

A Fighting Chance for Outlaws: Strict Scrutiny of North Carolina’s Felony Firearms Act

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I. INTRODUCTION

Joe Smith was sixty-two years old and still married to his high school sweetheart, Kim. Ever since graduating high school, he had worked as a crane operator for a small construction company, where he had made just enough to support his family and maintain their modest household. The couple's two sons were on scholarship at the state university. Joe hoped college would separate his boys from the sorts of local rabble which had gotten him into trouble decades ago. Fortunately, no one seemed to care anymore about Joe's 1964 conviction for felony drug possession. Or so he thought.

He opened his newspaper one Sunday morning and learned a group of four men armed with baseball bats had broken into the home of a local retiree over the weekend, destroying thousands of dollars worth of property before savagely beating the man's golden retriever to

death. This was the third incident of this kind in less than a month, and had happened less than three miles down the road from Joe's home. The suspects appeared to be victimizing older residents who lived in more isolated or rural parts of the county. Joe read this angrily, knowing he and his wife might also be targets. They would be helpless against four armed men.

After work the next day, Joe drove into town and visited Steve's Hunting Supply. After browsing the firearms display for a few hours, he decided on a pump action shotgun. "Perfect for home defense," Steve remarked. But once Joe had filled out all the paperwork—on which he noted his prior felony conviction—Steve refused to make the sale.

As Joe stared at him in confused silence, the uncomfortable store owner explained that state law had recently been revised to prohibit anyone with a felony conviction from having or buying a firearm,¹ and that federal law prohibited retailers from selling a gun to someone whose possession was illegal under *state* law.² So regrettably, because of Joe's 1964 drug conviction, it was unlawful for Steve to make the sale. Joe was bewildered. "That was forty-something years ago!" he protested. "Plus, I'm not taking this thing anywhere but my own house."

"I'm sorry," said Steve resolutely, "but that's the law, and if you don't like it, contact your state representatives." When Joe finally got home that night, he did just that. After having Kim check over his letter for spelling errors, Joe sealed it reverently inside an envelope, affixed two postage stamps just to be safe, and said a prayer.

One night several weeks later, Joe stood on the back porch of his country home grilling spare ribs for a late dinner. Kim was inside, folding laundry. Just as he turned off the propane flame, Joe heard a vehicle approaching his home. Even from the opposite side of the house, he could hear unbelievably loud music pumping from the car stereo into the rural night air. "I sure hope that's not *our* boys!" he shouted through the back door to Kim, who appeared momentarily, shaking her head. "I don't think so," she said with concern.

1. This is precisely the state of the law in North Carolina. See N.C. GEN. STAT. § 14-415.1 (2007).

2. See 18 U.S.C. § 922(b)(2) (2006) (making it unlawful for a dealer to sell "any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law"); *id.* § 922(d)(1) ("It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .").

Joe's pulse quickened. He strode through the kitchen and living room to the front of the house and peered through the small windows in the door. To his horror (but not to his surprise), he saw four shadowy figures get out of a parked car and begin to walk casually across the wide lawn towards his front steps, each carrying what looked like a baseball bat.

He tried to calm his breathing as he quickly double-checked the lock on the front door and handed his cell phone to Kim, who looked faint. Joe quietly instructed his wife to call for help and lock herself in the bedroom until police arrived. Without questioning him, she dialed emergency and hurried toward the rear of the home. Joe was still scouring the kitchen in search of something he could use to defend himself when he heard the first sound of shattering glass.

* * *

Thirty miles away from the crisis unfolding at Joe's home, a young dental assistant named Meredith paid her bar tab and finished off her fourth drink. She lit a cigarette as she stumbled out of the downtown martini bar, hoping to catch a stronger cell phone signal.

Six years earlier, before graduate school, she had been convicted of "felony death by vehicle" after drunkenly driving over the city sidewalk (and a pedestrian) on her way home from a cocktail party. While her prison sentence had been suspended, state law mandated revocation of her driver's license; yet it also allowed her to petition for a conditional license after five years. Just months earlier, her own petition had been granted, and she purchased a new Land Rover to celebrate regaining her driving privileges.

Now frustrated with being unable to contact her "no show" date, the tipsy young woman reoriented herself towards the parking deck. She climbed the stairs to the second level and peered groggily across several rows of cars in search of her large, silver-colored sports utility vehicle. Finding it, she scrambled into the driver's seat. With a sigh of resignation, she dialed her ex-boyfriend, started the engine, and dug through the glove box in search of her favorite Whitney Houston album.

* * *

In his office at the state capitol the next morning, Senator Randall hands a stack of unread constituent letters to his intern. "I'm heading to a late breakfast," he says. "If they're writing about the school funding bill, send a gracious response—you know what to do with the rest." An hour later, while the Senator is still shaking hands with union bosses, all six pages of a handwritten letter from Joe Smith meet their fate in the teeth of a document shredder.

A. *Understanding the Issue: What Britt Did Not Address*

The North Carolina Supreme Court very recently dealt with a case brought by Barney Britt, a citizen who (like Joe Smith in the above vignette) found his firearms ownership rights revoked by the state legislature some decades after being convicted of a minor felony offense.³ An amendment in 2004 to the Felony Firearms Act made it illegal for Britt to keep a firearm in his own home—even though his rights of citizenship had been fully restored and his post-conviction conduct had been without blemish.⁴ Reversing the court of appeals, the supreme court held, on state constitutional grounds, that the Act was an “unreasonable regulation” insofar as it applied to Britt:

Based on the facts of plaintiff’s crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute’s operation, *as applied to plaintiff*, the 2004 version of [the Act] is an unreasonable regulation, not fairly related to the preservation of public peace and safety. In particular, it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety.⁵

Even though the court properly restored Britt’s rights,⁶ its limited, fact-specific disapproval of the Act was inadequate. Because the court refused to reach its worthy result by way of Britt’s constitutional claims (which would have risked overturning the Act entirely), other persons with decades-old convictions for nonviolent and relatively insignificant crimes remain in the clutches of a statute that deprives them of a fundamental, individual right under the federal Constitution; namely, the right of self-defense.⁷ The silver lining, of course, is that the court’s as-

3. *Britt v. State*, 681 S.E.2d 320 (N.C. 2009). The decision from which Britt appealed, *Britt v. State*, 649 S.E.2d 402 (N.C. Ct. App. 2007), is discussed *infra* text accompanying notes 253–76.

4. *See Britt*, 681 S.E.2d at 321–22, 323 (discussing briefly the legislative history of N.C. GEN. STAT. § 14-415.1 and highlighting Britt’s exemplary behavior as a citizen).

5. *Id.* at 323 (emphasis added).

6. *See id.* at 322 (“[T]his Court retained plaintiff’s notice of appeal based upon a substantial constitutional question as to the following issue only: ‘Whether the application of the 2004 amendment to [the Act] to plaintiff violates his rights under N.C. Const. art. I, § 30.’”); *id.* at 321 (“We determine that [the Act] is unconstitutional as applied to plaintiff . . .”).

7. The Supreme Court has made clear that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such

applied holding left the Act vulnerable to further challenge from arguments it did not consider.

As the United States Supreme Court has recently emphasized, “the inherent right of self-defense [is] central to the Second Amendment right [to keep and bear arms].”⁸ When an individual like Joe is confronted with mounting criminal violence in the neighborhood, no response is more natural than his impulse to secure means of effective self-defense. Not only is this response natural, but it is also popular. Of the North Carolinians polled in a recent survey, over 52% keep a firearm in their home;⁹ and of this number, at least 76% report doing so for the specific purpose of defending themselves against criminals.¹⁰ In urban areas with higher instances of violent crime, an even greater number (85% of gun owners surveyed) reported keeping their weapon for protection against criminals.¹¹

Yet North Carolina law—even after the recent *Britt* decision—continues to prohibit people like our hypothetical Joe Smith from having a firearm for any purpose, including self-defense in the home.¹² Despite

that neither liberty nor justice would exist if they were sacrificed” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted) (internal quotation marks omitted). In a lengthy examination of the Second Amendment, the Court recently showed that the right to keep and bear arms is indeed deeply rooted in America’s history and tradition. *See generally* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783-2822 (2008). As North Carolina gun enthusiasts have opined, the right of self-defense is also “individual” in nature. *See* Gordon Hutchinson, *Heller Opens a Welcome Can of Worms*, N.C. SPORTSMAN, July 2008, available at <http://www.northcarolinaspportsman.com/details.php?id=836> (praising *Heller* as “a rock-solid constitutional determination by the Supreme Court of the United States that you and I have the individual right to own firearms for personal use and self-defense”); *see also* authorities listed *infra* note 37.

8. *Heller*, 128 S. Ct. at 2817.

9. Press Release, Pub. Policy Polling, Crime Protection Main Reason for NC Gun Ownership (Feb. 11, 2009) [hereinafter 2009 Survey], http://www.publicpolicypolling.com/pdf/ppp_release_nc_211.pdf. This figure appears to have increased significantly since a 2002 survey in which only 41.6% of respondents in North Carolina indicated they kept a firearm in or around their home. *See* N.C. State Ctr. for Health Statistics, Behavioral Risk Factor Surveillance System: 2002 Survey Results, <http://www.schs.state.nc.us/schs/brfss/2002/nc/all/firearm4.html> (last visited Nov. 22, 2009) (indicating the website-format reproduction of the survey results statistics was generated on July 28, 2003).

10. 2009 Survey, *supra* note 9.

