*

7. 18 U.S.C. § 922(g)(1).

8. *Id.* § 922(g).

9. See generally *Constructive Possession*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/constructive_possession (July 2022) [<https://perma.cc/JFX2-S3KQ>] (discussing constructive possession).

10. *Federal Felon in Possession of a Firearm*, RINGSTROM DEKREY, <https://www.ringstromlaw.com/practice-areas/federal/felon-in-possession-of-a-firearm> (last visited Dec. 15, 2023) [<https://perma.cc/2CCH-TU7J>].

11. See generally Doug Linder, *Procedural Due Process*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftirls/conlaw/proceduraldueprocess.html> (last visited Dec. 15, 2023) [<https://perma.cc/5LBN-ZXA3>] (discussing due process principles of fairness under the law and protection of property).

and their spouses in jurisdictions that recognize community property because spouses without a legal disability lose the ability to manage jointly-owned property.¹² This topic adds to the current literature by discussing how the GCA violates property rights and suggesting the addition of two statutory provisions to the law: (1) a grace period during which a person who belongs to a prohibited class could dispossess themselves of any firearms or ammunition and (2) a rebuttable presumption that prohibited property acquired after gaining a firearms disability would lack a possessory interest.¹³

The inclusion of these provisions to the current statute would allow people prohibited from possessing firearms or ammunition to manage property in a manner acceptable to both the Constitution and public policy.¹⁴ Because the proposed solution would enable those still in possession of prohibited items at the time their disability is imposed to legally manage their property, including a statutory grace period and a statutory presumption against possessory interests for future acquisitions of prohibited items would incentivize compliance with the law, protect property rights for those with a legal disability and their spouses in community property jurisdictions, and bring the current statute into compliance with principles of due process.¹⁵

II. HISTORY AND SURVIVAL OF THE GUN CONTROL ACT

The prohibitions in the GCA have support from over one hundred years of precedent affirming the federal legislature's authority to regulate firearms and ammunition through constitutionally derived powers of taxation and regulation of interstate commerce.¹⁶ As such, the history of regulation for firearms possession remains well documented through legislative recordation and contemporaneous analysis.¹⁷ Through withstanding attacks concerning the constitutionality of the provision of the GCA establishing the prohibited classes, 18 U.S.C. subsection 922(g), courts have provided quite specific guidance concerning the meaning of "possession" under the GCA and what acts the statute prohibits such a person from doing.¹⁸

12. *Community Property Legal FAQs*, JUSTIA, <https://www.justia.com/family/divorce/docs/community-property-faq/> (Oct. 2023) [<https://perma.cc/EC27-7NF4>].

13. Author's original thought.

14. *Id.*

15. See discussion *infra* Part II.

16. See generally Brandon Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. PA. J. CONST. L. 53, 63 (2023) (discussing a history of federal firearms regulation).

17. See *id.*; Michael A. Foster & Sarah Herman Peck, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, CONG. RSCH. SERV. 1, 1 (Mar. 25, 2019), <https://crsreports.congress.gov/product/pdf/R/R45629> [<https://perma.cc/VRQ9-LLAK>].

18. See *Henderson v. United States*, 575 U.S. 622, 626 (2015); *United States v. Wilson*, 107 F.3d 774, 779–80 (10th Cir. 1997); *United States v. Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006).

A. History of Laws Prohibiting Possession

With a political climate that prioritized states' rights, early federal attempts to regulate individual possession of firearms generally fell short of success until the 1920s.¹⁹ Congress's successful efforts for criminal regulation of firearms began with the Mailing of Firearms Act (MFA) in 1927, which only applied to firearms shipped through the U.S. Postal Service.²⁰ In that law, the federal legislature criminalized the shipment of concealable firearms with violations punishable by up to a \$1,000 fine, up to two years in prison, or both.²¹ Soon after, in light of prohibition-era organized crime and assassination attempts on public figures as the backdrop, Congress then passed the National Firearms Act of 1934 (NFA) as the first comprehensive federal firearms regulation.²² Though the legislature nominally styled the law as relating to Congress's power to tax, the legislative history shows a clear intent to limit, or even prevent, the transfer of firearms related to crime by levying severe taxes on the transfer of firearms or those who manufacture them.²³

While the MFA and NFA broke new ground in the regulation of firearms, lobbying by firearms manufacturers and interest groups watered down the laws with exceptions and loopholes.²⁴ In an effort to fill some of the exploitable loopholes in the MFA and NFA, the legislature then passed the Federal Firearms Act of 1938 (FFA), which created licensing requirements for firearms manufacturers and dealers and enacted the first real restrictions on firearm sales, transportation, and receipt.²⁵ Specifically, subsection 2(f) of the statute prohibited those with licenses from dealing with those with convictions for crimes of violence or fugitives from justice.²⁶ Notably, "the FFA prohibited unlicensed manufacturers and dealers, persons under indictment, fugitives from justice, and felons convicted of a crime of violence from engaging in the firearms and ammunition trade."²⁷

In addition to the prohibition against transfer of items identified within the Act, the FFA created a presumption that any firearms or ammunition in

19. See generally Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 49 (1981) (discussing a history of federal firearms regulations).

20. Beck, *supra* note 16, at 64.

21. 18 U.S.C. § 1715 (1927).

22. Beck, *supra* note 16, at 65.

23. See *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (Apr. 7, 2020) [<https://perma.cc/CX77-4ZNG>].

24. See Leff & Leff, *supra* note 19, at 48.

25. See Federal Firearms Act, 52 Stat. 1250 § 2(f) (1938); *Key Federal Regulation Acts*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/> (last visited Jan. 15, 2023) [<https://perma.cc/A3L2-GWMN>].

26. Federal Firearms Act § 2(f). See *Tot v. United States*, 319 U.S. 463, 464 (1943).

27. Beck, *supra* note 16, at 68.

the possession of a prohibited person was acquired through interstate commerce.²⁸ While courts have consistently agreed that Congress has the authority to regulate firearms and ammunition involved in interstate commerce, the Supreme Court quickly overturned the FFA's presumption of interstate commerce in the first relevant case to reach the Court in 1943.²⁹ There, the Court noted "the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated."³⁰ The Court reasoned that the presumption allowed a jury to find guilt by mere possession, and this violated due process.³¹ Despite the removal of the statutory presumption, the law allowed Congress to make another statutory step toward addressing the ease of national firearms access and trafficking.³²

Following the assassinations of President John F. Kennedy, Malcolm X, Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy and judicial hits attacking the existing legislation, Congress took new action with the passage of the Gun Control Act of 1968.³³ The GCA expanded the list of prohibited classes from the FFA and, for the first time, criminalized the mere possession of firearms or ammunition.³⁴ While often referred to as the "felon-in-possession" law, the relevant section of the statute identifies nine classes of persons currently restricted from possession of firearms or ammunition.³⁵ The provision reads as follows:

- (g) It shall be unlawful for any person—
 - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance . . . ;
 - (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
 - (5) who, being an alien . . . ;
 - (6) who has been discharged from the Armed Forces under dishonorable conditions;
 - (7) who, having been a citizen of the United States, has renounced his citizenship;
 - (8) who is subject to a court order that . . .

28. Federal Firearms Act § 2(f).

29. *Tot*, 319 U.S. at 472.

30. *Id.* at 467.

31. *Id.* at 469.

32. Author's original thought.

33. Beck, *supra* note 16, at 53.

34. *Tot*, 319 U.S. at 464.

35. 18 U.S.C. § 922(g).

- (B) restrains such person from harassing, stalking, or threatening . . . ; or
- (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.³⁶

A person's disability for federal crimes under subsection 922(g) may end if they receive a pardon from the President of the United States, or technically, the disabled individual may petition the Attorney General of the United States for relief.³⁷ While the GCA does enable the Attorney General to end firearms disabilities for individuals through application, the federal legislature has used the budgetary process to prohibit the expenditure of funds for these applications since 1992.³⁸ Because of these severe limitations, a person who gains a firearms disability for federal violations will rarely, if ever, have the opportunity to restore their possessory rights.³⁹

Alternatively, some states allow for the restoration of firearms possession rights lost for state crime violations after completing an identified statutory process.⁴⁰ Statutory schemes in the states may involve pardons by the state governor, bars for a specific amount of time post-conviction, applications for expungement, or other similar processes.⁴¹ These processes relate to the GCA because "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly" prohibits the restoration of firearms rights.⁴²

36. *Id.* The author recognizes the offensive nature of the outdated terms "alien" and "mental defective," but the well-founded arguments against their continued use fall outside the scope of this Comment. Author's original thought.

37. *United States v. Miller*, 588 F.3d 418, 420 (7th Cir. 2009).

38. *Is There a Way for a Prohibited Person to Restore Their Right to Receive or Possess Firearms and Ammunition?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and> (Aug. 21, 2019) [<https://perma.cc/24RN-J3SS>].

39. *See How Do I Restore My Firearm Rights Under Federal Law?*, ZUANICH L. PLLC, <https://www.zuanichlaw.com/how-do-i-restore-my-federal-firearm-rights> (last visited Jan. 25, 2023) [<https://perma.cc/PAH6-UZCD>].

40. Haitham al Mhana, *How to Restore Your Gun Rights*, FELONIES.ORG (May 1, 2020), <https://felonies.org/how-to-restore-your-gun-rights/> [<https://perma.cc/5NBQ-7ZSY>].

41. *Id.*

42. 18 U.S.C. § 921(a)(20).

B. What Is Possession?

For people who enter a prohibited class under subsection 922(g), the GCA prohibits any form of possession, which the law typically breaks down into actual or constructive possession.⁴³ Generally, actual possession of firearms or ammunition is not difficult to spot, occurring whenever a person acts to control something directly.⁴⁴ Examples of actual possession could include physically holding something or carrying the item in a bag.⁴⁵ When prohibited from possessing firearms or ammunition, the concept of refraining from actual possession is simple: a person in a prohibited class could avoid situations where they would handle a firearm merely by not entering the same room as firearms or if the actual owner kept the gun or ammunition in a locked space.⁴⁶ For cases involving actual possession, the government only has to show that a defendant physically possessed something and that it was contraband.⁴⁷

Alternatively, people with firearms disabilities who own firearms at the time of their conviction may have more difficulty avoiding acts that involve constructive possession.⁴⁸ Constructive possession occurs whenever someone has the power and intent to control an object, even if they cannot access it physically.⁴⁹ One constructively possesses something if they can make choices about the disposition of that thing or control the area in which it is located.⁵⁰ For example, telling someone to get a pen from your desk or backpack and bring it to you would count as constructive possession.⁵¹ Even though someone else physically acted to bring you the pen, it belonged to you, and you had the power and intent to control it.⁵² Similarly, someone may constructively possess an object if it is in a storage unit they rent or if it is inside their car.⁵³

Historically, courts have viewed constructive possession quite broadly so that people with legal disabilities do not act in bad faith to continue possession of prohibited items or to act through others to do so.⁵⁴ This broad interpretation enables convictions for constructive possession of firearms with a plausible inference that a person had knowledge of and access to

43. *Henderson v. United States*, 575 U.S. 622, 626 (2015).

44. *Id.*; *United States v. Jones*, 484 F.3d 783, 787–88 (5th Cir. 2007).