11. *See id.* (“[S]ignificantly more gun owners in urban areas—85% compared to the overall 76%—reported owning them for protection against criminals.”). As the report explained, “[p]eople living in places with higher crime rates, specifically large cities, have greater concerns about becoming crime victims.” *Id.*

12. *See* N.C. GEN. STAT. § 14-415.1 (2007).

the fact that he has never done anything remotely violent, Joe's four-decade old felony conviction calls for his permanent disarmament under the Act.¹³ In other words, this statute robs Joe of the only tool realistically capable of protecting him against today's violent criminals: his firearm. By disarming Joe, the Act effectively deprives him of his fundamental right of self-defense—a right to which *other* North Carolinians remain entitled even if they are convicted of other heinous wrongs, so long as those wrongs are not labeled “felonies.”¹⁴

Even though there is no fundamental right to drive a car, North Carolina's treatment of drunk drivers like Meredith is far more careful than its treatment of nonviolent felons like Joe. It is true that Meredith's felony death-by-vehicle conviction triggered the mandatory, “permanent” revocation of her driver's license by the Division of Motor Vehicles (DMV).¹⁵ But notwithstanding her conviction and the fact that her crime was actually the unlawful killing of a person *with her car*, current North Carolina law allows Meredith to own and possess a motor vehicle.¹⁶ Moreover, upon her petition after a five-year revocation period the DMV can reinstate her driver's license, with certain restrictions, if it is pleased with her conduct during the five years.¹⁷ Joe, meanwhile, has no way to recover his right to keep arms, short of receiving an unconditional pardon for his 1964 felony by the Governor, which will not happen.¹⁸ The current Felony Firearms Act simply does not provide for relief from the disenfranchisement it imposes.¹⁹

The Due Process Clause “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”²⁰ In contrast to the anemic “as applied” reasoning of the North Carolina Supreme Court in *Britt*,²¹ this Com-

13. See *id.*

14. As explained *infra* Part IV.A.1, even if a person has committed a shocking or violent misdemeanor, she does not become disenfranchised under the Act. See, e.g., *infra* text accompanying note 335 (“Even the habitual, wanton blowing up of dynamite or exploding of bombs is not enough to earn disenfranchisement under the Act.”). Why? Because her crime is subject to neither “felony” punishment nor imprisonment in excess of a year. See *infra* note 158; *infra* text accompanying notes 302–16.

15. See *infra* notes 452–71 and accompanying text.

16. *Id.*

17. *Id.*

18. See *infra* discussion accompanying notes 443–46.

19. Rather than attack North Carolina's licensing or impaired driving laws, this Comment will suggest that these statutes might serve as a model for improving the Felony Firearms Act. See *infra* discussion accompanying notes 450–77.

20. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

21. See *supra* notes 3–6 and accompanying text.

ment argues that the Felony Firearms Act is not narrowly tailored to any compelling state interest and thus unconstitutionally infringes the fundamental right of self-defense.²²

B. *Considering the Heller Decision*

On June 26, 2008, in *District of Columbia v. Heller*, the United States Supreme Court struck down the District's longstanding ban on handgun possession.²³ Justice Scalia's majority opinion declared that the District's cocktail of laws, which effectively outlawed home possession of all operable firearms by combining a proscription against registration of handguns with a ban on possession of unregistered firearms, violated guarantees contained in the Second Amendment to the United States Constitution.²⁴ The Court emphatically denounced the District's absolute handgun ban in the home, "where the need for defense of self, family, and property is most acute."²⁵ The Court explained:

The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence], including some measures regulating handguns But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.²⁶

While anxious to safeguard the "inherent right of self-defense" and the use of implements "overwhelmingly chosen by American society for that lawful purpose,"²⁷ the Court cautiously attempted to avoid establishing any illimitable right to firearm possession. "Like most rights," explained Justice Scalia, "the right secured by the Second Amendment is not unlimited."²⁸ The Court attempted to reassure opponents of felon gun possession—such as Congress—that its holding should not serve to "cast doubt on longstanding prohibitions on

22. If we could read Joe's letter, we might find him making some of the same observations which are made in this Comment.

23. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008) ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

24. *See id.* at 2817.

25. *See id.*

26. *Id.* at 2822.

27. *Id.* at 2817.

28. *Id.* at 2816.

the possession of firearms by felons”²⁹ or other “presumptively lawful regulatory measures.”³⁰ But these words of comfort seem little more than dicta,³¹ being unnecessary to the case’s holding and instead merely incidental to the Court’s admission that it had not undertaken to analyze the “full scope” of the Second Amendment.³²

Yet even if Justice Scalia’s platitudes in this regard are interpreted by lower courts as binding authority,³³ limitations on the fundamental right of self-defense are still only “presumptively” lawful. Presump-

29. *Id.* at 2816–17 (listing as additional examples “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms”).

30. *Id.* at 2817 n.26.

31. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence* 15 (Geo. Mason L. & Econ. Research Paper No. 09-01, 2009), available at <http://ssrn.com/abstract=1324757> (describing Justice Scalia’s assurances regarding these regulatory measures as an “astounding series of dubious *obiter dicta* pronouncing on the constitutionality of a wide range of gun control regulations that were not before the Court”). Even Justice Breyer admitted that he was “puzzled by the majority’s list . . . of provisions that in its view would survive Second Amendment scrutiny.” See *Heller*, 128 S. Ct. at 2870 (Breyer, J., dissenting). He continued:

These [“presumptively lawful regulatory measures”] consist of (1) prohibitions on carrying concealed weapons; (2) prohibitions on the possession of firearms by felons; (3) prohibitions on the possession of firearms by . . . the mentally ill; (4) laws forbidding the carrying of firearms in sensitive places such as schools and government buildings; and (5) government conditions and qualifications attached to the commercial sale of arms. . . . Why these? Is it that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues.

Id. (first alteration in original) (internal quotation marks omitted). The last three sentences of this quoted passage seem designed to cast doubt sarcastically on Justice Scalia’s qualifications as an originalist. Professor Lund, who disagrees with Justice Breyer’s position in *Heller*, would nevertheless seem to agree with his criticism of Scalia’s approach. See Lund, *supra*, at 15 (“The most obviously originalist approach would ask what kind of gun regulations were accepted, or acceptable, in the late eighteenth century.”).

32. See *Heller*, 128 S. Ct. at 2816.

33. Professor Lund suggests that, unfortunately, Scalia’s dicta might be treated as law by lower courts. See Lund, *supra* note 31, at 15. He elaborates on this topic at length, employing a critical tone:

Justice Scalia seems to promise an “exhaustive historical analysis” of [the lawfulness of such regulatory limitations] in future cases. If that turns out to be anything like the historical analysis he used in ruling on the handgun ban, it won’t be exhaustive and it won’t be historical. In any event, don’t hold your breath waiting for these cases—lower courts routinely treat Supreme Court dicta as though they were holdings, and the Court routinely declines to review such decisions.

Id. (footnote omitted).

tions are rebuttable. If absolute prohibitions against possessing the means of exercising that right are unconstitutional, every lawmaking body in America ought to reexamine any of their statutes which have the effect of outlawing gun possession in absolute and indiscriminate terms. This is particularly true for North Carolina, since its highest court has indicated the Felony Firearms Act may, in some cases, constitute an unreasonable regulation.³⁴

The question for North Carolina, which *Britt v. State* failed to answer,³⁵ is whether the Felony Firearms Act in its current form—which outlaws *all* gun possession by persons having *any* felony conviction—represents a constitutional response to gun violence, or whether the state’s decision to dispossess all felons of all firearms in all places is instead a policy choice which the Constitution, through *Heller’s* recognition of a fundamental right of self-defense, has taken off the table.³⁶ A proper understanding of the constitutional right at issue, in conjunction with an analysis of the Act’s relationship to that right, will answer the question. It is to the fundamental right itself which we now turn.

C. Assuming a Fundamental Right

Put quite simply, this Comment assumes the Fourteenth Amendment’s Due Process Clause protects an individual, fundamental right of self-defense.³⁷ It further assumes that application of strict scrutiny

34. See *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009).

35. See Plaintiff Appellant’s Supplemental Brief Per Order of 24 March 2009 at 4 n.1, *Britt*, 681 S.E.2d 320 (No. 488A07), 2009 WL 1347773 (emphasizing that *Britt* was not “abandon[ing] the prior position taken in this case . . . that [Second Amendment of the United States Constitution] is also violated by the application of [the Act] to [him]”); *Britt*, 681 S.E.2d at 322 (“Because we agree with plaintiff that the application of [the Act] to him violates Article I, Section 30 of the North Carolina Constitution, it is unnecessary for us to address any of plaintiff’s remaining arguments, and we express no opinion on their merit.”).

36. Cf. *supra* text accompanying note 26.

37. See *Heller* 128 S. Ct. at 2797 (stating that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation” and that “this meaning is strongly confirmed by the historical background of the Second Amendment[;] . . . it has always been widely understood that the Second Amendment . . . codified a pre-existing right” which does not depend on the Constitution for its exercise); cf. Brief for Amici Curiae 55 Members of United States Senate et al. in Support of Respondent at 1, 5, 9, *Heller*, 128 S. Ct. 2783 (No. 07-290), available at <http://www.gurapossessky.com/news/parker/documents/07-290bsacmembersussenate.pdf> (stating Congress has repeatedly declared the Second Amendment to protect an individual, fundamental right); Brief for the National Rifle Ass’n & the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent at 17, *Heller*, 128 S. Ct. 2783

to any law infringing this fundamental right is appropriate, in keeping with the Supreme Court's multitudinous Fourteenth Amendment "substantive due process" holdings.³⁸ With these assumptions in place, I

(No. 07-290), available at http://www.nraila.org/media/PDFs/nra_amicus_heller.pdf ("As the Framers made clear in the very text of the Second Amendment, they considered the right to keep and bear arms necessary to the security of a free State[;] . . . this explicit connection between the right to keep and bear arms and the preservation of democratic self-government compels a conclusion that the Amendment guarantees a fundamental right." (citations omitted) (internal quotation marks omitted)); SENATE JUDICIARY COMM., 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION 12 (1982) (concluding that "the history, concept, and wording of the [Second Amendment], as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner"). Note that while Justice Scalia emphasized that a person's need for self-defense may be "most acute" in the home, *Heller* 128 S. Ct. at 2817, there is no reason to define the fundamental right of which we now speak with such specificity that it becomes merely a right of home-defense. Cf. Posting of Randy Barnett to Volokh Conspiracy, <http://volokh.com/posts/1231623391.shtml> (Jan. 10, 2009, 16:36 EST) (describing the right at issue in *Heller* as simply an unenumerated "natural right of self-defense" but providing no qualification as to whether that right may only be protected in a person's home).