45. Author's original thought.

46. *See United States v. Lane*, 267 F.3d 715, 717–19 (7th Cir. 2001).

47. *Jones*, 484 F.3d at 787–88.

48. *Cf. Henderson*, 575 U.S. at 626–31 (supporting the general principle despite finding against constructive possession in the instant case).

49. *Id.*

50. *Id.* at 626; *Jones*, 484 F.3d at 787–88.

51. *Henderson*, 575 U.S. at 626.

52. *Id.*

53. *See id.*; *Jones*, 484 F.3d at 787–88.

54. *United States v. Al-Rekabi*, 454 F.3d 1113, 1118–21 (10th Cir. 2006).

firearms.⁵⁵ As an example, the First Circuit Court of Appeals considered constructive possession in a case involving a drive-by shooting.⁵⁶ There, the court upheld a conviction for possession of firearms when evidence showed that a defendant drove the car used during the shooting.⁵⁷ The court noted that constructive possession could be inferred from the circumstances and that a jury could reasonably believe that the driver exercised control at some point.⁵⁸

The Fifth Circuit Court of Appeals similarly noted in *United States v. Jones* that defendants may deny having knowledge of items within their area of control, but unlike actual possession, intent to possess an object plays a part in the constructive possession analysis.⁵⁹ In cases involving constructive possession, the government must show that the person knew the prohibited item was present and that they intended to exercise dominion or control over the objects.⁶⁰ Because a person with a firearms disability only has to know of their possession of prohibited items and that they are legally barred from possessing the property, a person may exercise possession, actually or constructively, by transferring ownership, receiving the proceeds from the sale of property, or having exclusive control of a premise where firearms are located.⁶¹ People with firearms disabilities may also constructively possess prohibited items if they purposely avoid learning whether they have firearms in a place that they control, like their home.⁶²

As an example, consider Charles and George from the hypothetical.⁶³ After George received a final judgment for his felony crime, Charles could move the guns and ammunition to his side of the closet, cover them with a blanket, and tell George not to look under the pile of blankets on that side of the couple's closet.⁶⁴ While George could then claim that he did not know what lay under the pile on Charles's side of the closet, he knew that he owned firearms and that the couple kept them in the house.⁶⁵ George's "ignorance" would not suffice to prevent conviction under subsection 922(g) because his continued ownership and uninterrupted power and intent to control the items remained unchanged.⁶⁶ Though George did not personally act to move the guns and ammunition to their hiding place, his acquiescence to keep them

55. *Id.*

56. *United States v. Tanco-Baez*, 942 F.3d 7, 25–26 (1st Cir. 2019).

57. *Id.*

58. *Id.*

59. *See United States v. Jones*, 484 F.3d 783, 787–88 (5th Cir. 2007).

60. *Id.*

61. *United States v. Wilson*, 107 F.3d 774, 779–80 (10th Cir. 1997); *United States v. Little*, 829 F.3d 1177, 1181–84 (10th Cir. 2016).

62. *Wilson*, 107 F.3d at 779–80.

63. *See discussion supra* Part I.

64. *See Wilson*, 107 F.3d at 779–80; *Little*, 829 F.3d at 1181–84.

65. *See Wilson*, 107 F.3d at 779–80; *Little*, 829 F.3d at 1181–84.

66. *See Wilson*, 107 F.3d at 779–80; *Little*, 829 F.3d at 1181–84.

wherever Charles decided, within an area of George's own control, was enabled by his ownership and possessory interests.⁶⁷

In *Henderson v. United States*, the Supreme Court reviewed the issue of constructive possession in situations when the government had custody of firearms owned by a person prohibited from possession under subsection 922(g).⁶⁸ There, the case involved marijuana distribution, and the magistrate required the defendant to surrender his firearms as a condition of bail.⁶⁹ After conviction and incarceration, the defendant, Mr. Henderson, wanted the district court to direct the transfer of his firearms to his wife or sell them to a friend.⁷⁰ The government argued this arrangement would amount to constructive possession because the defendant directed who received the firearms and retained the proceeds from the sale, but the Supreme Court held that the district court could direct the transfer without violating constructive possession.⁷¹ Because the firearms sat in an FBI evidence locker, Mr. Henderson had no access to the prohibited items or any actual control over the process.⁷² In such a situation, the court merely provides a method for a person with a remaining ownership interest to manage their property.⁷³ According to the Supreme Court, the district court could even extract a guarantee from the receiver that the person petitioning the court would not have access to or control over the firearms throughout the transfer.⁷⁴

While the state may direct the transfer of property within the government's custody, a person still in possession of their firearms at the time of disability does not have this option available.⁷⁵ Because subsection 922(g) does not require a person to relinquish any firearms they may own to the government when they become part of a prohibited class, a person may still possess their firearms upon entry.⁷⁶ A person in this situation becomes barred from any act that would indicate an exercise of power and intent to control, including transfers of ownership or possession.⁷⁷

67. See *United States v. Jones*, 484 F.3d 783, 787–88 (5th Cir. 2007).

68. *Henderson v. United States*, 575 U.S. 622, 624 (2015).

69. *Id.* at 624–25.

70. See *id.* at 626–31.

71. *Id.* at 627.

72. *Id.* at 628.

73. *Id.* at 631.

74. *Id.* at 630.

75. *Id.* at 631.

76. *Who Can Have a Gun: Firearm Relinquishment*, GIFFORDS LAW CTR., <https://giffords.org/law-center/gun-laws/policy-areas/who-can-have-a-gun/firearm-relinquishment/> (last visited Dec. 15, 2023) [<https://perma.cc/5FAK-Y3Q2>].

77. *Henderson*, 575 U.S. at 628.

C. Property Rights and the Consequences of Legal Disability

Property ownership is not a single right but rather a collection of various rights that allow a person “to acquire, use, and dispose of property freely.”⁷⁸ While property rights are granted through the authority of individual states, the Constitution of the United States grants federal protection to those rights through the Fifth and Fourteenth Amendments.⁷⁹ The Fifth Amendment provides federal protection of individual property rights, stating, in relevant part, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁸⁰ Similarly, the Fourteenth Amendment extends this protection to state action.⁸¹ The Supreme Court has ruled that before government action deprives a person of life, liberty, or property, affected parties must first have notice and an opportunity to be heard on the matter.⁸² Without these two requirements, a “taking” occurs.⁸³

In addition to physical invasions of property by the government, a taking may occur if governmental action restricts use too tightly.⁸⁴ When determining the extent of government action, analysis of property rights in the United States has often analogized rights of ownership to a bundle of sticks.⁸⁵ States may decide which specific property rights, or “sticks,” a person may have with respect to their property, and the government may not significantly invade upon those rights without due process.⁸⁶ The Supreme Court provided further clarification concerning the removal of certain rights without taking property in *Andrus v. Allard* when the Court indicated that “the denial of one traditional property right does not always amount to a taking.”⁸⁷

While governmental actors may remove sticks from a property owner’s “bundle” of rights, removal of too many violates due process.⁸⁸ Due process seeks to protect “the individual against arbitrary action of government” and must be observed in order for the government to take away property outright or through regulatory burdens.⁸⁹ As stated above, in situations when a person

78. Roger Pilon, *16. Property Rights and the Constitution*, CATO INST. (2017), <https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution> [<https://perma.cc/53E3-39WP>].

79. U.S. CONST. amends. V, XIV.

80. *Id.* amend. V.

81. *Id.* amend. XIV.

82. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

83. *Johnson v. United States*, 576 U.S. 591, 595 (2015).

84. See Adam Vann, *The Takings Clause of the Constitution and Eminent Domain: An Overview of Supreme Court Jurisprudence on Key Topics*, CONG. RSCH. SERV. 1, 1 (May 22, 2023), <https://crsreports.congress.gov/product/pdf/R/R47562> [<https://perma.cc/9JPT-CRYB>].

85. *United States v. Craft*, 535 U.S. 274, 278–79 (2002).

86. *Id.*

87. *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

88. *See id.*

89. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

loses a possessory interest for violations of subsection 922(g), they only lose their possessory interest while retaining the remaining rights associated with general property ownership.⁹⁰ In cases such as this, the government's police powers allow for the removal of individual ownership rights of possession because of the relationship between the dangers of firearm possession by risky classes of people.⁹¹

D. Attacks on Prohibitions Against Firearms Possession

Despite attempts to challenge the constitutionality of federal firearms disability laws, courts have generally seen these laws as a legitimate exercise of congressional authority under different sections of the Constitution.⁹² While focusing on an effort to attack provisions of the GCA as a violation of the Second Amendment, the Seventh Circuit Court of Appeals has identified congressional action to prohibit access to firearms for those identified as "unvirtuous citizens," or risky people, since the 1800s.⁹³ While the Seventh Circuit, in the cited case, focused on the applicability of the statute to those who lose possessory rights under subsection 922(g)(3), prohibiting possession by drug users or abusers, the analysis applies for treatment of subsection 922(g) as a whole.⁹⁴ The court's analysis indicating a history and tradition of regulating firearm possession since the nineteenth century shows that the Constitution "does not require Congress to allow [a person] to simultaneously choose both gun possession and" potentially risky or dangerous behavior.⁹⁵

Other cases, such as *United States v. Cheeseman*, sought to invalidate provisions of the GCA on various grounds, such as arguing the law imposed a grossly disproportionate consequence.⁹⁶ There, the Third Circuit Court of Appeals noted Congress appropriately used its control over interstate commerce to regulate the flow of firearms during a time of heightened violence.⁹⁷ The court in that case indicated the significant government interest in reducing dangerous crime and noted the GCA fulfilled this purpose.⁹⁸

Though courts have upheld congressional authority to regulate and criminalize the transfer and possession of firearms and ammunition with

90. See Pilon, *supra* note 78.

91. See *United States v. Romero*, No. 1:12-cr-224, 2013 WL 625338, at *5 (D.N.D. Feb. 20, 2013). See also *Henderson v. United States*, 575 U.S. 622, 623–25 (2015).

92. See *Torres v. Lynch*, 578 U.S. 452, 457 (2016). See also *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010).

93. *Yancey*, 621 F.3d at 683–84.

94. *Id.* at 684.

95. *Id.* at 687.

96. *United States v. Cheeseman*, 600 F.3d 270, 279 (3d Cir. 2010).

97. *Id.*

98. *Id.*

relative consistency, the statutory schemes culminating in the GCA have presented the judicial system with issues concerning the protection of constitutional rights.⁹⁹ As an example, the Supreme Court overturned the provision of the NFA that criminalized possession of unregistered firearms and imposed a duty on possessors of unregistered firearms to register with the Secretary of the Treasury in *Haynes v. United States* in 1968.¹⁰⁰ The Court noted that the law compelled a person with an unregistered firearm to provide evidence against themselves by registering the firearm, which violated the Fifth Amendment protection against self-incrimination.¹⁰¹

While the GCA attempted to address the concerns raised in the *Haynes* decision by removing the information-sharing provisions, courts then considered the constitutionality of dispossession provisions within the updated statute.¹⁰² For example, the Supreme Court considered a provision of the GCA disallowing firearms possession for those with involuntary commitments for mental treatment in *United States Department of Treasury v. Galioto* in 1986.¹⁰³ That case involved a former patient of a mental health facility with a short involuntary commitment who attempted to purchase a firearm from a licensed dealer; the dealer refused on account of the patient's subsection 922(g) disability.¹⁰⁴ The patient applied for an exemption available to those with felony convictions but not people with involuntary commitments.¹⁰⁵ According to the district court in that case, this inequitable treatment for prohibited classes under the GCA violated the principle of equal protection under the law.¹⁰⁶ Before the Supreme Court could issue a ruling in the matter, the case became moot when Congress expanded the relevant provision to allow anyone in a prohibited class under subsection 922(g) to apply for relief.¹⁰⁷

More recently, the Fifth Circuit Court of Appeals considered the subsection 922(g)(8) provision criminalizing possession by those with protective orders against them.¹⁰⁸ In that case, the Fifth Circuit considered the provision under a historical analysis and determined that the restriction violated the Second Amendment.¹⁰⁹ While the Second Amendment argument falls outside the scope of this Comment, the Fifth Circuit's analysis indicated that a person may lose their possessory right under lawful regulatory

99. See *Torres v. Lynch*, 578 U.S. 452, 457 (2016).

100. *Haynes v. United States*, 390 U.S. 85, 100 (1968).

101. *Id.* at 97–100.

102. See *United States v. Quiroz*, 449 F.2d 583, 584 (9th Cir. 1971). See also *United States v. Weatherford*, 471 F.2d 47, 51–52 (7th Cir. 1972); *Barrett v. United States*, 423 U.S. 212, 215 (1976).

103. *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 557–59 (1986).

104. *Id.* at 557–58.

105. *Id.* at 558.

106. *Id.*

107. *Id.* at 559.

108. *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023).

109. *Id.*

measures.¹¹⁰ At the time of writing, the Supreme Court heard this case but has yet to issue a ruling.¹¹¹

As Congress wrote laws “to [keep] firearms out of the hands of potentially irresponsible persons,” courts continued to chip away provisions which violated principles of constitutional protections.¹¹² Other challenges concerning violations of due process are generally unsuccessful, however, with courts often ruling in favor of Congress’s ability to regulate possession of firearms for certain classes.¹¹³ Numerous authorities have discussed concerns surrounding the revocation of rights to possess firearms based on membership in a class—like criminality—but courts have consistently upheld the constitutionality of this provision.¹¹⁴ This Comment declines to focus on the issue of prohibited classes and intends to limit its scope to concerns surrounding the effect of the GCA’s prohibitions on property rights.¹¹⁵

III. FRAMING THE PROBLEM AND SOLUTIONS

As discussed above, subsection 922(g) prohibits possession, sale, or transportation of firearms from the moment of conviction or other entry into a prohibited class.¹¹⁶ Though generally considered within the federal legislature’s ability to regulate, the law in its current form offers people belonging to these prohibited classes no legal mechanism, process, or opportunity to legally dispose of firearms or ammunition if they did not do so prior to receiving judgment or otherwise entry into a prohibited class.¹¹⁷ While courts may attempt to interpret the statute in a way that does not render the law unconstitutional, the statute’s strict prohibition against constructive possession prevents any transfer in which a person may continue to exercise possessory control.¹¹⁸ Because subsection 922(g) offers no way to legally comply with the law, this provision of the GCA violates Fifth and Fourteenth Amendment principles of due process and property rights.¹¹⁹

To solve the problems created by the current structure of subsection 922(g), the federal legislature should make two updates to the current statute.¹²⁰ First, Congress should rewrite the statute to include a provision that

110. *Id.* at 454–55.

111. Author’s original thought.

112. *See Barrett v. United States*, 423 U.S. 212, 217–18 (1976).

113. *See United States v. Batchelder*, 442 U.S. 114, 118–19 (1979) (noting the GCA did not violate due process protections against vagueness).

114. *Haynes v. United States*, 390 U.S. 85, 87 (1968).

115. Author’s original thought.

116. *See discussion supra* Section III.B.

117. *See* 18 U.S.C. § 922(g).

118. *See Lent v. Tillson*, 72 Cal. 404, 425 (1887).

119. *See Linder, supra* note 11.

120. Author’s original thought.

gives people who are prohibited from possessing firearms under subsection 922(g) fourteen days upon release after conviction to dispossess themselves of prohibited items.¹²¹ Second, the law should create a rebuttable statutory presumption that any prohibited property acquired after entering a disabled class without an exchange for consideration (i.e., inheritance or community property) would lack a possessory right.¹²² The proposed regulation reads as follows:

- (g) It shall be unlawful for any person—
- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance . . . ;
 - (4) who has been adjudicated as [mentally incompetent] or who has been committed to a mental institution;
 - (5) who [has been admitted to the United States pursuant to a nonimmigrant visa or is an unlawfully present noncitizen] . . . ;
 - (6) who has been discharged from the Armed Forces under dishonorable conditions;
 - (7) who, having been a citizen of the United States, has renounced his citizenship;
 - (8) who is subject to a court order that . . .
 - (B) restrains such person from harassing, stalking, or threatening . . . ; or
 - (9) who has been convicted in any court of a misdemeanor crime of domestic violence, *to receive or to ship or transport in interstate or foreign commerce, or possess in or affecting commerce any firearm or ammunition which has been shipped or transported in interstate or foreign commerce upon entry to a class identified in subsection (1)–(9) for any purpose unrelated to dispossession.*¹²³ *Beginning fourteen (14) days after release from adjudication or otherwise entry to an identified prohibited class, it shall be unlawful to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.*¹²⁴
 - (10) *Upon entering any of the classes identified in subsection (1)–(9), there will be a rebuttable presumption that acquisition of an interest in any firearm or ammunition which has been shipped or transported in interstate or foreign commerce without an exchange for consideration lacks a*

121. *Id.*

122. *Id.*

123. *Id.* (emphasis added to indicate a new language added by the author).

124. *See* 18 U.S.C. § 922(g)(3), (5) (emphasis added to indicate a new language added by the author). The Author would like to note the use of updated terminology within this section. Author's original thought. These changes merely reflect an attempt to reduce the use of derogatory language and do not affect the enforcement of the statute. *Id.*

*possessory right if possession is transferred to and retained by a person who is not prohibited under this Chapter if transfer is completed within fourteen (14) days of acquisition of title.*¹²⁵

This proposed solution would allow the statute to continue serving the public interest of regulating firearm possession by risky classes of people while allowing time for and incentivizing legal dispossession.¹²⁶ Additionally, the inclusion of both a statutory grace period and rebuttable presumption ensures the preservation of constitutionally protected property rights for those with firearms disabilities and their families.¹²⁷ While allowing people with a legal disability access to prohibited items for even a short time may sound counter to the public interest, a review of historical models shows how courts have looked at previous issues involving limited access or technical violations to prohibited items by those with legal disabilities.¹²⁸

A. Including a Statutory Grace Period for Dispossession

The inclusion of a statutory grace period addresses the due process and property concerns raised by this Comment by allowing a limited opportunity for those entering a prohibited class to legally manage their property and avoid further criminal liability.¹²⁹ Aside from subsection 922(g)(3) and subsection 922(g)(5), each of the categories of people prohibited from possession have some form of legal adjudication marking the entry to a prohibited class.¹³⁰ While these two subsections do not have an actual legal judgement associated with entering the classes, they do have a definite starting point.¹³¹ A statutory grace period allowing for legal dispossession beginning at release after judgment allows prohibited persons the opportunity to dispossess themselves in a timely manner.¹³² In support of the public interest, this defined opportunity would incentivize timely dispossession of any prohibited items and allow for the preservation of property rights for the individual with a disability and their spouse.¹³³

125. Author's original thought (emphasis added to indicate a new section added by the author).

126. See discussion *supra* Section II.A.

127. See discussion *supra* Section II.A.3.

128. See discussion *supra* Section II.C.

129. See discussion *supra* Section II.A.1.

130. 18 U.S.C. § 922(g) (noting some have argued against the legislature's use of plenary authority to treat unlawful entrants differently under the law, but such concerns fall outside the scope of this Comment).

131. § 922(g)(3), (5) (noting the legality of removing property rights without a legal adjudication falls outside the scope of this Comment).

132. See discussion *supra* Section II.A.1.

133. See discussion *supra* Sections II.A.2–3.

I. A Statutory Grace Period Would Allow for Due Process

The Fifth Amendment establishes, in relevant part, that the government may not deprive a person of “life, liberty, or property, without due process of the law.”¹³⁴ In order to preserve due process, courts note that a person must have both notice and the opportunity to be heard.¹³⁵ The Supreme Court noted in *United States v. Salerno* that the government may act to “[deprive] a person of life, liberty, or property,” but it must act fairly.¹³⁶ On its face, subsection 922(g) does provide the appropriate notice and opportunity to speak throughout the trial process, but this Comment argues an additional factor of due process applies: the opportunity to act.¹³⁷ While not identified as a specific aspect of due process, a law requiring the impossible would nevertheless violate the most basic idea of having the opportunity to avoid punishment under the law or defending against prosecution.¹³⁸

Because subsection 922(g) is impossible to obey, the current law creates circumstances that deprive violators of their liberty without due process.¹³⁹ The law injures any person convicted under the statute because they have no legal method of compliance.¹⁴⁰ The Supreme Court noted in *Lambert v. California* that due process requires that a person has an “opportunity either to avoid the consequences of the law or to defend any prosecution brought under it,” and other courts have recognized the unconscionable nature of impossible laws.¹⁴¹ As an example from state law, the Ninth District Ohio Court of Appeals noted that:

The law is not so unreasonable as to require the performance of impossibilities . . . and, when Legislatures use language so broad as to lead to such results, courts may properly say that the Legislature did not intend to include those cases in which a literal obedience has become impossible.¹⁴²

In the case of impossible dispossession under subsection 922(g), the law acts precisely to require the unperformable.¹⁴³ A person who owns firearms at the time of conviction has no opportunity to avoid the consequences were they charged because the disabled person becomes prohibited from possession of firearms or ammunition at the moment of their conviction

134. U.S. CONST. amend. V.

135. *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92–95 (2d Cir. 1999).

136. *United States v. Salerno*, 481 U.S. 739, 746–52 (1987).

137. *Beckles v. United States*, 580 U.S. 256, 256–57 (2017).

138. *Lambert v. California*, 355 U.S. 225, 229 (1957).

139. *See id.*

140. *Id.*

141. *Id.*

142. *Gigliotti v. N.Y.C., Chi. & St. Louis R.R. Co.*, 157 N.E.2d 447, 452 (Ohio Ct. App. 1958).