38. The Supreme Court has applied strict scrutiny to laws affecting fundamental rights. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). Professor Fallon writes that

the Supreme Court adopted the strict scrutiny formula as its generic test for the protection of fundamental rights One stringent version [of strict judicial scrutiny] allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms. Another, which views legislation as appropriately suspect when likely to reflect constitutionally forbidden purposes, aims at "smoking out" illicit governmental motives.

Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007). Fallon also observes that "individual Justices tend to vary their applications of strict scrutiny based on their personal assessments of the importance of the right in question." *Id.* One might even say that the Justices sometimes refuse to acknowledge they are even applying such a standard. The *Heller* dissenters, for example, characterized the majority's analysis in that case as, "in theory," an application of strict scrutiny, 128 S. Ct. 1783, 2851–52 (Breyer, J., dissenting), notwithstanding the Court's assertion that it had "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions." *Id.* at 2821 (majority opinion). For a discussion of the confusion surrounding the question of the appropriate level of scrutiny to be applied to infringements of Second Amendment and other fundamental rights, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). Writing prior to *Heller*, Professor Winkler states that "[u]nder current Second Amendment doctrine, the right protected by the Second Amendment is *not* deemed 'fundamental.'" *Id.* at 697 (emphasis added). "Yet," he continues, "one would imagine that holding would be reconsidered should the Supreme Court reinterpret the amendment to protect an *individual* right." *Id.* (emphasis added). According to some, the *Heller* decision provided

argue that the Felony Firearms Act is such a law and that it fails such scrutiny.

It is crucial to understand that questions concerning whether this right is truly fundamental, whether the Second Amendment applies to the states,³⁹ or whether such a fundamental right may be defined with this level of generality, are irrelevant to the analytical substance of this discussion. For purposes of this Comment, the answer to all three of

just the sort of reinterpretation Professor Winkler predicted. *E.g.*, Lund, *supra* note 31 (interpreting Justice Scalia's opinion in *Heller* as recognizing that the Second Amendment protects an individual right to bear firearms for purposes of personal and collective self-defense).

The Court has also addressed limitations of certain individual rights through a determination of whether the right has been unduly burdened. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (explaining, in its evaluation of a "constitutional right of privacy" as exercised by women seeking abortions, that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right," and that "a finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). Even if Felony Firearms Act does not have the *purpose* of placing a "substantial obstacle" in the path of someone trying to defend their own life from an attacker, it certainly has such an *effect*. The burden analysis, however, has no application with respect to the fundamental right of self-defense, which—unlike abortion—depends on its being *instantly* exercisable if it is to be of any value to its possessor. The ability to exercise and benefit from the right of self-defense is simply either available or unavailable in a given instance; it cannot be "duly" burdened as *Casey* and other cases might suggest. *But see* *United States v. Bledsoe*, No. SA-08-CR-13(2), 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. Aug. 8, 2008) (upholding a federal gun regulation under intermediate scrutiny despite the case being decided in the wake of *Heller*); *but cf.* Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 CONST. L.J. 101, 172-73 (1995) (arguing that strict scrutiny should be applied to state gun laws, but that intermediate scrutiny is proper in reviewing federal gun restrictions). Nor do I find applicable Professor Volokh's suggestion that "a restriction [on gun possession rights] might only *slightly* interfere with rightholders' ability to get the benefits that the right secures, and thus might be a burden that doesn't rise to the level of unconstitutionally 'infringing' the right." Posting of Eugene Volokh to Volokh Conspiracy, <http://volokh.com/posts/1238001528.shtml> (Mar. 25, 2009, 13:18 EST) (alterations omitted) (emphasis added). Accordingly, this Comment rejects the burden analysis and its applicability to North Carolina's Felony Firearms Act.

39. There still appears to be some disagreement regarding whether the Second Amendment has been "incorporated" into the Fourteenth Amendment so as to apply to the states. *See* Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/heller-sequels-move-along> (Feb. 16, 2009, 17:48 EST) (discussing post-*Heller* Seventh Circuit cases debating the issue of "whether state and local governments must obey the [Second] Amendment").

these questions is “yes.”⁴⁰ An individual, fundamental right is at stake, and the Felony Firearms Act ought therefore to be examined under the most scrutinizing level of constitutional review.⁴¹

40. Prior to *Heller*, the answer would seem to have been “no.” For an argument that “the North Carolina Constitution provides for an individual right to bear arms,” see Carl W. Thurman, Note, *State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. REV. 1078, 1078 (1990). The Note reviews, among other cases, *State v. Fennell*, 382 S.E.2d 231 (N.C. Ct. App. 1989), in which the court of appeals upheld appellant’s conviction for possessing a weapon of mass destruction—here, a sawed-off shotgun—against his federal and state constitutional arguments. See Thurman, *supra* at 1079–80 (describing the violation of N.C. GEN. STAT. § 14-288.8 (1988)). The court held that the federal Constitution “does not guarantee an individual the right to bear arms except in connection with a well-regulated militia.” *Id.* at 1080 (describing *Fennell*, 382 S.E.2d at 232). This conclusion, of course, was one expressly rejected in *Heller* roughly seventeen years later. See 128 S. Ct. 2783, 2790–91 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment confer[s] an individual right to keep and bear arms.”). Interestingly, the *Fennell* court “acknowledged . . . that North Carolina courts have held that there exists an *individual* as well as a collective right to bear arms under the North Carolina Constitution,” though that right is subject to reasonable regulation. Thurman, *supra* at 1080 (citing *Fennell*, 382 S.E.2d at 233) (emphasis added).

41. It is worth mentioning here that while *Heller* was not overtly a substantive due process case, and while the Court did not purport to apply any particular level of scrutiny in its analysis, the opinion emphasized that “under *any* of the standards of scrutiny [the Court has] applied to enumerated constitutional rights,” the District’s handgun ban “would fail constitutional muster.” 128 S. Ct. 2783 at 2818 (2008) (emphasis added). The Court also pointed out that the “presumption of constitutionality” for legislation “appear[ing] on its face to be *within a specific prohibition* of the [Bill of Rights]” was more narrow than in rational review cases, where the affected right bore only a strained relationship to an enumerated right. *Id.* at 2818 n.27 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). Indeed, “if all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on *irrational* laws, and would have no effect.” *Id.* (emphasis added). Moreover, the Court specifically rejected the approach of Justice Breyer and the dissenters, who favored balancing the individual’s interest in self defense against the government’s interest in public safety (and would have upheld the District’s ban). See *id.* at 2851–52 (Breyer, J., dissenting) (“[A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”). The dissenters thus characterized the majority’s analysis as an application of strict scrutiny “in theory.” See *id.* In response, Justice Scalia emphasized that the Second Amendment is itself “the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.” *Id.* at 2821 (majority opinion).

II. STRICT SCRUTINY: PUTTING THE ACT TO THE TEST

During the 1971 legislative session, the Felony Firearms Act became law, making it unlawful for “any person who [had] been convicted . . . of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess or have in his custody, care or control, any hand gun or pistol.”⁴² In the decades subsequent to its enactment, the Act has seen numerous permutations, some of which significantly limited its restrictive scope.⁴³ But today, the Act prohibits possession of virtually any firearm by any person convicted of any felony.⁴⁴

The United States Supreme Court’s substantive due process jurisprudence under the Fourteenth Amendment requires heightened, strict scrutiny of any law prohibiting a person from exercising or possessing the means to exercise an individual fundamental right.⁴⁵ Strict scrutiny has traditionally ensured that laws limiting or affecting the exercise of a fundamental right are narrowly tailored so as to impose the least restriction possible.⁴⁶ In other words, a law may only limit a person’s fundamental rights to the extent its constraints are truly “necessary” to further a “carefully defined” and compelling state interest.⁴⁷

If a criminal statute, for example, has greater restrictive reach than is logically necessary to achieve the state’s policy goal (overinclusive) or leaves loopholes which make it possible to circumvent that policy or

42. Act of July 19, 1971, ch. 954, sec. 1, 1971 N.C. Sess. Laws 1538, 1538.

43. For a more detailed examination of the Act’s history, see Part III.A, *infra*.

44. See N.C. GEN. STAT. § 14-415.1 (2007).

45. See sources cited *supra* note 38.

46. See Fallon, *supra* note 38, at 1272 (“Especially in cases in which challenged governmental regulations would serve to reduce risks of harm rather than eliminate them . . . , courts almost inescapably ask an all-things-considered question: Is a particular infringement of constitutional rights, measured by its nature and scope, justifiable in light of the benefits likely to be achieved and the available alternatives?”). One might distinguish the “least restrictive means” analysis from the “overinclusiveness” analysis, however, since “the prohibition against overinclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no less restrictive alternative existed.” *Id.* at 1328.

47. See *Johnson v. California*, 543 U.S. 499, 505 (2005); *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Moreover, it appears that “despite the Supreme Court’s efforts to separate the questions whether the government has asserted a compelling governmental interest and whether legislation satisfies a narrow tailoring requirement, the application of strict scrutiny frequently involves a joint, simultaneous assessment of ends and means.” Fallon, *supra* note 38, at 1272. In other words, a government interest may be regarded as less compelling where the means it employs are not a tight logical fit to that interest.

which confound it altogether (underinclusive), that statute cannot be described as narrowly tailored.⁴⁸ Overinclusiveness is often evidence

48. Although it addresses state interference with an established, enumerated fundamental right (rather than an unprecedented, penumbral one, as the right of self-defense may be), the Supreme Court's discussion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), is nonetheless instructive. In that case, the Court applied strict scrutiny to a Massachusetts "closure" statute that "require[d] trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim." *Id.* at 598 (describing MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981)). In an earlier decision, the Court had "firmly established" that "the press and general public have a constitutional right of access to criminal trials" under the First Amendment as applied to the states through the Fourteenth Amendment. *Id.* at 603 (referencing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-81 (1980) (plurality opinion)). The *Globe* sought injunctive relief against the Superior Court of Norfolk County for denying the newspaper access to a rape trial pursuant to Massachusetts's closure statute. *Id.* at 598-602. The Commonwealth defended its law by asserting its interests in (1) "[protecting] minor victims of sex crimes from further trauma and embarrassment" and (2) "[encouraging] such victims to come forward and testify in a truthful and credible manner." *Id.* at 607.

While acknowledging that the first of these interests—"safeguarding the physical and psychological well-being of a minor"—was compelling, the Court found it insufficient to uphold the statute. *Id.* at 608-09. Concerned that "the circumstances of the particular case may affect the significance of the interest," the Court explained that a *case-by-case* rule, requiring a determination of whether closure might be necessary to protect the child's welfare, would be just as effective as the statute's mandatory closure rule. *Id.* In light of this less-restrictive alternative, the law was unnecessarily restrictive and therefore not narrowly tailored to this asserted interest. *Id.*

The Court was dismissive of the second interest. If the closure statute was really intended to encourage child victims to testify truthfully by limiting the audience to which victims would broadcast their humiliating sufferings, it was grossly underinclusive for its failure to deny the press "access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony." *Id.* at 609-10. The dissenting opinion, however, stressed that the Commonwealth's closure rule was "intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers." *Id.* at 617-18 (Berger, C.J., dissenting). But the majority was not persuaded, and went on to emphasize that, in addition, the Commonwealth had "offered no *empirical support* for the claim that the rule of automatic closure . . . [would] lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities." *Id.* at 609-10 (majority opinion) (emphasis added). Without saying so explicitly, the Court appeared to treat the absence of empirical data as well as the underinclusiveness of the statute as evidence that this second interest was not as "compelling" as the Commonwealth described it. *See id.*

Globe Newspaper is thus one of the cases that suggests that there is a rather circular relationship between the criticality of an asserted interest and the narrowness with which the challenged statute is deemed tailored to furthering that interest. *See supra*

of policymaking zeal and the disregard for individual rights that accompanies an indignant legislature or its intentionally demonstrative response to popular public concerns. Underinclusiveness, on the other hand, is evidence that the interest purportedly furthered by the law is not really as “compelling” as the state pretended; in other words, if the state had been serious about its policy objective, it would have been more meticulous in drafting the statute.

Together, over- and underinclusiveness suggest that the force behind the law is not *reason*, but something more arbitrary, such as legislators’ desire to gain or retain popularity with voters by appearing responsive to their complaints.⁴⁹ Arbitrariness alone is not a denial of the Fourteenth Amendment’s guaranty of due process, but an arbitrary law which infringes upon an individual, fundamental right does so unconstitutionally.⁵⁰

Against this substantive due process backdrop, I posit that all persons have an unenumerated, individual, fundamental right of self defense.⁵¹ Because defending oneself from an armed home invader

explanation in note 47. That is, the less tight the fit between the means and the ends, the less highly the Court will regard the ends. Likewise, the less compelling the ends, the more narrowly the Court will require the statute to be tailored to them. Because of the Court’s willingness to engage in this reciprocal reasoning, it is not hard to see how an application of strict scrutiny all but ensures the unconstitutionality of the challenged law.

49. *But see* Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 453 (1977) (describing a compelling interest in inspiring public confidence in government). Professor Gottlieb contends that such an interest, on its face, “is much too broad, for it would include an interest in public confidence in government *independent of a factual evaluation of the performance of that government.*” Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 962 (1988) (emphasis added) (pointing out, in addition, that this interest was “derived . . . from an implicit [government] need to operate efficiently”). Such a purpose is made illegitimate, he suggests, by the First Amendment’s countervailing guarantees of freedom of speech and the right to petition the Government for a redress of grievances. *See id.*

50. As Justice Scalia has observed, “[i]t would be absurd to think that *all* ‘arbitrary and capricious’ government action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee’s parking privileges.” *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (Scalia, J. concurring) (emphasis added) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Nevertheless, “the Fourteenth Amendment ‘forbids the government to infringe . . . ‘fundamental’ liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.” *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

51. Some rights not mentioned in the Bill of Rights have come to be recognized as fundamental despite the fact that they are “unenumerated.” Under the Supreme Court’s famously inventive “penumbral” doctrine, *see* *Griswold v. Connecticut*, 381

may require the use of a firearm, a statute which prohibits such an attacker's intended victim from owning or possessing a gun—limiting her available defensive tools to kitchen knives or blunt instruments—affects her fundamental right of self-defense in a lethal way. That law would fail under strict scrutiny. Indeed, *Heller* struck down such a law as unconstitutional.⁵² It is precisely this sort of limitation on the fundamental right of self-defense that exists on the books in North Carolina today, and which needs to be reexamined.

Subjecting the Act's current provisions to strict scrutiny should all but guarantee their prospective unconstitutionality, as most statutes considered under this level of review are presumed to be unconstitutional.⁵³ Thorough analysis shows the Act to represent critically flawed, unreasonable public policy laying beneath a shroud of public inattention and barely stirring the curiosity of the courts, whose opinions (with the exception of the recent *Britt v. State* decision) address the Act with cursory, half-hearted review under minimal constitutional scrutiny. To date, no court in North Carolina or the Fourth Circuit has directly addressed the federal question of whether the Felony Firearms Act is an unconstitutional infringement of a fundamental right; the courts have not dealt with a substantive due process argument or responded decisively to a "narrow tailoring" critique of the Act. Even in *Britt*, the North Carolina Supreme Court specifically refused to answer such questions.⁵⁴ This is unsettling in light of the *Heller* opinion's vigorous articulation of the right of self-defense, regardless of the level of specificity with which Justice Scalia's opinion may have implicitly defined the right.⁵⁵

We will now explore the Felony Firearms Act's legislative history, consider the legislature's purpose in creating and enforcing it, analyze

U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."), the enumerated rights "necessarily suggest other peripheral, but nevertheless fundamental, rights that must also be protected, such as the right of privacy, the right to travel, and freedom of association." 16A AM. JUR. 2d *Constitutional Law* § 400 (2008). Applying this concept to the issue at hand, it is not difficult to reason that the Second Amendment, with its specific guarantee of a right to keep and bear arms, U.S. CONST. amend II, might be said to "emanate" a "penumbra" containing within its periphery the fundamental right of self-defense.

52. See generally *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

53. See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) ("Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether [such] review . . . has been strict in theory, but fatal in fact.")

54. The *Britt* decision is discussed in Part I.A, *supra*.

55. Cf. Barnett, *supra* note 37 (defining the right at issue in *Heller* in broad terms).

its current text, and evaluate its effectiveness in order to determine whether the limitations it places on individuals' exercise of the fundamental right of self-defense are narrowly tailored toward achieving a compelling state interest.

III. IDENTIFYING THE STATE'S "COMPELLING" INTEREST

Proper constitutional analysis of any statute requires first identifying a compelling state interest and *then* conducting an analysis of the statutory language, applying strict scrutiny to determine whether the law is narrowly tailored to further the interest. Because the fundamental right of self-defense has not been litigated in North Carolina in the substantive due process context, the state has never been required to produce for the courts an actual, compelling interest in support of its Felony Firearms Act. And the courts seem to have been uninterested in describing the legislature's precise purpose in passing the Act, notwithstanding their insistence that a criminal statute must be construed "with regard to the evil which it is *intended* to suppress."⁵⁶

Practically speaking, of course, it is rather impossible to anticipate in advance *all* interests that the state might advance in defending the Act. Lack of precedent, as well as adversarial creativity, makes unrealistically presumptuous any analytic approach which would amount to guessing at the precise contours of the state's arguments or the interests it might describe.⁵⁷ Even in the recent *Britt v. State* appeal, the only interest the State managed to identify was "preserving the peace and security of the public," announcing that this was an "important governmental objective" to which the Act was "substan-

56. *State v. Wood*, 647 S.E.2d 679, 686 (N.C. Ct. App. 2007) (emphasis added) (quoting *State v. Priddy*, 445 S.E.2d 610, 612 (N.C. Ct. App. 1994)).

57. Attempting to overcome the Supreme Court's strict scrutiny of laws which affect fundamental rights, government litigants have demonstrated pronounced determination and creativity in asserting their interests. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (1984). The respondent, California's Secretary of State, offered no fewer than *seven* different in justification of the state's limitation—in the form of mandating "blanket" open partisan primary elections—on political parties' fundamental right to associational freedom under the First Amendment. *See id.* at 570, 582-86. Rejected by the Court as insufficiently compelling were the state's interests in "producing elected officials who better represent the electorate," *id.* at 582, "expanding candidate debate beyond the scope of partisan concerns," *id.*, "[supporting] *nonparty* members' keen desire to participate in selection of the *party's* nominee," *id.* at 583 (emphasis added), "promoting fairness, affording voters greater choice, increasing voter participation," *id.* at 584, and protecting the "confidentiality of [voters'] party affiliation." *Id.* at 585.

tially related.”⁵⁸ In light of the hollowness of such assertions, we should pursue more thoughtful conclusions as to both the identity and weight of the state’s objectives and interests by first carefully tracking the policies underlying the Act’s development and then examining cases describing the policy goals North Carolina courts perceive as justifying the Act.

Accordingly, this part of the discussion begins with a chronological and policy-conscious examination of the Act’s history, with an eye towards tracking legislative purpose. It then investigates the state’s challenging burden of identifying an interest which might be asserted as compelling, focusing first on the interests described by a pair of North Carolina cases, then considering several plausible alternative interests.

A. *Legislative History: Four Decades of Political Plinking*

Reviewing the history of the Felony Firearms Act is vital to learning what interests the legislature has actually intended the Act to further. Bypassing this preliminary step may render impossible the task of determining whether the interests the Act was intended to advance are truly “compelling.” Equally important is that a detailed examination of the legislative history allows us to contrast legislative strategies from one year to the next in a “comparative reasonableness” analysis when conducting strict scrutiny later in this discussion.⁵⁹

So far, North Carolina courts have merely summarized changes to the Act’s language in a sterile, chronological fashion.⁶⁰ But there is more to the Act’s history than our courts have spelled out. This Com-

58. Defendant/Appellee’s Supplemental Brief at 8, *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (No. 488A07), 2009 WL 1615170.