143. *Contra id.*

under the current statute.¹⁴⁴ Because the statute provides no legal method for a person in such a situation to dispose of prohibited items, a jury could reasonably find a person guilty for both retaining possession of the property or transferring it to someone else.¹⁴⁵ While the GCA may not violate due process by prohibiting possession of firearms by those in prohibited classes, the law lacks an opportunity to legally act.¹⁴⁶ When literal obedience of the law becomes impossible, a person lacks the protection of due process as required by the Fifth Amendment.¹⁴⁷ Because subsection 922(g) does not allow for a legal pathway for compliance, the law violates the most basic principles of due process.¹⁴⁸ The inclusion of a statutory grace period would provide the missing opportunity to comply with the statutory requirements of the law.¹⁴⁹

2. A Statutory Grace Period Would Incentivize Legal Compliance

The current prohibition on sale, shipping, and transport in subsection 922(g) incentivizes illegal possession of firearms and ammunition after gaining a firearms disability by not providing a legal pathway of compliance.¹⁵⁰ Adding a statutory grace period would incentivize dispossession quickly upon release by providing a well-structured system for dispossession after entry into a prohibited class.¹⁵¹ Generally, the justice system in the United States works through motivation by incentives and punishment: if a person does the right thing, the law will not punish them.¹⁵² When the legislature constructs a law correctly, it incentivizes the targets of that law to act in a socially acceptable manner.¹⁵³

The idea of incentivizing compliance through punishments and rewards, while simple, has a profound impact on the way our American legal system functions.¹⁵⁴ In the case of subsection 922(g), the law acts to punish people with firearms disabilities because their actions display a tendency to engage in irresponsible behavior.¹⁵⁵ As evidenced in a report by the United States

144. *See id.*

145. *Compare* Henderson v. United States, 575 U.S. 622, 631 (2015), *with* United States v. Wilson, 107 F.3d 774, 771–80 (10th Cir. 1997).

146. *See* United States v. Batchelder, 442 U.S. 114, 118–19 (1979).

147. *See id.*

148. *See* Linder, *supra* note 11.

149. Author's original thought.

150. *See* discussion *supra* Section II.A.

151. *See* Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L. J. 1070, 1076–79 (2013).

152. Ruth Lee Johnson, *Why Do We Obey the Law?*, PSYCH. TODAY (Jan. 15, 2015), <https://www.psychologytoday.com/us/blog/so-sue-me/201501/why-do-we-obey-the-law> [https://perma.cc/5RXQ-XGZH]. *See* Atiq, *supra* note 151, at 1076–78.

153. Johnson, *supra* note 152. *See* Atiq, *supra* note 151, at 1076–78.

154. *See* Johnson, *supra* note 152; Atiq, *supra* note 151, at 1076–78.

155. Barrett v. United States, 423 U.S. 212, 218–21 (1976).

Sentencing Commission from 2022, however, the current statute has concerning indicators showing the lack of effectiveness.¹⁵⁶ Convictions for violations of subsection 922(g) have generally risen over the past decade, culminating with roughly 64,000 cases and nearly 8,700 convictions in 2022.¹⁵⁷ The high number of cases and convictions drain resources and harm communities, and a law which incentivizes compliance would create better policy and more efficient enforcement.¹⁵⁸

As noted by the Department of Justice, rather than the threat of strong punishments, the knowledge that one is more likely to be caught committing a crime more effectively deters socially unacceptable behavior.¹⁵⁹ Similarly, the National Conference of State Legislatures noted that schemes that rely on reinforcement of positive conduct work more effectively to change behavior than mere threats of additional criminal sanctions.¹⁶⁰ These important principles provide a basic framework to view the current issue and proposed solution: because a person who possesses firearms or ammunition at the time of their disability has no way to dispose of their prohibited items legally, the current law incentivizes legally disabled persons to retain possession.¹⁶¹

Under the current statute, if someone with a legal disability made a good-faith effort to comply with the law, evidence of those attempts could lead a jury to reasonably find that person violated subsection 922(g).¹⁶² When attempts to comply with the law make it more likely to get caught, the threat of increased punishment does not lead to the socially desired outcome of dispossession by risky people.¹⁶³ The current language of subsection 922(g) incentivizes people in prohibited classes to retain their prohibited items by making their attempts to comply with the law the very acts that cause them to violate it.¹⁶⁴

To illustrate this issue, we will return to the hypothetical couple, George and Charles.¹⁶⁵ After his conviction for pointing a laser at an airplane, George would know that subsection 922(g)(1) prohibits his possession of firearms or ammunition.¹⁶⁶ If George were to post on Facebook or Craigslist that he

156. *QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf (last visited Mar. 25, 2024) [<https://perma.cc/AN4T-LZJT>].

157. *Id.*

158. *See Incentives for Supervision Compliance*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/incentives-for-supervision-compliance> (Nov. 15, 2022) [<https://perma.cc/VB5Y-G22C>].

159. *Five Things About Deterrence*, NAT'L INST. OF JUST. (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence#one> [<https://perma.cc/A6U8-CUYV>].

160. *Incentives for Supervision Compliance*, *supra* note 158.

161. Author's original thought.

162. *See United States v. Garlick*, No. 22-CR-540, 2023 WL 2575664, at *18 (S.D.N.Y. Mar. 20, 2023).

163. *See Incentives for Supervision Compliance*, *supra* note 158.

164. *Five Things About Deterrence*, *supra* note 159.

165. *See discussion supra* Part I.

166. *See* 18 U.S.C. § 922(g)(1).

needed someone to buy his prohibited items the minute of his release after conviction, officers could use the post as evidence against him because George acted with the power and intent to control his property.¹⁶⁷ If George were to reach out to a family friend over text to give the firearms and ammunition to the friend, prosecutors could use the texts as evidence of George's intent and display of control through attempts to transfer title and possession.¹⁶⁸ As the current law stands, if George did not plan to break additional laws, the statute acts as an incentive for George to keep his firearms at home or give them to another person who may not know or care that George cannot legally have access to them.¹⁶⁹ If the purpose of the law is to further the public interest of dispossession, current conviction rates indicate room for improvement.¹⁷⁰

Because the suggested updates to subsection 922(g) account for expected patterns of human behavior, the new statute would create better public policy and more efficiently compel adherence to the law, while also allowing for due process.¹⁷¹ The legislature's enactment of a statutory grace period would incentivize disposal of firearms or ammunition quickly through limited sale or exchange or enable the retention of ownership without possession in a manner acceptable to both the Constitution and public policy.¹⁷²

3. A Statutory Grace Period Would Protect Individual and Community Property Rights

Those with legal firearms disabilities retain an ownership interest in their property after conviction, and the statute's failure to provide a legal mechanism to dispose of prohibited property leaves no avenue to exercise constitutionally protected property rights.¹⁷³ Rewriting the statute to include a statutory grace period would protect the property rights of people in prohibited classes, and their spouses in community property jurisdictions, by allowing for the opportunity to dispose of legally owned items without violating the law requiring dispossession.¹⁷⁴ The inclusion of a statutory grace period and rebuttable presumption against future possessory interests would protect due process by enabling compliance with the law and allowing

167. See *Garlick*, 2023 WL 2575664, at *18.

168. See *id.*

169. Author's original thought.

170. See *QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses*, *supra* note 156.

171. Author's original thought.

172. See U.S. CONST. amends. V, VI. The Author would like to note that Fourteenth Amendment due process also applies for state criminal violations, but the scope of this Comment focuses primarily on federal action. See U.S. CONST. amend. XIV.

173. See *Henderson v. United States*, 575 U.S. 622, 626 (2015).

174. See U.S.C. 18 § 922(g).

legal property owners to exercise constitutionally protected property rights.¹⁷⁵

When a person in a prohibited class only loses the “possessory” stick from the proverbial bundle and retains other rights incident to their ownership interest, the Fifth Amendment protects their rights concerning the remaining interests.¹⁷⁶ As such, people with a firearms disability have no requirement to relinquish any firearms or ammunition they may own after conviction, and the statute provides no mechanism for any agency, without a court order, to receive the firearms if a disabled person wanted to try.¹⁷⁷ Although courts and regulations allow for the disposition of firearms and other property confiscated by the government, the same is not available for property still in possession after entry to a prohibited class.¹⁷⁸ Because those still in possession of prohibited items do not have the same opportunities to comply with the law and manage property interests, the statute violates due process.¹⁷⁹

To compound issues, jurisdictions recognizing community property presume joint-ownership for acquisitions during marriage, with few exceptions.¹⁸⁰ Because of this presumption, a spouse without a firearms disability may have no legal way to manage jointly owned property.¹⁸¹ If a married couple owns firearms as community property, both spouses must consent to any changes of title.¹⁸² A law that never provides a legal pathway for one of the spouses to consent to disposition violates the property rights of both the spouse with a legal disability and the spouse who never committed a crime.¹⁸³

While the spouse with a firearms disability may have the notice and opportunity required by due process for government deprivation of their possessory property right, a spouse without a legal disability has no notice or opportunity to speak against the infringement of their rights.¹⁸⁴ As such, a law which disallows spouses from managing their legally owned property removes sticks from their bundle of rights without due process, violating the Fifth Amendment.¹⁸⁵ Like similar analyses above using current principles of constructive possession, a reasonable fact finder could determine that a spouse with a legal disability constructively possessed prohibited items to

175. See Linder, *supra* note 11.

176. Cooper v. Greenwood, 904 F.2d 302, 305 (5th Cir. 1990).

177. *Who Can Have a Gun: Firearm Relinquishment*, *supra* note 76.

178. *Contra* Henderson v. United States, 575 U.S. 622, 626 (2015).

179. Author’s original thought.

180. See discussion *supra* Section II.C.2.

181. See Carissa Peterson, *Community and Separate Property in Texas: Ownership and Control*, THE STRONG FIRM, P.C. (Mar. 31, 2021), <https://www.strongfirm.com/blog/community-and-separate-property-in-texas-ownership-and-control/> [<https://perma.cc/YF6J-4YLR>].

182. *Id.*

183. See Nat’l Shooting Sports Found., Inc. v. California, 420 P.3d 870, 873–74 (Cal. 2018).

184. See *id.*

185. Author’s original thought.

give consent to transfer community property.¹⁸⁶ Because effects of subsection 922(g) invade upon the property rights of spouses without a legal disability, the law violates Fifth Amendment due process.¹⁸⁷

Importantly, this Comment does not argue that the mere ownership and possession of a firearm by a spouse without a legal disability would cause their legally disabled partner to violate subsection 922(g).¹⁸⁸ In *United States v. Palomo*, the Fifth Circuit Court of Appeals considered a situation where a driver with a subsection 922(g)(1) disability traveled interstate with his spouse who possessed a firearm.¹⁸⁹ During a traffic stop, the officer noticed the spouse in the passenger seat sitting on a gun and arrested the driver who was convicted for violating subsection 922(g).¹⁹⁰ While the case involved Texas community property law and constructive possession, the analysis indicated that the driver's guilt for violating subsection 922(g) centered on the driver's knowledge of the weapon and the power and intent to control it.¹⁹¹ Whether the driver actually had an ownership interest should not have factored into the jury's considerations because, as indicated in *Henderson*, the law is concerned about access to prohibited items rather than benign property interests.¹⁹²

American society recognizes the importance of limiting possession of firearms and ammunition for people who have committed acts deemed too risky for continuing firearm possession, but some of those effects carry over to innocent family members.¹⁹³ Including a statutory grace period would allow for the legal disposition of property owned by people barred from possession as well as respect the property rights of spouses who committed no crimes.¹⁹⁴ Even though we may recognize that a spouse without a disability may become impacted by the effects of subsection 922(g), they still maintain rights under due process which the law must still acknowledge and protect.¹⁹⁵

While one spouse may have had the notice and opportunity to be heard concerning property rights required by due process, spouses without a disability never get the opportunity to speak concerning their rights, and they certainly never receive notice of their disability imposed by another person's prohibition under subsection 922(g).¹⁹⁶ Because a legally disabled spouse

186. See *Tot v. United States*, 319 U.S. 463, 465 (1943); *Henderson v. United States*, 575 U.S. 622, 624–31 (2015).

187. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922); *Andrus v. Allard*, 444 U.S. 51, 65–67 (1979); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 145–46 (2021).