59. As an example of such an analysis outside the confines of this Comment, suppose a federal judge reviewing the current Act under strict scrutiny silently acknowledges a 1975 policymaking maneuver as particularly careful or scrupulous in placing limitations on the right of self-defense. Having seen this, she might be subliminally inspired to denounce a *less* fastidious infringement created in 2004 as unconstitutionally overbroad in contrast—even though the later policy may represent an honest attempt to correct flaws not realized nearly three decades earlier. Practically speaking, these contrasts might prove influential or even determinative.

60. In *State v. Johnson*, for example, the North Carolina Court of Appeals provided a summary of the changes made to the Felony Firearms Act, without any discussion of policy concerns which brought about those amendments:

In 1971, the General Assembly enacted the Felony Firearms Act, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. [One section of the Act] set forth an exemption for felons whose civil rights had been restored.

ment distinguishes carefully between a mere chronological record of the Felony Firearms Act's textual changes and a more thorough discussion that includes reference to the political concerns that actually influenced the development of the statute—and takes the approach last mentioned. While the first and simpler approach is certainly easy to digest, the latter is far more nutritious. Even given the relative ease with which the *Heller* majority apparently dismissed any historical and statistical concerns underlying the District of Columbia's handgun ban,⁶¹ the vigor with which the dissenters⁶² and amici curiae on both sides⁶³ debated those concerns advises that the following discussion

In 1975, the General Assembly repealed [the exemption for restored felons] and amended [the remainder of the Act] to ban the possession of firearms by persons convicted of certain crimes for five years after the date of “such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later.”

. . . .

In 1995, the General Assembly amended [the Act] to prohibit possession of certain firearms by *all* persons convicted of any felony. [In 2004, the Act was amended to provide that] “[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm. . . .”

610 S.E.2d 739, 741 (N.C. Ct. App. 2005) (citations omitted). And two years later, praising the above synopsis as its own “thorough[] review[]” of the Act, the court of appeals explained modifications to the law since *Johnson*: “[e]ffective 23 August 2006, the legislature modified [the Act] to exempt ‘antique firearms’ from the proscription of felons possessing firearms [and] modified the definition of ‘antique firearms’ . . . to exclude conventional cartridge firearms.” *Britt v. State*, 649 S.E.2d 402, 404, 405 (N.C. Ct. App. 2007) (citations omitted). The North Carolina Supreme Court’s reversal of the court of appeals was hardly an improvement, as Justice Brady’s opinion rehashed the intermediate court’s version of the Act’s legislative history in fewer than seven sentences. *See Britt v. State*, 681 S.E.2d 320, 321 (N.C. 2009).

61. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008). Justice Scalia assured the District that the Court was “aware of the problem of handgun violence in this country,” and that it “[took] seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution.” *Id.* *See, e.g.*, Brief for Brady Center to Prevent Gun Violence et al. Supporting Petitioner at 1, 50, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157193. “[B]ut what is not debatable,” Scalia concluded, “is that it is not the role of this Court to pronounce the Second Amendment extinct.” *Heller*, 128 S. Ct. at 2822.

62. *E.g., id.* at 2854-55 (Breyer, J., dissenting).

63. *E.g.*, Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as Amici Curiae in Support of Respondent at 5, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 383535 (“Correctly analyzed, the District’s crime statistics confirm that there is no real evidence that the handgun ban helped, and reason to believe that it may have hurt the District’s residents.”). *But see* Brief for Brady Center, *supra* note 61, at 44-45 (ignoring the question of the effectiveness of the

err on the side of robustness.⁶⁴ Brace yourself for a detailed examination of nearly forty years of legislative history.

1. *From Introduction to Enactment*

Edward Knox was elected in 1970 to serve as a senator in North Carolina's General Assembly.⁶⁵ During the time leading up to his election, Knox was aware of mounting public criticism of the state's meager gun control laws in light of what was perceived as an unchecked increase in violent crime.⁶⁶ Accordingly, Knox emphasized throughout his Senate campaign that he would take affirmative steps to address the crime situation.⁶⁷

So not long after taking office, Senator Knox introduced a bill which would culminate in the Felony Firearms Act.⁶⁸ He intended the Act to reflect the contours of federal gun laws.⁶⁹ But the Knox bill would not be ratified before a series of textual changes had occurred, each of which provide a significant insight on the concerns of North Carolina's legislature as it contemplated this new public safety measure.

District's ban, and focusing instead on the effectiveness of broad federal regulations on firearm); Brief of Amici Curiae Major American Cities, the United States Conference of Mayors, and Legal Community Against Violence in Support of Petitioners at 5, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157195 (complaining that large cities are disproportionately impacted by gun violence).

64. As a discussion of legislative history is necessarily narrative in nature and not analytic, most discussion of the legal ramifications of the Act's provisions has been saved for the portion of this Comment applying strict scrutiny to the current statute.

65. Telephone Interview with H. Edward Knox, Managing Partner, Knox, Brotherton, Knox & Godfrey (Oct. 25, 2008). After serving two terms in the Senate (1971 through 1974), Mr. Knox was elected Mayor of Charlotte. In 1984, he ran for Governor of North Carolina, but lost to then-Attorney General Rufus Edmisten in a hotly-contested Democratic gubernatorial primary. Mr. Knox reports that he is a firm supporter of gun rights. *Id.*

66. *Id.* (explaining that although convicted criminals were on the streets with weapons, "we had to wait on violations of federal law [to prosecute them]; but the feds weren't doing much about it, and we didn't have anything [similar to the federal felon-in-possession law] in the state").

67. *Id.*

68. See S.B. 43, 1st Ed., 1971 Gen. Assem., Reg. Sess. (N.C. 1971) (indicating bill was introduced in January of 1971).

69. Telephone Interview, *supra* note 65.

a. *Only Certain Firearms Prohibited*

Initial disagreement appeared to exist in the Senate regarding what sorts of weapons felons would be prohibited from possessing under the proposed Felony Firearms Act. The Knox bill provided:

It shall be unlawful for any person who has been convicted in any court in this State, in any other State of the United States or in any federal court of the United States of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess, or have in his custody, care or control, any of the following: (1) *firearms*⁷⁰

The range of guns prohibited to felons by this language was quite broad, since the term "firearms" inevitably included *all* firearms, irrespective of concealability or other factors which might bear on the likelihood of their being used violently by criminals. Rejecting this rather all-inclusive language, the Senate's Judiciary II Committee replaced the term "firearm," along with the rest of the original list of prohibited items,⁷¹ with the following terms:

(1) pistol, (2) revolver, (3) sawed-off shotgun, a sawed-off shotgun is herein defined as any weapon made from a shotgun, whether by alteration, modification, or otherwise, with a barrel or barrels of less than 18 inches in length, or a modified weapon having an overall length of less than 26 inches; or (4) explosives, as defined [elsewhere].⁷²

This list of prohibited items was ultimately done away with,⁷³ but its brief appearance sheds some light on what may have been going on in the minds of those on the committee. The decision to enumerate certain types of weapons appears to represent an attempt to narrow the statute's prohibitions to apply more directly to the type of harm sought to be avoided without creating irrelevant or unreasonable

70. S.B. 43, 1st Ed., 1971 Gen. Assem., Reg. Sess. (N.C. 1971) (emphasis added). The Act as introduced also would have outlawed possession of explosives, burglary tools, "a deadly weapon used . . . in the commission of a crime," and "marijuana, any depressant or stimulant drug or narcotic drug unless the same has been duly prescribed by a licensed physician." *Id.* Punishment for violation of the Act was a maximum ten years imprisonment, a fine of up to \$5000, or both. *Id.*

71. *See id.* The additional items the originally-introduced Act would have prohibited felons from possessing, which are described *supra* note 70, seem to have nothing to do with firearms or a fundamental right of self defense.

72. *See* S.B. 43, 2d Ed., 1971 Gen. Assem., Reg. Sess. (N.C. 1971) (reflecting Senate's adoption of a committee substitute to the Knox bill on May 6, 1971).

73. *See infra* discussion accompanying notes 76-80.

restrictions.⁷⁴ While no related committee minutes from 1971 remain in North Carolina's legislative libraries which might provide additional clarity as to the impetus of these proposed changes, a plain reading of them—and a bit of common sense—suggests that they were careful, reasoned policymaking ideas.

For example, the decision to list (and thus prohibit) “pistol[s]” and “revolver[s]” as part of disenfranchisement suggests that it was the convicted criminal's *ability to conceal* a weapon—his having the chance to bring a gun into close proximity with his intended victims without it being detected—that the committee deemed most dangerous to the public. In contrast, because the public is visually alerted when an evildoer parades himself about while carrying a long gun in open view, the danger he poses may be avoided by those alert to what he is carrying around.

Similarly, the “sawed-off shotgun” also appears to have been listed due to concerns about its concealability, though its inclusion in the committee's short-lived list may have been the product of additional considerations. One of these may have been the weapon's enhanced ability to inflict close-range carnage despite a villain's bad aim by sending dozens of lethal projectiles flying in a spread pattern instead of just one bullet in a straight line. But if shotgun spray was the danger, why did the proposed amendment not list *all* shotguns? One reason may have been the committee's concern that a significant number of North Carolinians were likely to own normal shotguns for legitimate sporting or home defense purposes. This would mean the politically safe alternative to dispossessing all convicted felons of their shotguns was to apply disenfranchisement only to those shotguns that had been rendered unusable for *lawful* purposes by being sawed short.⁷⁵

74. Recall the discussion *supra* note 41. Perhaps the members of the Senate's Judiciary II Committee in 1971 were aware of rational basis scrutiny and the requirement that a law be *at least* rationally related to a legitimate state purpose. In any event, the changes made to the Knox bill prior to its ratification seem either to have been motivated by concern for constitutional scrutiny, or by elected officials' hesitancy to alienate those persons convicted of felonies whose voting and other civil rights had been restored, and who kept rifles and shotguns for lawful purposes such as hunting or home defense. The likelihood that only a relatively small fraction of North Carolinians would suffer disenfranchisement under the original Knox bill makes the committee's initial reluctance to impose disenfranchisement all the more remarkable. This suggests that the right of self-defense (along with the means to exercise it) was greatly valued by both the public and legislature in 1971.

75. With the short barrel of a sawed-off shotgun, the spread pattern of the pellets fired becomes so aberrant and uncontrollable that the weapon is rendered largely incapable of striking live game, or even stationary targets—and oddly enough, this large blast pattern is what makes a sawed-off shotgun such a frightening tool in the hands of

Following what appears to have been another round of changes made by the Judiciary II Committee, the Felony Firearms Act finally became law.⁷⁶ But instead of the Knox bill's "firearms"⁷⁷ and the list of weapons enumerated in the first committee substitute,⁷⁸ the Act simply read, "any hand gun or pistol."⁷⁹ It is uncertain what distinction may have appeared to the minds of the legislators between a class of weapons (handguns) and a member of that class (pistol) which would have advised prohibiting both that class and a member of it. The fact that certain non-concealable *long* guns actually operated on a revolving cylinder design⁸⁰ may suggest why the legislature was leery of including the term "revolver" in its list.

Also of relevance may have been the North Carolina State Constitution, which specifically declares that the General Assembly holds all power to control and restrict possession of *concealed* weapons.⁸¹ On a theory of negative implication, one might argue that the legislature has no constitutional authority to prohibit the possession of arms that do not create the sorts of dangers that might be avoided through restrictions against concealed weapons. Perhaps the General Assembly in 1971 was mindful of such an argument, and was thus leery of lumping "long guns" into the Act.

b. *Delimiting the Cause of Disentitlement*

Recall that disentitlement under the Act would only befall a person "who ha[d] been *convicted* [in any state or federal court] . . . of a crime, punishable by imprisonment for a term exceeding two

an assailant at close range. To the extent a sawed-off shotgun may have nevertheless fired a "slug" instead of numerous pellets, the likeness of that weapon to handguns would likely have triggered the "pistol or revolver" enumeration if an individual were to be charged with a Felony Firearms Act violation.

76. See *generally* Act of July 19, 1971, ch. 954, 1971 N.C. Sess. Laws 1538 (effective Oct. 1, 1971).

77. Relevant language from the Knox bill is reproduced *supra* in the text accompanying note 70.

78. This list is described *supra* in the text accompanying notes 71-75.

79. Compare S.B. 43, 3d Ed., 1971 Gen. Assem., Reg. Sess. (N.C. 1971), with Act of July 19, 1971, ch. 954, sec. 1, 1971 N.C. Sess. Laws 1538, 1538.

80. See 3 EDWARD HENRY KNIGHT, KNIGHT'S AMERICAN MECHANICAL DICTIONARY 1928-29 (Hurd & Houghton 1877) (picturing, with accompanying description, several "revolvers" which are also long guns).

81. While providing that "the right of the people to keep and bear arms shall not be infringed," the North Carolina constitution also makes clear that it should not be read to "justify the practice of carrying *concealed* weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30 (emphasis added).

years”⁸² The statute made clear that “the term ‘conviction’ [meant] a *final judgment* in any case of any offense having a maximum permissible penalty of more than two years without regard to the plea entered or the sentence imposed.”⁸³ By requiring a final judgment—rather than merely an indictment, for example—the Act would postpone a defendant’s disqualification until he was proven more certainly to be a felon.

Also uncontroversial was the Act’s use of a seemingly broad definition of the event which would trigger disqualification: receipt of a conviction in *any* state or federal court in the nation for *any* crime punishable by imprisonment exceeding two years.⁸⁴ Absent from this description was the term “felony.” Yet the fact that this law’s short title was (and continues to be) “The *Felony Firearms Act*”⁸⁵ suggests at a minimum that the General Assembly imagined “felons” to be those who could be sentenced under *any* law in the United States, or of any state therein, to more than two years’ imprisonment for their actions. This means the General Assembly also might have assumed only violent or dangerous criminals would receive sentences of that length across the nation.

The question of “triggering events” is addressed more thoroughly when I apply strict scrutiny to the Act’s *current* provisions. In the meantime, the Act’s two-year sentencing qualification suggests that the 1971 General Assembly was careful to disqualify only felons of a dangerous, violent variety. As will become clear, more recent versions of the Act have not operated as narrowly in this regard.⁸⁶

c. *The Restoration Exemption*

Perhaps the most puzzling and most substantial change made to Senator Knox’s bill prior to enactment was the insertion of the following sentence: “Any person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes, [or] any comparable State or federal statute, shall thereafter be exempted from the provisions of this act.”⁸⁷ I refer to this proviso as the “restoration exemption.” Absent this language, a felon’s disqualification under the Act

82. Act of July 19, 1971, ch. 954, sec. 1, 1971 N.C. Sess. Laws 1538, 1538 (emphasis added).

83. *Id.* (emphasis added).

84. *See id.*

85. *Id.* (emphasis added).

86. Part IV.A.1-2, *infra*, discusses the language of the modern Act and its tenuous connection to potential state objectives.

87. Act of July 19, 1971, ch. 954, sec. 2, 1971 N.C. Sess. Laws 1538, 1539.

would have been perpetual. Up until a few days before the Act was first ratified, Chapter 13 had provided that two years after a convicted felon was discharged from incarceration or probation, he could petition to have his “rights of citizenship” restored by way of a hearing, in which he needed only satisfy the judge of his character for truth and honesty.⁸⁸ The exemption placed the right of firearm ownership among those rights of citizenship recoverable under Chapter 13 or its analogues.

The restoration exemption would seem to run against the very assumption underlying the Act, which is that persons convicted of certain crimes present a danger even after their sentence has been served. Yet the legislature’s thinking appears to have been that any felon who met the state’s requirements for restoration of civil rights was not a person whose possession of weapons endangered the public, and thus his disenfranchisement ought not persist. Moreover, the creation of this exemption implicitly announced that, in North Carolina’s judgment, the right of an individual to possess a firearm was equal in importance to other civil rights restorable to a felon on his or her release, such as the right to vote.

But the exemption, and its limiting effect on the Act, was rendered even more forceful by way of changes in the law governing restoration of civil rights. Indeed, just *three days prior* to passing the Felony Firearms Act, the General Assembly had repealed the existing Chapter 13, replacing it with rights restoration hurdles that were even easier for ex-cons to negotiate.⁸⁹ In short, it was only after further *loosening* the slack on the restoration scheme, and then adding the restoration exemption, that the General Assembly passed the Felony Firearms Act.⁹⁰

88. See Act of July 16, 1971, ch. 902, 1971 N.C. Sess. Laws 1421; cf. *State v. Currie*, 202 S.E.2d 153, 154-55 (N.C. 1974) (discussing the legislative history—as it stood in 1974—of changes to the procedures and requirements for restoring civil rights to convicts and applying revised Chapter 13 to the benefit of the defendant, who had been charged with a violation of the Felony Firearms Act, notwithstanding the fact that the Chapter 13 revision occurred after his trial but while his appeal was pending).

89. The laws replacing Chapter 13 provided for “automatic restoration of citizenship to any person who ha[d] forfeited such citizenship due to committing a crime and ha[d] either been pardoned or completed his sentence,” upon satisfaction of any of these three conditions: “(a) the Department of Correction at the time of release recommend[ed] restoration of citizenship; (b) two years ha[d] elapsed since release . . . during which time the individual ha[d] not been convicted of a criminal offense . . . ; (c) or upon receiving an unconditional pardon.” Act of July 16, 1971, ch. 902, sec. 1, 1971 N.C. Sess. Laws 1421, 1421.

90. Compare the ratification dates of the Chapter 13 amendments and the original Felony Firearms Act.

These observations should not be taken as an argument that the legislature diluted the rights restoration process with an eye towards weakening the Felony Firearms Act's disentiing effect. None of the legislative history suggests that the repeal and replacement of Chapter 13 and inclusion of the restoration exemption in the Act prior to its passage were anything more than coincidental bits of lawmaking. Still, it is not difficult to imagine that legislators soliciting member support for the Act might have forecasted a relaxation of the rights restoration requirements in an effort to comfort those who may have feared public backlash over firearms disentiement.

In any event, it is reasonable to conclude that the General Assembly in 1971 was anything but cavalier in creating this disentiement, appearing instead to move sensitively and cautiously as it narrowed the Act's provisions. But regardless of whether the Felony Firearms Act's pre-enactment development should be attributed to political, constitutional, or prudential concerns, what is certain is that between the time Senator Knox introduced it until the day it was ratified, the Act had diminished profoundly in its scope.

2. *Subtle But Significant Early Adjustments*

In 1974, six members of the House of Representatives introduced an amendment to the Act that would replace the term "pistol" with "other firearms with a barrel length of less than 18 inches or an overall length of less than 26 inches."⁹¹ As introduced, the bill would have also repealed the restoration exemption, making permanent any disentiement imposed by the Act.⁹² While the first of these proposed changes survived, the second appears to have been rejected before the bill was ratified.⁹³

The replacement of "pistol" with a specific, measurement-based term certainly broadened the Act's scope. For example, possession of a twenty-five inch long "rifle" previously not implicated by the Act would now fall within its proscriptive ambit. Yet this explicit focus on the physical size of the weapon to be prohibited was nothing new, having been first proposed in 1971 in substantially the same form.⁹⁴ This

91. See H.B. 1757, 1st Ed., 1973 Gen. Assem., 2d Sess. (N.C. 1974).

92. See *id.* The restoration exemption is described *supra* in the text accompanying notes 87-90.

93. See Act of Apr. 8, 1974, ch. 1196, sec. 1, 1973 N.C. Sess. Laws 320, 320 (reflecting changes to definition of prohibited firearms but retaining the restoration exemption).

94. Compare *supra* text accompanying note 91, with *supra* text accompanying note 72.

reintroduction of measurement-specific language suggests that the 1974 General Assembly was principally concerned with keeping *concealable* weapons out of the hands of violent criminals. So while the Act's terminology was broadened in a logical sense, the substance of the revision was far from sweeping. The harm to be remedied by the Act remained quite narrowly defined.