188. *United States v. Palomo*, No. 97-10825, 1998 WL 770665, at *1–5 (5th Cir. Oct. 15, 1998).

189. *Id.*

190. *Id.* at *1.

191. *Id.* at *1–3.

192. See *id.* See also *Henderson v. United States*, 575 U.S. 622, 622 (2015).

193. Author's original thought.

194. *Id.*

195. See *Henderson*, 575 U.S. at 622.

196. See 18 U.S.C. § 922(g).

loses the ability to manage their property the moment they gain the disability, non-disabled spouses lose the ability to manage their property without due process.¹⁹⁷ The current statute violates the right to due process afforded by the Fifth Amendment.¹⁹⁸ Including a fourteen day statutory grace period would protect due process rights and enable people with firearms disabilities and their spouses to manage property legally.¹⁹⁹

a. The Current Law Violates Property Rights

Like the proverbial bundle of sticks, the idea of property often breaks down into a number of individual rights such as the rights to possess, transfer, own, or use for profit.²⁰⁰ The government may invade upon these rights, but they must use due process and afford people with a property interest at stake the opportunity to be heard on the matter before an infringement of the interest.²⁰¹ In some circumstances, a person may lose one right concerning their property while keeping other rights.²⁰² When people become members of a prohibited class under 18 U.S.C. subsection 922(g), they lose their right to possession but retain other property rights like ownership.²⁰³ While state action may justifiably sever rights, the Fifth Amendment Due Process Clause requires that people whom the law affects have notice of the affecting action and the opportunity to speak on the matter.²⁰⁴

b. The Current Law Violates Individual Property Rights

When a statutory provision severs a possessory right from property, the person may retain the remaining property interests.²⁰⁵ As shown in the Supreme Court's analysis in *Henderson v. United States*, the right to sell or dispose of property differs from the right to possess.²⁰⁶ This may seem contradictory considering constructive possession's prohibition against the power and intent to control an item; however, a person's right to dispose differs from the "naked right of alienation—the capacity to sell or transfer [their] guns, unaccompanied by any control over them."²⁰⁷ As an example,

197. See discussion *supra* Section II.C.2.

198. *Contra* *Johnson v. United States*, 576 U.S. 591, 593–606 (2015) (noting the Supreme Court rejected the argument challenging § 922(g) on grounds of void for vagueness and overbreadth, which differs from the arguments made in this Comment).

199. See *id.*

200. See *Henderson*, 575 U.S. at 622.

201. See *Linder*, *supra* note 11.

202. *Id.*

203. *Henderson*, 575 U.S. at 622; *Andrus v. Allard*, 444 U.S. 51, 64–69 (1979).

204. *Baldwin v. Hale*, 68 U.S. 223, 233 (1863).

205. *Henderson*, 575 U.S. at 628; *Allard*, 444 U.S. at 64–69.

206. *Henderson*, 575 U.S. at 628.

207. *Id.*

people with firearms disabilities may use gun trusts where a trustee holds the possessory interest in prohibited property while the disabled person retains the other ownership interests they may legally exercise.²⁰⁸

While avenues such as those noted above may help someone avoid constructive possession when the government has custody of their prohibited items, people still in possession at the time disability is imposed do not have this option available.²⁰⁹ A person who has not relinquished control of any firearms or ammunition prior to entering a prohibited class still retains the legal right of alienation, but they also still have the power and intent to control, violating subsection 922(g).²¹⁰ Because of this inconsistency, the only way a person with a disability may currently dispose of prohibited property under subsection 922(g) is through nonconsensual transfers of ownership, such as fraud or theft.²¹¹

Consider George and Charles from the hypothetical above.²¹² When George and Charles got married, George already owned all three firearms and had stockpiled all of his ammunition.²¹³ As such, all of the items belonged solely to George.²¹⁴ The otherwise happily married couple want to continue living together after George's conviction, so George's firearms would have to leave before George came home.²¹⁵ While the couple may wish to comply with the GCA, George could not take any action to exercise power and intent to control the firearms the moment he received judgement and entered the prohibited class.²¹⁶ George could not legally consent to any action Charles took with the firearms, give permission to give the property away, put it in trust, or grant any other action that actually removed George's ability to exercise power and intent to control without an exercise of the same.²¹⁷ Under the current law, George has no avenue available to manage his legally owned property without violating subsection 922(g).²¹⁸ In this situation, George could keep his firearms and violate the statute through actual possession or transfer them illegally through constructive possession.²¹⁹

208. See *Est. of Keener*, No. 13-18-00007-CV, 2019 WL 758872, at *1-7 (Tex. App.—Corpus Christi—Edinburg Feb. 21, 2019, no pet.).

209. Author's original thought.

210. *Henderson*, 575 U.S. at 628.

211. *Updated: The Risks of Selling Assets Prior to Divorce Without Your Spouse's Approval*, POWERS & KERR, PLLC (Mar. 15, 2021), <https://www.powersandkerr.com/familylawblog/the-risks-of-selling-assets-prior-to-divorce-without-your-spouse-s-approval> [<https://perma.cc/F997-H7GA>].

212. See discussion *supra* Part I.

213. Author's original thought.

214. See 22 DORSANEO, TEX. LITIGATION GUIDE § 363.01 (2023).

215. See 18 U.S.C. § 922(g)(1).

216. Author's original thought.

217. *Id.*

218. *Id.*

219. See discussion *supra* Section II.B.

c. The Current Law Violates the Rights of Spouses Without a Legal Disability in Community Property Jurisdictions

Property acquired by spouses in legally recognized marriages typically breaks down into two types: separate or community property.²²⁰ When a married couple lives in a state recognizing community property rights, anything acquired during the marriage by either party becomes community property by presumption.²²¹ To beat the presumption, a spouse must have clear and convincing evidence to prove otherwise.²²² Despite the presumption of community property, couples may still have separate property if a spouse receives something through gift, devise, or descent during the marriage.²²³ When something becomes community property, both spouses have an equal and undivided interest in the property.²²⁴

Currently, nine states recognize community property, two others allow spouses to elect to use community property distributions, and still, others have schemes in which spouses may create community property trusts.²²⁵ Importantly, community property, with few exceptions, requires the consent of both parties for sale or other transfers.²²⁶ Generally, one spouse may not make unilateral decisions concerning community property without the consent of their partner, even if the partner does not care about the property or intend to use it.²²⁷

While protected by the Constitution, property rights arise from state authority, and the particulars of ownership, acquisition, and disposition can have a large impact on an individual's right to manage property.²²⁸ Generally, couples may manage their property as they wish, with one or both parties making decisions about the jointly owned interests, but the decisions must be made with the consent of both parties, especially when the decision involves a transfer of title.²²⁹ Both spouses in the marriage own a one-half interest in the community property, and both spouses must consent to decisions to end

220. Thomas M. Featherston, Jr., *His, Her or Their Property: A Primer on Marital Property Law in the Community Property States*, AM. BAR ASS'N 1, 7 (2014), <https://law.baylor.edu/sites/g/files/ecbvkj1546/files/2023-11/His%2C%20Her%20or%20Their%20Property%20--%20New%20York%202014.pdf> [<https://perma.cc/Q6JD-M7UV>].

221. *Id.*

222. See *Community Property*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/community-property> (Feb. 27, 2024, 4:25 PM) [<https://perma.cc/9GV6-37EY>]; Featherston, Jr., *supra* note 220, at 11.

223. Featherston, Jr., *supra* note 220, at 7.

224. See 22 DORSANEO, TEX. LITIGATION GUIDE § 363.01 (2023).

225. Laura Wartner, *Why Worry About Community Property?*, SMITH GAMBRELL RUSSELL, <https://www.sgrlaw.com/why-worry-about-community-property/> (last visited Dec. 15, 2023) [<https://perma.cc/688D-VTF5>].

226. *Id.*

227. *Who Has the Right to "Manage" Marital Property*, NELSON L. GRP., <https://nelsonlawgroup.com/right-to-manage-marital-property/> (last visited Dec. 15, 2023) [<https://perma.cc/AH7D-QF6M>].

228. See *Poe v. Seaborn*, 282 U.S. 101, 110–11 (1930).

229. See *id.*

their ownership.²³⁰ As made clear by legislatures and courts in community property jurisdictions, management of jointly owned property must come with the consent of both parties, and the current language of subsection 922(g) fails to take into account the effects on spouses without a legal disability.²³¹

For example, consider George and Charles from our hypothetical example above again.²³² The couple lives in Texas, a state that recognizes community property.²³³ If George bought the guns and ammunition after the marriage, state law presumes that both spouses enjoy joint-ownership of the items.²³⁴ Assuming acquisition after marriage, George and Charles would both have to consent to any disposition of the co-owned property, even if Charles had no interest or desire to own the firearms or ammunition.²³⁵ George and Charles may have an established understanding that George may manage the property as he wished, or Charles may take as much active participation with the property as he likes.²³⁶ Either way, both parties have equal rights to the guns and ammunition and an equal say in their disposition.²³⁷ After George's conviction, both parties in the marriage must still consent to whatever happens to the firearms and ammunition.²³⁸ Whether George owns the property solely or as community property, he will have to make a choice and exercise power and intent concerning the disposition of his firearms and ammunition in violation of subsection 922(g).²³⁹

If George and Charles jointly own the property, Charles may think that he can just give the firearms to George's brother to keep them in the family or to sell them to the local gun dealer; however, because the firearms are community property, George must consent to dispose of the property.²⁴⁰ George's consent to any such act, even tacitly, would count as an act of constructive possession and violate subsection 922(g) because George's acquiescence to the transfer to his brother still exercises an intent to act with the power to control.²⁴¹ George maintains the ability to guide or stop the transfer, or even act to regain control after the transfer, directly contrary to the reasons the Supreme Court recognized in court-guided transfers like those described in *Henderson*.²⁴² In the situation described, a reasonable jury could

230. *See id.*

231. *Id.*

232. *See* discussion *supra* Part I.

233. Featherston, Jr., *supra* note 220, at 11.

234. *Id.*

235. *Id.*

236. *See id.*

237. *Id.*

238. *See id.*

239. Author's original thought.

240. Featherston, Jr., *supra* note 220, at 11.

241. *See Henderson v. United States*, 575 U.S. 622, 628 (2015).