Interestingly, the Senate Judiciary I Committee—the same committee with which the above terminological change was clearly popular—refused to repeal the restoration exemption.⁹⁵ Whatever the reason, North Carolina's elected senatorial representatives were not sufficiently convinced that felons should *forever* be dispossessed of arms.

3. *Tightening the Reins: The Narrowing Amendments*

By the summer of 1975, the legislative spotlight had fallen once again on the Felony Firearms Act, and with it a flurry of substantive modifications. On May 19 of that year, Senator Allsbrook⁹⁶ introduced a bill designed to repeal the restoration exemption, replacing it with what was to be, in essence, a ten-year sunset on disenfranchisement.⁹⁷ But by the time the Allsbrook bill was ratified on June 26, other members of the General Assembly had succeeded in amending it so heavily that it barely resembled the original at all.⁹⁸

The Allsbrook bill, as amended, had a “narrowing” effect on the Act in that it wrought significant limitations on the Act's restrictive scope. Yet the impromptu nature⁹⁹ and radical substantive import of some of the amendments to the Allsbrook bill suggest, paradoxically, that its narrowing effect came about through what appear to have been less-than-careful legislative methods. For this reason, perhaps the bill as amended should be considered only *mostly* narrowing. In any

95. See H.B. 1757, 2d Ed., 1973 Gen. Assem., 2d Sess. (N.C. 1974) (indicating a committee substitute had been adopted on March 12, 1974).

96. Throughout this discussion, the names of the General Assembly members sponsoring a given bill or an amendment have been provided to clarify the sequence of events involved in bringing about the 1975 changes to the Felony Firearms Act.

97. See S.B. 829, 1st Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

98. Compare *id.* (showing the language originally proposed by Senator Allsbrook), with Act of June 26, 1975, ch. 870, 1975 N.C. Sess. Laws 1273 (reflecting the final, ratified text of the Allsbrook bill).

99. Several of the changes to the Allsbrook bill (each discussed in the text below) came about by way of “floor amendments,” which are generally handwritten changes offered by the legislator at a time just prior to voting on the given bill. These are introduced, discussed, and then adopted (or rejected) without the benefit of committee review or any other meaningful opportunity to conduct relevant research or poll constituents.

event, it is undisputable that the original Felony Firearms Act was rendered nearly unrecognizable as a result of these amendments. And despite their drastic effect on the Act, these changes were to stand untouched for roughly the next twenty years.

a. Restoration Exemption Replaced by Five-year Disentitlement Cap

The Allsbrook bill cut the restoration exemption from the Felony Firearms Act.¹⁰⁰ Yet as an apparent substitute for that exemption, the bill also would have provided that possession of certain firearms¹⁰¹ by a convicted felon would only be unlawful “within 10 years from the date of [the underlying] conviction, or unconditional discharge from a correctional institution, or termination of suspended sentence, or parole upon such conviction, whichever is later.”¹⁰² In effect, this bill would have mitigated the harsh impact of repealing the original restoration exemption by creating a ten-year maximum duration for convicts’ disentitlement.¹⁰³

100. See S.B. 829, 1st Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

101. The Allsbrook bill did not revise the then-existing description of prohibited weapons, which—as of the changes made to the Act in 1974—was “any hand gun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches.” Act of Apr. 8, 1974, ch. 1196, sec. 1, 1973 N.C. Sess. Laws 320, 320.

102. S.B. 829, 1st Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975) (emphasis added).

103. Alas, the Fourth Circuit Court of Appeals failed to appreciate that the Allsbrook bill’s specific time limit on disentitlement was actually *more* lenient in its treatment of felons than the former arrangement, which had provided only the *possibility* of relief from disentitlement under the restoration exemption, failing which perpetual disentitlement was guaranteed:

When the Firearms Act became law in 1971, felons were not automatically restored to full citizenship immediately on their release from prison; however, those felons whose citizenship rights had been restored were exempt from the Act. . . . Then in 1973, North Carolina amended the [citizenship-restoration provisions of the] General Statutes to restore felons to full citizenship immediately upon their unconditional discharge. . . . When it became apparent that this would make virtually all felons exempt from the Firearms Act, . . . the General Assembly repealed the exemption for felons whose citizenship rights had been restored. . . . *Clearly, North Carolina intends to restore to ex-convicts their general citizenship rights but limit their firearms privileges.*

United States. v. McLean, 904 F.2d 216, 218-19 (4th Cir. 1990) (emphasis added). The Fourth Circuit thus described the result with undue emphasis on the legislature’s “inten[t]” to “limit” convicted felons’ firearms rights and without properly observing the mitigating effect of the provisions *replacing* the restoration exemption. See *id.* This unscrupulous inference of legislative intent based on a shallow review of the Act’s legislative history has managed to go unnoticed by commentators, who only discuss the case with an eye toward *ex post facto* analysis. See, e.g., Note, *Retrospective Applica-*

The ten-year cap, however, was not to be. On June 12, in the course of reviewing the Allsbrook bill as a member of the Judiciary I Committee, Senator Gudger¹⁰⁴ moved to amend it by reducing the proposed maximum duration of disenfranchisement under the Act from a period of ten years to *five* years.¹⁰⁵ His motion carried,¹⁰⁶ the committee gave its substitute a favorable report,¹⁰⁷ and the Senate adopted it.¹⁰⁸ The ratified version of the bill would ultimately reflect Senator

tion of State Firearm Prohibitions Triggering Enhanced Sentencing Under Federal Law: A Violation of the Ex Post Facto Clause? The Circuits Split, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 307, 316-17 (2001) (echoing the *McLean* court's conclusion that "intended result" of the restoration exemption's repeal was an unmitigated restriction of felons' firearm rights). Moreover, the Fourth Circuit cited no authority whatsoever in support of its assertion that it suddenly "became apparent" to the legislature that its 1973 changes to North Carolina's rights-restoration statutes would result in more freedom for felons. *McLean*, 904 F.2d 218-19. Indeed, as explained *supra* in the discussion accompanying notes 89-90, it seems unlikely that the General Assembly was at all "surprised" to learn of this consequence. If this possibility—rehabilitated convicted felons regaining their gun rights—had truly been a surprise rather than a debated policy concern, the Allsbrook bill arguably would have repealed the restoration exemption *without* replacing it with what would ultimately become the disenfranchisement cap. See *infra* paragraph accompanying note 104.

104. A decorated Army Air Corps veteran, lawyer, and Buncombe County democrat, Lamar Gudger served the North Carolina legislature as a senator from 1971 until 1976, when he was elected to serve the first of two congressional terms in the United States House of Representatives. See Obituary, GREENSBORO NEWS & REC. (N.C.), Aug. 4, 2004, at B6, available at 2004 WLNR 17567388.

105. See S. Amend. 1, S.B. 829, 1st Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975). Note that Senator Gudger's changes also cut in half the existing ten-year maximum imprisonment term for violation of the Act. Compare *id.*, with Act of July 19, 1971, ch. 954, sec. 1, 1971 N.C. Sess. Laws 1538, 1538.

106. See MINUTES FOR S. JUDICIARY I COMM., June 12, 1975, 1975 Gen. Assem., Reg. Sess., at 4. The committee minutes from this almost two-hour long meeting indicate that Senator Allsbrook, who was Chairman of the committee, "excused himself briefly and asked Senator Gudger to temporarily preside." See *id.* at 2. Interestingly, Senator Gudger proceeded to call for discussion of a number of other bills, postponing debate of the Felony Firearms Act bill—and his own amendment thereto—until Allsbrook had "resumed the Chair." *Id.* at 3-4. As only five members of this committee were present at any point during the meeting, see *id.* at 1, it is possible that Senator Gudger's delay was designed to ensure that a potentially tie-breaking vote had returned to the room before reaching the bill.

107. See *id.*; INST. OF GOV'T, LEGIS. SERV., BILL HISTORY AS OF JUNE 26, 1975, S. 829, microformed on N.C. Legislative Library (Off. State Mgmt. Sys.) [hereinafter BILL HISTORY] (indicating the Senate adopted its Judiciary I Committee's substitute bill on June 16, 1975, the Committee having given it a favorable report).

108. *Id.*

Gudger's changes, replacing the restoration exemption with a five-year disenfranchisement cap.¹⁰⁹

There was, of course, an important difference between the restoration exemption and the disenfranchisement cap. The former allowed for a case-by-case determination of whether a convict's rights of citizenship (including firearms rights) ought to be restored, while the latter proviso set disenfranchisement to expire automatically. The petitioning process for restoration involved addressing specific features of the criminal, crime, and case involved—features whose evaluation requires human judgments irreducible to statutory formulae. Automatic renewal of entitlement, on the other hand, is just arbitrary. For example, it is not necessarily true that a convicted shotgun murderer will become any *less* violent on the fifth (or even tenth) anniversary of his completion of a thirty-year sentence. But by the same token, a woman convicted of operating a half-dozen video poker machines in her home basement¹¹⁰ is not necessarily any more violent or dangerous on the first day of her release than she will be five years later. While representing a willingness to err on the side of recognizing the fundamental importance of North Carolinians' right of self-defense, such a one-size-fits-all solution is not a particularly careful method of restoring firearm entitlements. Thus, the creation of the disenfranchisement cap is one change that rendered the Allsbrook bill, as ultimately ratified, only "mostly" narrowing.

b. Only Specific Crimes Trigger Disenfranchisement

On June 23, Senator Vickery introduced an amendment to the Allsbrook bill on the floor of the Senate identifying in specific terms the