242. *See id.*

find George guilty of violating subsection 922(g).²⁴³ Because George cannot consent to any transfers or changes in the disposition of legally owned property interests, the law violates Charles's right to due process under the Fifth Amendment.²⁴⁴

Alternatively, couples may decide not to transfer ownership of firearms owned as community property.²⁴⁵ In that case, one partner may decide to remove the prohibited items from their legally disabled spouse's possession by placing them in a secure gun safe, storage facility, or secured room within the home where the spouse with a subsection 922(g) disability could not access the property.²⁴⁶ On its face, this solution may seem plausible, but a decision not to dispose of property does not change the fact that spouses without a disability or notice and an opportunity to be heard lack due process protections of constitutionally guaranteed property interests.²⁴⁷ Whether a couple decided to retain or transfer property prohibited under subsection 922(g), the statute removes the ability to manage property in the future.²⁴⁸ Including a statutory grace period allowing for dispossession within a specific time period and a rebuttable presumption against future possessory interests for those with legal disabilities allows both parties in a marriage an opportunity to manage their interests legally.²⁴⁹

B. Including a Rebuttable Legislative Presumption Against Possessory Rights Would Prevent Future Arbitrary Enforcement

Under the current iteration of subsection 922(g), people belonging to a prohibited class may not exercise possessory control over firearms or ammunition, with very limited exceptions as discussed below.²⁵⁰ This presents concerns when a person may acquire ownership of prohibited items through no action of their own in situations such as inheritance or acquisition through community property.²⁵¹ In instances such as these, people who acquire ownership rights would violate subsection 922(g) through transfers after gaining the legal disability.²⁵² To prevent arbitrary enforcement against good-faith acquisitions, a provision in the statute creating a rebuttable

243. *Contra id.*

244. Author's original thought.

245. *Id.*

246. See discussion *supra* Section I.C.1.

247. See *Henderson*, 575 U.S. at 626.

248. Author's original thought.

249. See discussion *supra* Section I.C.1.

250. 18 U.S.C. § 922(g).

251. See Adam Gunderson, *Inheriting Firearms: What to Do if Your Deceased Loved One Owned a Gun*, Gunderson L. Grp., P.C. (Mar. 3, 2021), <https://www.gundersonlawgroup.com/estate-planning/inheriting-firearms-deceased-loved-one-owned-gun/> [<https://perma.cc/PW7U-9EM2>].

252. See 22 DORSANEO, TEX. LITIGATION GUIDE § 363.01 (2023).

statutory presumption against acquiring a possessory interest would protect those with disabilities and their families.²⁵³

The relevant provision of the proposed statute reads as follows:

(10) Upon entering any of the classes identified in subsections 922(g)(1)–(9), there will be a rebuttable presumption that acquisition of an interest in any firearm or ammunition which has been shipped or transported in interstate or foreign commerce without an exchange for consideration lacks a possessory right if possession is transferred to and retained by a person who is not prohibited under this Chapter if completed within fourteen (14) days of acquisition of title.²⁵⁴

The suggested provision allows people with a legal disability the opportunity to avoid arbitrary enforcement of the law by providing a very limited window during which any good-faith acquisitions of prohibited property may be legally managed.²⁵⁵ In an effort to prevent bad-faith action, the proposed solution would limit the rebuttable presumption only to acquisitions made without consideration.²⁵⁶ This means that a person with firearms disabilities could not actively seek out and buy new firearms, and the rebuttable presumption allows enforcement if evidence showed the legally disabled person acted to otherwise actually or constructively possess the prohibited property.²⁵⁷

Some may argue that people who lose their possessory interest in firearms or ammunition under subsection 922(g) should have to disclaim inheritances of prohibited items due to the risk and public interest, but the Supreme Court's analysis in *Henderson v. United States* clearly notes that legally disabled individuals do not lose their ownership right, merely their right to possess property.²⁵⁸ With over 100 million gun owners in the United States and around 20 million people with felony convictions, the likelihood of a legally disabled person inheriting a prohibited item continues to grow.²⁵⁹ The proposed solutions in this Comment would allow those individuals the opportunity to retain ownership without possession or to legally receive its economic value through a clearly defined process which would serve the

253. Author's original thought.

254. See discussion *supra* Part II.

255. Author's original thought.

256. *Id.*

257. *Id.*

258. *Henderson v. United States*, 575 U.S. 622, 628 (2015).

259. See Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sep. 13, 2023), <https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns/> <https://perma.cc/2FEP-UH7U>. See also Alan Flurry, *Study estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), <https://news.uga.edu/total-us-population-with-felony-convictions/> [<https://perma.cc/S4CB-DWKX>].

public interest of dispossession while also protecting those in disabled classes and their families.²⁶⁰

Because subsection 922(g) does not provide guidance for couples in community property jurisdictions, a reasonable factfinder could find a legally disabled spouse guilty for violating the statute for exercising property rights gained through community property acquisitions or inheritance.²⁶¹ The proposed solutions would allow spouses in community property jurisdictions to manage their property without fear of arbitrary enforcement against their legally disabled spouse.²⁶² Similarly, individuals who may acquire prohibited property through other transfers without consideration, such as inheritance, could use the statutory grace period to either transfer possession to someone else for management or rightfully sell the prohibited items to recover their economic value.²⁶³

C. Legal Models that Demonstrate Similar Principles

While the legislature may have wide latitude in regulating firearms and ammunition in interstate commerce, courts have stepped in when innocent conduct becomes penalized.²⁶⁴ The public may have a legitimate interest in the prevention of widespread crime and violence, but the law should not prevent legal behavior.²⁶⁵ Allowing people with firearms disabilities to legally possess firearms during the grace period may seem unreasonable at first glance; however, the idea has precedential support.²⁶⁶ A short review of historical approaches to similar issues provides several examples where the law seeks to prevent discriminatory enforcement or allows limited technical violations in reasonable circumstances.²⁶⁷

1. Preventing Arbitrary and Discriminatory Enforcement

As noted by the Supreme Court in *Kolender v. Lawson*, the “Constitution is designed to maximize individual freedoms within a framework of ordered liberty.”²⁶⁸ Within that ordered framework, laws must provide enough detail and guidance to prevent law enforcement personnel from enacting arbitrary enforcement.²⁶⁹ In *Kolender*, the Court considered

260. Author’s original thought.

261. *Id.*

262. See discussion *supra* Section II.C.2.

263. See discussion *supra* Section II.A.1.

264. See *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 556 (1986).

265. See *generally* *United States v. Singh*, 979 F.3d 697, 723–25 (9th Cir. 2020) (discussing the public interest of dispossession).

266. See discussion *infra* Sections II.C.1–3.

267. See *id.*

268. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

269. *Id.* at 357–58.

the void-for-vagueness doctrine and noted that criminal statutes should provide enough detail so that “ordinary people” may know what the law allows or prohibits.²⁷⁰ As noted, the touchstone of this principle is avoiding “arbitrary and discriminatory enforcement.”²⁷¹ To prevent arbitrary enforcement, legislatures must provide, at a minimum, enough guidance that factfinders and investigators do not discriminate in the application of the law.²⁷² When a reasonable jury can find a person guilty of violating statutes for engaging in legal activity, the law violates the framework of ordered liberty.²⁷³

Similarly, when the Supreme Court overturned the provision creating a presumption of shipment through interstate commerce in the FFA in *Tot v. United States*, the Court evaluated precedential treatment of legislative presumptions.²⁷⁴ In the Court’s analysis, a valid presumption must have a “rational connection between the fact proved and the ultimate fact presumed.”²⁷⁵ Mere possession of a firearm or ammunition by someone in a prohibited class was not rationally connected to the presumption that the person acquired the items through interstate commerce.²⁷⁶ The Court further noted that “where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.”²⁷⁷ Likewise, the Fourth Circuit’s analysis concerning a void-for-vagueness challenge under the First and Fourteenth Amendments in *Manning v. Caldwell* noted that “a statute must give a person of ordinary intelligence adequate notice of what conduct is prohibited and must include sufficient standards to prevent arbitrary and discriminatory enforcement.”²⁷⁸

Similar analysis from the California Supreme Court in *National Shooting Sports Foundation, Inc. v. State of California* evaluated the nature of impossible laws.²⁷⁹ There, the court reasoned that interpretations of the law should avoid absurd outcomes.²⁸⁰ While California has a statute explicitly preventing interpretation of laws as impossible, the same does not exist federally.²⁸¹ Despite this, the analysis shows a clear intent of the law in general to operate in a way that prevents arbitrary enforcement and absurd outcomes against those who cannot find any legal avenues to compliance.²⁸²

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Tot v. United States*, 319 U.S. 463, 467 (1943).

275. *Id.* at 468.

276. *See id.* at 467.

277. *See id.* at 468.

278. *Manning v. Caldwell*, 930 F.3d 264, 272 (4th Cir. 2019).

279. *Nat’l Shooting Sports Found., Inc. v. California*, 420 P.3d 870, 871 (Cal. 2018).

280. *Id.*

281. *Cf. id.* (holding that the state law forbids impossibilities).

282. *Id.*

Other states like Florida found similarly, noting “that violation of a statute or regulation, whether deemed prima facie evidence of negligence or negligence per se, is excused where it appears without dispute that compliance with the statute is impossible even in the exercise of reasonable diligence.”²⁸³

While the presumptions in the FFA do not exist in the GCA, subsection 922(g)’s provision creating firearms and ammunition disabilities without a legal avenue of dispossession violates the underlying principle of the above analyses; the GCA provides no way for a person whom the law intends to regulate to act legally and therefore allows for arbitrary enforcement.²⁸⁴ When a statute “fails to give appropriate guidance to the people it regulates and fails to cabin adequately the discretion of enforcement officials,” the law becomes unconstitutionally vague.²⁸⁵ Including a minimal statutory grace period and the limited rebuttable presumption against future possessory interests changes the law in a reasonable manner so that those enforcing the law and those governed by it have adequate notice to comply and avoid arbitrary enforcement.²⁸⁶

2. The Doctrine of Equitable Tolling

The doctrine of equitable tolling describes a legal principle in which courts consider extending the length of a statute of limitation established by Congress in light of extraordinary circumstances.²⁸⁷ Characterized by the Supreme Court in *Lozano v. Montoya-Alvarez*, equitable tolling generally acts by pausing the statute of limitations for those who act in good faith but extraordinary circumstances keep them from complying in a timely manner.²⁸⁸ In such situations, courts look to the statutory intent to determine if pausing the limitation period fits within the purpose of the act.²⁸⁹

Though the doctrine of equitable tolling deals with situations in which Congress has created a statute of limitations and the proposed updated language to subsection 922(g) would create a statutory grace period, this principle reflects the form of the proffered solution.²⁹⁰ Equitable tolling applies when courts allow extended time so people in extraordinary circumstances may act in a timely fashion.²⁹¹ Similarly, the proposed solution recognizes the extraordinary circumstances of people with a legal disability attempting to comply with a statute that offers no legal method of

283. *Ivaran Lines, Inc. v. Waicman*, 461 So. 2d 123, 126 (Fla. Dist. Ct. App. 1984).

284. Author’s original thought.

285. *Brown v. Kemp*, 86 F.4th 745, 771 (7th Cir. 2023).

286. *See Beckles v. United States*, 580 U.S. 256, 257 (2017).

287. *Lozano v. Montoya-Alvarez*, 572 U.S. 1, 10 (2014).

288. *Id.*

289. *Id.*

290. Author’s original thought.

291. *Lozano*, 572 U.S. at 10.

compliance.²⁹² Both indicate how the legal system may adapt to serve the needs of public policy and address equity concerns when the language of the statute may prove inadequate.²⁹³

Equitable tolling provides an example in which courts may allow limited technical violations of the law in support of public policy, but the doctrine presents some noteworthy differences from the proposed statutory update.²⁹⁴ Primarily, equitable tolling comes from judicial action in which courts look to legislative intent for guidance on the applicability of the doctrine to specific cases.²⁹⁵ This does not seriously detract from the comparison because a similar relationship between legislatures and the judiciary also applies to the proposed solution.²⁹⁶ Specifically, it shows how courts could apply this similar doctrine if the legislature fails to address the shortcomings of the current language of subsection 922(g).²⁹⁷ Despite the differences between the proposed solution and the judicial action of equitable tolling, this legal doctrine informs the analysis of this Comment by showing how the law may adjust to reflect public policy and protect those who live under it.²⁹⁸

3. *The Necessity Defense*

In addition to disfavoring legal constructions that unreasonably limit the ability to act within the law or lead to absurd outcomes, the law allows for other technical violations in limited circumstances.²⁹⁹ For example, the Fifth Circuit Court of Appeals considered whether a person with a firearms disability under subsection 922(g) violated the law by temporarily possessing a firearm for self-defense purposes in *United States v. Panter*.³⁰⁰ There, the court held that a person barred from possession of firearms may have protection under a self-defense exception for as long as the danger lasts; however, the court further noted that possession before or after the immediate threat would constitute a violation of the law.³⁰¹

Further examining the necessity defense in the context of subsection 922(g), the Sixth Circuit Court of Appeals noted that, while the text of the statute fails to include a section allowing for defenses like the necessity defense, rare circumstances may arise in which a person with a legal

292. Author's original thought.

293. See *Lozano*, 572 U.S. at 10.

294. See *id.*

295. See *id.*

296. Author's original thought.

297. *Id.*

298. *Id.*

299. See *United States v. Panter*, 688 F.2d 268, 268 (5th Cir. 1982).

300. *Id.*

301. *Id.*

disability could use a firearm for self-protection.³⁰² In a similar analysis, the Tenth Circuit Court of Appeals iterated that courts evaluate the necessity to determine the reasonableness of the circumstances.³⁰³ A legally disabled individual must have no other reasonable alternatives than to possess the firearm, or their use was not necessary.³⁰⁴ Importantly, “defendant’s subjective beliefs or perspectives are not controlling; they must be objectively reasonable.”³⁰⁵ These examples apply to subsection 922(g), showing that the law may excuse technical violations when necessary.³⁰⁶

While the *Panter* court considered the issue involving self-defense, the analysis clearly shows a general legal principle of protecting legal rights and interests, even if the person involved has a legal disability.³⁰⁷ This Comment’s argument for including the suggested statutory updates relies on a similar analysis.³⁰⁸ The inclusion of a statutory grace period and limited rebuttable presumption against possession allows for a technical violation of public policy for only as long as reasonably necessary to manage a constitutionally protected property interest.³⁰⁹ Additionally, this proposal presents a solution to an objectively reasonable issue: people with a firearms disability cannot comply with the law.³¹⁰ While the statutory grace period would allow possession by risky people, the limited time frame and purpose works to protect the public interest.³¹¹ The law should not prevent the legal exercise of personal rights, including the disposition of property.³¹²

4. The Abandonment Defense

At times, the law recognizes situations in which a person may use the defense of abandonment when they engage in criminal activity and later totally withdraw from the illegal acts while taking affirmative steps to comply with statutory requirements.³¹³ Often associated with criminal conspiracies, abandonment of purpose comes after the person agrees to some type of unlawful activity.³¹⁴ As a continuing offense, the act of abandoning or withdrawing from a conspiracy provides a defense because the person no

302. *Id.*

303. *United States v. Dixon*, 901 F.3d 1170, 1179 (10th Cir. 2018).

304. *Id.*

305. *Id.*

306. Author’s original thought.

307. *See Panter*, 688 F.2d at 271–72.

308. Author’s original thought.

309. *Compare Panter*, 688 F.2d at 271–72, with discussion *supra* Part II.

310. *See Dixon*, 901 F.3d at 1181.

311. *See discussion supra* Section II.A.

312. Author’s original thought.

313. *Smith v. United States*, 568 U.S. 106, 111–12 (2013).

314. *Id.*

longer has an intent to break the law and takes efforts to ensure the planned illegal activity does not continue.³¹⁵

While not a perfect analog to the current issue, the abandonment defense provides another example of forgiving technical violations of the law when a person has an intent to comply while taking active steps to make up for the wrong activity, such as reporting their knowledge of illegal acts.³¹⁶ With the proposed update to include a statutory grace period and limited rebuttable presumption against possession within subsection 922(g), a person who dispossesses themselves of prohibited items during the approved timeframe may violate the public interest briefly.³¹⁷ Their possession does not violate public policy because the person shows an intent to act timely to comply with the law.³¹⁸

D. Counterarguments

Including the suggested statutory updates into subsection 922(g) addresses the concerns caused by not allowing a legal method of compliance; however, questions may arise concerning how the provision operates in practice and whether the grace period and limited rebuttable presumption against possession most effectively address the raised issues.³¹⁹ This Comment attempts to address some of the foreseeable concerns with implementing such a statutory scheme, including a need for action with the reasoning from *Henderson*, the variable timeframe for people in prohibited classes, the administrative burdens, and the alternative option of a judicial solution using precedential analysis.³²⁰

1. Material Differences from Supreme Court Precedence Show a Need for Action

In *Henderson*, the Supreme Court considered the purpose behind subsection 922(g) and determined that the government's expansive view of constructive possession failed to advance the statute's purpose.³²¹ Notably, the Court stated:

[O]n the Government's construction, § 922(g) would prevent *Henderson* from disposing of his firearms even in ways that guarantee he never uses them again, solely because he played a part in selecting their transferee. He

315. Author's original thought.

316. See *United States v. Young*, 613 F.3d 735, 744–46 (8th Cir. 2010).

317. Author's original thought.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Henderson v. United States*, 575 U.S. 622, 629 (2015).

could not, for example, place those guns in a secure trust for distribution to his children after his death. He could not sell them to someone halfway around the world. He could not even donate them to a law enforcement agency. Results of that kind would do nothing to advance § 922(g)'s purpose.³²²

While Justice Kagan's analysis seems to indicate the lack of necessity for the proposed solution, the facts from the *Henderson* case differ materially from the situation described within this Comment.³²³ There, Mr. Henderson turned his firearms over to the FBI as part of a bail agreement and upon conviction and release from prison, asked the court in the case to direct the FBI to transfer the weapons to his wife or a friend.³²⁴ As discussed above, this did not violate constructive possession because Mr. Henderson had no control over the guns in an FBI evidence locker.³²⁵ Mr. Henderson may have had intent, but he lacked any power to control.³²⁶

Alternatively, a person who still retains possession of their prohibited items after entry into a prohibited class has both intent and the power to control when they engage in transfers to others or give consent to transfer community property.³²⁷ Because of this discrepancy, the law creates the exact kind of unreasonable circumstance described in *Henderson*.³²⁸ The solution proposed by this Comment would bring the statute in line with public policy and protect property rights for those governed by the law.³²⁹

2. Issues with the Variable Timeframe Do Not Violate the Public Interest

Because adjudication of crimes can occur in many different ways, the date for when the statutory grace period would start could be variable for many people.³³⁰ As proposed, the grace period starts upon release after conviction.³³¹ For some, this involves making a plea and going home the same day, or "release after conviction" could mean twenty or more years later.³³² This Comment argues that the variable time has little negative

322. *Id.*

323. Author's original thought.

324. *Henderson*, 575 U.S. at 624.

325. *Id.* at 628. See discussion *supra* Section II.B.

326. *Henderson*, 575 U.S. at 628.

327. See *United States v. Tanco-Baez*, 942 F.3d 7, 25–26 (1st Cir. 2019).

328. See *Henderson*, 575 U.S. at 628.

329. Author's original thought.

330. See generally *Primer: Firearms Offenses*, U.S. SENT'G COMM'N 1, 4 (Aug. 2023), https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Firearms.pdf [<https://perma.cc/G76Q-YN9>] (discussing potential sentencing outcomes).

331. See discussion *supra* Part II.

332. See *Primer: Firearms Offenses*, *supra* note 330, at 2–3.

practical effect from a social policy point of view, but it would materially address violations of constitutionally protected rights.³³³

While it may seem flippant to suggest such variation would not materially affect the public policy goals addressed by subsection 922(g), the doctrine of equitable tolling provides an example of adjusted timeframes for compliance.³³⁴ Equitable tolling may apply on a case-by-case basis as determined by courts; however, this shows that the law does not always require that every person or situation strictly follow the same timeline.³³⁵ Requiring courts to individually adjudicate claims takes significant judicial resources, but the proposed solution would apply the principle to everyone belonging to a risky class.³³⁶ In practice, the proposed solution would essentially give everyone entering a legally disabled class a two-week “toll” during which they may engage in reasonable action to manage prohibited items before the prohibitions of the law take effect.³³⁷

With the alteration to the law suggested by this Comment, a person covered by subsection 922(g) who violated additional laws with a firearm during the statutory grace period could receive the consequences allowed for violations of the statute.³³⁸ As an example, if George from our hypothetical couple received probation after his guilty plea and went home the same day, his statutory grace period would begin that day, and George and Charles would have two weeks to dispose of any jointly-owned firearms.³³⁹ Alternatively, if George received the statutory maximum of five years, the grace period for George and Charles to dispose of their firearms would not end until fourteen days after George’s release from prison.³⁴⁰

If George committed no additional crimes during his incarceration, then society is no worse off, and the public interest of dispossession is protected.³⁴¹ Additionally, because George acted as an otherwise law-abiding citizen during his incarceration, the incentives of the lawful behavior result in the reward of extra time during which the couple—or just George in jurisdictions without community property—may direct the disposition of their property.³⁴² On the other hand, if George attempted to constructively possess his firearms to direct criminal activity during his incarceration or the statutory grace period, then he would be chargeable for violating subsection 922(g) under the proposed change to the statute, in addition to the consequences of any

333. Author’s original thought.

334. See discussion *supra* Part II.C.2.

335. See *Lozano v. Montoya-Alvarez*, 572 U.S. 1, 10 (2014).

336. Author’s original thought.

337. See *Lozano*, 572 U.S. at 10.

338. 18 U.S.C. § 922(g).

339. See discussion *supra* Part I.

340. See discussion *supra* Part II.

341. Author’s original thought.

342. *Id.*

additional crimes.³⁴³ In such a case, the law serves the public interest of exacting justice for engaging in additional criminal behavior.³⁴⁴

3. *The Proposed Solution Would Not Significantly Increase Administrative Burdens*

In a nation comprised of around 335 million people and 400 million guns, in which 32% of Americans own firearms and 44% live in a household with them, courts have an increased burden if they are asked to facilitate transfers for every person gaining a firearms disability.³⁴⁵ Eight thousand convictions for subsection 922(g) violations could indicate a large concern in regard to asking courts or local agencies to handle such transfers; however, many gun owners would likely find alternatives to transfers overseen by courts for a number of reasons, including distrust of such a system and the availability of preferable alternatives like local private gun dealers.³⁴⁶

Gun owners who go through the adjudication process may not believe courts or local government agencies have the person's best interests in mind concerning the transfer of property; however, the process of notification of the option to use the courts would provide an available avenue if none other existed and would serve the public policy of compliance in a timely manner.³⁴⁷ In general, many defendants hold low opinions of the enforcement officials involved with the criminal justice system.³⁴⁸ Taking George and Charles as an example, the couple could decide to avoid the hassle of finding a private gun dealer and voluntarily relinquish the firearms and ammunition to the local sheriff's department the day after George pleads and goes home.³⁴⁹ The couple could also take the two weeks to find vendors, family members, or friends who may take possession of any prohibited items in accordance with established property rights.³⁵⁰

343. 18 U.S.C. § 922(g).

344. Author's original thought.

345. Lydia Saad, *What Percentage of Americans Own Guns*, GALLUP, <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> (Nov. 13, 2020) [<https://perma.cc/XS5J-6XE3>]; Harmeet Kaur, *What Studies Reveal About Gun Ownership in the US*, CNN (June 2, 2022, 4:13 PM), <https://www.cnn.com/2022/06/02/us/gun-ownership-numbers-us-ccc/index.html> [<https://perma.cc/CE2X-XCXK>]; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045223> (last visited Jan. 28, 2023) [<https://perma.cc/A8TQ-X7KK>].

346. Domenico Montanaro & Eric Westervelt, *Most Gun Owners Favor Modest Restrictions but Deeply Distrust Government*, *Poll Finds*, NPR (July 8, 2022, 5:00 AM), <https://www.npr.org/2022/07/08/1110239487/most-gun-owners-favor-modest-restrictions-but-deeply-distrust-government-poll-fi> [<https://perma.cc/BZD9-7J5R>].

347. Author's original thought.

348. See Rachel Swaner et al., *What Do Defendants Really Think?: Procedural Justice and Legitimacy in the Criminal Justice System*, CTR. FOR CT. INNOVATION 1, 12–13 (Sept. 2018), https://www.innovatingjustice.org/sites/default/files/media/documents/2018-09/what_do_defendants_really_think.pdf [<https://perma.cc/CW2Z-XLEW>].

349. See discussion *supra* Part I.

350. Author's original thought.

4. Judicial Solutions Would Increase Administrative Burdens

One may note the lack of apparent political will to amend the law to give legal license to people in a legally disabled class to retain possession of prohibited items for even limited periods of time and argue for a common law solution to this issue.³⁵¹ In this situation, people have hope that investigators and factfinders agree that the potential defendant acted reasonably in each instance that may violate constructive possession.³⁵² While courts may eventually establish tests to determine reasonableness for transfers made after entry into a prohibited class, this solution would increase the chance for arbitrary and discriminatory enforcement.³⁵³ The solution proposed by this Comment provides the missing statutory guidance necessary for constitutional enforcement of the statute.³⁵⁴

Additionally, some may argue that a person indicted with a felony could avoid the issues presented by merely dispossessing themselves of any firearms or ammunition prior to their conviction.³⁵⁵ This solution may work for the criminal who always plans ahead, but reliance on this as policy would violate the due process idea of every person having a presumption of innocence under the law until proven guilty.³⁵⁶ While a person could receive the economic benefit of their property through a sale prior to conviction or engage in a deal with a trusted third party to recover their property if not convicted, this would act like a presumption of guilt and force presently innocent people to make property dispositions.³⁵⁷ The law may not compel a person to give up property on the mere allegation of criminality because failures in the law create a situation leaving a person with no legal method of compliance.³⁵⁸

E. Public Policy Considerations of Subsection 922(g)

Though some metrics concerning enforcement were addressed above, the data bears further discussion.³⁵⁹ Most notably, between the years 2018 and 2022, over 37,000 people in the United States received a conviction

351. See Adam Carlson, *The Gun Legislation Congress Has Passed and Rejected Amid Mass Shootings: Timeline*, ABC NEWS (May 7, 2023, 11:41 AM), <https://abcnews.go.com/Politics/gun-control-efforts-congress-failed-30-years-timeline/story?id=84995465> [<https://perma.cc/5KQ6-T2UB>].

352. Author's original thought.

353. See discussion *supra* Section III.B.

354. Nat'l Shooting Sports Found. v. California, 420 P.3d 870, 873 (Cal. 2018).

355. See generally *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (discussing the doctrine of "innocent until proven guilty").

356. See *id.*

357. See *id.*

358. Richard A. Epstein & Eduardo M. Peñalver, *The Fifth Amendment Takings Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/634> (last visited Mar. 25, 2024) [<https://perma.cc/3NAR-JKCR>].

359. Author's original thought.

under subsection 922(g).³⁶⁰ While the demographic breakdown of the United States indicates 57.8% of Americans are White, 18.7% are Hispanic, 12.1% are African American, and 11.4% are of other reported racial backgrounds, the conviction demographics look very different.³⁶¹ According to data from the United States Sentencing Commission, 58.1% of those convicted, over 21,600 people, were African American, 23.1% were White, 15.6% were Hispanic, and 3.2% were of other races.³⁶² Disparities in enforcement for crimes such as violations of subsection 922(g) have large effects on the policed populations.³⁶³

I. Long Prison Sentences

Over 97% of those convicted under subsection 922(g) received a prison sentence, with an average sentence of sixty-three months.³⁶⁴ While legislative records indicate an intent to serve those most harmed in society by reducing the risk to public safety, research indicates that lengthy prison sentences have little to no effect on reducing problematic behavior while simultaneously increasing societal harms.³⁶⁵ Specifically, people who spend long sentences inside prisons develop “response[s] to the extraordinary demands of prison life” that often run counter to social integration efforts after release from incarceration.³⁶⁶ Stressors like problems with family outside prison, injuries, threats, financial difficulties, and more may lead prisoners to develop reactions that prevent effective reentry into general society.³⁶⁷ Improving the process of dispossession for legally disabled classes would provide a framework of ordered liberty that would prevent arbitrary enforcement and exposure to socially harmful environments.³⁶⁸ With such high conviction rates for violations of subsection 922(g), the public interest is clearly not being served.³⁶⁹

360. *Section 922(G) Firearms*, U.S. SENT’G COMM’N, <https://www.uscc.gov/research/quick-facts/section-922g-firearms> (last visited Jan. 2, 2024) [<https://perma.cc/8RMH-93ZV>].

361. *Id.*

362. Connie Hanzhang Jin et al., *What the New Census Data Shows About Race Depends on How You Look at It*, NPR (Aug. 13, 2021, 5:01 AM), <https://www.npr.org/2021/08/13/1014710483/2020-census-data-us-race-ethnicity-diversity> [<https://perma.cc/JL25-B4B9>].

363. Author’s original thought.

364. *Section 922(G) Firearms*, *supra* note 360.

365. Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, OFF. OF ASSISTANT SEC’Y FOR PLAN. & EVALUATION (Nov. 30, 2001), <https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0> [<https://perma.cc/GZ72-PHXX>].

366. *Id.*

367. *Id.*

368. *Id.*

369. See Tara O’Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/#_edn2 [<https://perma.cc/TR8H-LWPC>].

Adding to the concerns raised about the psychological effects of lengthy prison sentences, the rate of people who leave prison and commit more crimes also increases the longer they spend incarcerated.³⁷⁰ Research indicates that, while longer prison sentences may make the public feel safer, lengthier incarceration terms correlate to higher rates of recidivism.³⁷¹ In effect, efforts to punish socially deviant behavior more harshly may actually cause an increase in the exact behaviors that the consequences purportedly sought to prevent.³⁷² One study noted “that each additional year sentenced increased the likelihood of post-release criminal activity by 4 to 7 percentage points per quarter.”³⁷³

If the dangers of possession by risky classes of people present such a hazard to public safety, the legislature should craft statutes to decrease undesirable outcomes rather than seek to merely punish.³⁷⁴ The proposed solution would address these concerns by incentivizing compliance and providing a more reliable system to serve the public policy of keeping dangerous weapons away from potentially dangerous people.³⁷⁵ With a more defined system of dispossession and increased compliance, law enforcement officers would preserve resources previously expended on those unnecessarily caught in the criminal justice system through structural deficiencies in the process.³⁷⁶

2. Effects on Families

While the mass incarceration of subsection 922(g) violators is ineffective, the law also prevents those with convictions and their families from succeeding economically after release from the violator’s conviction.³⁷⁷ Research indicates that economic value lost to lower educational outcomes for children of imprisoned parents reaches the tens of billions of dollars.³⁷⁸ Additionally, having a parent in prison increases the likelihood of a child going to prison by five times compared to children without parents in prison.³⁷⁹ Strikingly, incarceration may lead to a decrease in total lifetime earnings by as much as 40% for the imprisoned person, and the effects on their families can be huge, with higher rates of divorce and other negative outcomes.³⁸⁰

370. See Section 922(G) Firearms, *supra* note 360.

371. Hayes, *supra* note 369.

372. *Id.*

373. *Id.*

374. Author’s original thought.

375. *Id.*

376. *Id.*

377. Hayes, *supra* note 369.

378. See *id.*

379. Haney, *supra* note 365.

380. *Id.*

Because of the wildly disproportionate convictions and the negative effects associated with such, minority populations receive the largest share of hardship from the current statutory structure.³⁸¹ As a striking example of this inequity, “as the present decade began, there were more young Black men (between the ages of 20-29) under the control of the nation's criminal justice system (including probation and parole supervision) than the total number in college.”³⁸² Though American society benefits from reducing violent crime rates, statutory schemes which operate through inequitable and arbitrary enforcement do not serve the public interest.³⁸³ As indicated above, such inequities violate constitutional principles of due process and equal protection under the law, and the innocent feel the effects as well.³⁸⁴

The proposed solution of adding language to the statute to create a grace period and a presumption against possessory interests would act to allow for more equitable enforcement by incentivizing legal compliance and offering a reliable and predictable method of dispossession of prohibited items.³⁸⁵ This improved process would keep family members out of incarceration and away from the severely negative impacts of an inequitable justice system.³⁸⁶

VI. CONCLUSION

The current structure of the GCA's prohibition on possession of firearms and ammunition in 18 U.S.C. subsection 922(g) offers no legal pathway for a person belonging to a specified class to comply with the law.³⁸⁷ Because the statute prohibits possession from the moment of conviction, the law violates principles of due process by creating a situation in which a person has no legal options available.³⁸⁸ This situation creates an incentive for people to remain out of compliance with the law and violates the property rights of people belonging to a prohibited class and their families.³⁸⁹

The legislature could alleviate these concerns with the inclusion of a statutory grace period of fourteen days after release from conviction and the addition of a limited rebuttable statutory presumption against possessory rights.³⁹⁰ This proposed solution would serve the public policy interests of encouraging people belonging to a prohibited class to dispossess themselves of prohibited items while respecting their property rights.³⁹¹ Additionally, the

381. Author's original thought.

382. Haney, *supra* note 365.

383. Author's original thought.

384. See discussion *supra* Part II.

385. See Haney, *supra* note 365.

386. Author's original thought.

387. See discussion *supra* Part II.

388. See discussion *supra* Section II.C.

389. See discussion *supra* Sections III.C.1–3.

390. See discussion *supra* Sections III.A–B.

391. See discussion *supra* Sections III.A–C.

proposed solution would provide guidance to law enforcement personnel to act as guardrails against inequitable enforcement of the law and better protect the liberties of those living under the law.³⁹²

392. See discussion *supra* Section III.E.