109. See Act of June 26, 1975, ch. 870, sec. 3, 1975 N.C. Sess. Laws 1273, 1273.

110. N.C. GEN. STAT. § 14-306.1A(a) (2007) makes it unlawful for anyone not in certain recognized Indian tribes or their lands "to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine" A video gaming machine is "a video machine which requires deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play" *Id.* § 14-306.1A(b). Any person who operates five or more of these gambling machines "is guilty of a Class G felony." *Id.* § 14-309(b). While this particular illustration of nonviolent felony activity comes from today's law instead of contemporary criminal statutes, nonviolent crimes of the "white collar" variety were punishable by two or more years imprisonment at the time the disenfranchisement cap was created. See, e.g., *State v. Butler*, 153 S.E.2d 477, 477-79 (N.C. 1967) (stating that defendant was sentenced to two years in prison for "cheat[ing] and defraud[ing] the . . . Welfare Department out of the sum of \$40.00 per month" for a year); *State v. Young*, 204 S.E.2d 185, 185 (N.C. Ct. App. 1974) (stating that a man convicted of felony embezzlement had been sentenced to seven years in prison).

criminal activity that would call for the revocation of a given convict's firearm possession rights.¹¹¹ Specifically, the Vickery amendment provided that a conviction for "violating any provision of Article 3, 4, 6, 7, 8, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, or 53 of Chapter 14 of the General Statutes" would render a person disentitled under the Act, and deleted the requirement that the crime be punishable by over two years in prison.¹¹² In other words, convictions which would trigger the Act's disentitlement under the proposed Vickery amendment would be those obtained based on a violation of certain Articles of North Carolina's Chapter 14, regardless of sentence length—*instead* of convictions for crimes under any law in the nation which were punishable by imprisonment for a term exceeding two years.¹¹³

The first problem with the Vickery amendment (as first proposed) was that if someone was convicted of violating the laws of a jurisdiction *other* than North Carolina, that conviction would *not* bring about firearms disentitlement under the Act, notwithstanding the nature of the crime and the potential length of its accompanying imprisonment term.¹¹⁴ However, no one in the Senate seemed concerned with this discrepancy.¹¹⁵

The second difficulty was that by erasing the two-year prison sentence criterion, the Vickery amendment risked grouping serious crimes together with even extremely minor ones that might happen to reside in the same specified Article of the General Statutes. Unlike the first, this problem did raise eyebrows. At least one member of the Senate appeared uncomfortable with the idea of designating entire Articles of Chapter 14 as containing disentitlement-triggering offenses without being given opportunity to review the contents of those Articles thoroughly.¹¹⁶ Indeed, before the Vickery amendment was put to a final vote, Senator Gudger moved to change the text of that amendment by

111. See S. Amend. 2, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

112. *Id.* Chapter 14 of the North Carolina General Statutes contains the majority of the state's criminal law provisions.

113. See *id.*

114. See *id.*

115. See Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273, 1273 (reflecting, with respect to the discrepancy described in the text, the language of the Vickery Amendment, S. Amend. 2, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975), as first proposed).

116. The nature of the Vickery amendment as a *floor* amendment meant that rather than having its subject matter researched by legal staff and debated in committee prior to any vote, it would require members of the Senate to pass upon it without any more scrutiny than could be conducted in the Senate Chamber.

inserting the word “feloniously” before the word “violating.”¹¹⁷ This modification meant only convictions received for “feloniously violating” any of the specified Chapter 14 Articles would trigger disenfranchisement.¹¹⁸

It seems clear that Senator Gudger’s insertion was aimed at mitigating the hazards of deleting the two-year criterion.¹¹⁹ What is even clearer is that it was hotly disputed; for when the votes were tallied, the Gudger modification passed by a narrow three-vote margin.¹²⁰ Among those opposing the modification was Senator Vickery himself.¹²¹ But in the end, the Senate appears to have agreed that the amendment’s list of disenfranchisement-triggering Chapter 14 Articles—each of which *might* have contained relatively minor offenses not contemplated by Senator Vickery—amounted to painting with too broad a brush.¹²² After being thus revised by the Gudger modification, the Vickery amendment passed with only five senators voting against it.¹²³

Insofar as the Vickery amendment limited disenfranchisement-triggering acts to violations of laws which were actually under the control of the General Assembly—as opposed to those of other states and the federal government, which have the potential to vary from their North

117. See S. Amend. 3, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

118. Compare Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273, 1273 (reflecting Senate’s adoption of the word “feloniously” as a qualifier for those violations of state law triggering disenfranchisement), with S. Amend. 2, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

119. Senator Gudger was likely concerned that the selection of Articles provided by Senator Vickery in his amendment contained statutes the violation of which normally would *not* be considered as rising to the level of “felonious” criminal conduct, and which *rightly*, therefore, were not punishable by a prison term exceeding two years. His modification thus attacked the overinclusiveness of the Vickery amendment. Unfortunately, an adverb like “feloniously” is definable only in a circular sense; that is, the term assumes individuals may be said to have violated the law in such a manner as to render their conduct truly “felonious,” yet does not anticipate that the state might also choose to define even *minor* offenses as “felonies.” Though his decision to inject such an unwieldy adverb into the Felony Firearms Act appears to fall somewhat short of his goal, it seems obvious that Senator Gudger was attempting to ensure that only serious crimes would serve as a basis for disenfranchisement.

120. N.C. S. Roll Call, S. Amend. 3, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975) (indicating the Gudger modification received twenty-one votes of “aye,” and eighteen “no” votes).

121. See *id.*

122. See *id.*

123. See N.C. S. Roll Call, S. Amend. 2, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975) (indicating the Vickery amendment received thirty-five votes of “aye,” and only five “no” votes).

Carolina analogues—it was “narrowing.”¹²⁴ But because the amendment discarded the old requirement that a disintitling offense be “punishable by imprisonment exceeding two years,” it was necessary to require that the Vickery amendment’s listed statutes be “feloniously” violated before a consequent conviction would trigger disintitlement, lest the Act limit the firearm rights of unwary committers of minor and innocuous offenses.¹²⁵

Yet it seems the General Assembly preferred to err on the side of underinclusiveness, because the amendment would mean that “out of state” crimes, however heinous, would no longer trigger disintitlement in North Carolina. Additionally, while the Vickery amendment ultimately gave the Act greater specificity, it was evaluated on the floor of the Senate Chamber without the benefit of a more careful methodology. For these reasons, the Vickery amendment represents another “mostly” narrowing change.

c. The Home and Business Exceptions

By the time the sun sank below the Raleigh skyline on June 23, 1975, the Allsbrook bill provided that the Act would not “prohibit the right of *any person* to have possession of a firearm within his own home or on his lawful place of business.”¹²⁶ But neither the exception for home possession nor the exception for business possession was original to Senator Allsbrook’s bill.¹²⁷

Senator Strickland created the home exception by way of a handwritten amendment to the bill which he offered on the floor of the Senate in the same manner—and on the same day—as Senator Vickery had offered his amendment.¹²⁸ The former moved to amend the bill by inserting a declaration that “[n]othing in [the] Act would prohibit the right of any person to have possession of a firearm within his own home.”¹²⁹ Rather amazingly, in light of its being discussed in the divi-

124. Compare *supra* text accompanying notes 111-12, with Act of July 19, 1971, ch. 954, 1971 N.C. Sess. Laws 1538 (containing relevant provisions of the original law), and discussion *supra* accompanying notes 84-85.

125. See *supra* note 120.

126. Act of June 26, 1975, ch. 870, sec. 2, 1975 N.C. Sess. Laws 1273, 1273 (emphasis added).

127. This bill is first discussed *supra* in the text accompanying notes 96-98.

128. The Vickery amendment is introduced *supra* in the text accompanying note 111.

129. S. Amend. 4, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975) (emphasis added).

sive wake of the controversial Gudger modification¹³⁰ debated perhaps only minutes before, Senator Strickland's home exception received *unanimous* Senate approval.¹³¹

After the Senate adopted the home exception, the Allsbrook bill—now in its third edition—was sent to the House.¹³² There, Representative Erwin succeeded in adding, by way of a floor amendment, the words “or lawful place of business” to the excepting language created by Senator Strickland.¹³³ The Senate subsequently concurred as to the addition of Erwin's business exception, again without a single “no” vote.¹³⁴

The apparent popularity of both the home exception and business exception is remarkable given the colossal import of their combined substantive sweep: for while the disenfranchisement cap and the Vickery amendment limited the duration and specified the causes of disenfranchisement under the Felony Firearms Act, respectively, the home and business exceptions went even further. Assuming the Act was designed to prevent violence against the public by keeping dangerous and concealable firearms out of the hands of persons deemed unsafe with such weapons, what justification could have possibly supported allowing convicted felons to keep guns in their homes or lawful places of business?

The answer is self-defense. Other hypotheses as to the home and business exceptions' justification are reasonable,¹³⁵ but they really

130. Senator Gudger's modification of the Vickery amendment is described *supra* in the text accompanying notes 116–25.

131. See N.C. S. Roll Call, S. Amend. 4, S.B. 829, 2d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975) (indicating the Strickland amendment received thirty-seven votes of “aye,” and zero “no” votes).

132. See BILL HISTORY, *supra* note 107. By this time, of course, the Senate had adopted the committee substitute reflecting Senator Gudger's reduction of the disenfranchisement cap to five years (from the original ten), and had approved the Vickery amendment as revised by the Gudger modification. *Id.*

133. See H. Amend., S.B. 829, 3d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975).

134. See N.C. S. Roll Call, H. Amend., S.B. 829, 3d Ed., 1975 Gen. Assem., Reg. Sess. (N.C. 1975). This vote tally was hand-marked by the Principal Clerk as being “for concurrence.” *Id.*

135. Such alternative speculations might suppose, for example, that the legislature rallied around pre-*Heller* Second Amendment arguments in adopting the home and business exceptions. But there is nothing in the legislative history—or in the case law of that time—to corroborate such notions. Up until the time the Allsbrook bill was ratified, “the right of the people to keep and bear arms” guaranteed by both the federal and state constitutions had not hindered the General Assembly in its quest to restrict possession of firearms by felons. See U.S. CONST. amend. II; N.C. CONST. art. I, § 30 (stating that “the right of the people to keep and bear arms shall not be infringed,” and stressing that “[n]othing herein shall . . . prevent the General Assembly from enacting

cannot be explained without acknowledging what must have been the legislature's recognition of the importance of self-defense. Particularly during a time in North Carolina where vigorous criminal activity was a great public concern,¹³⁶ the legislature must have been keenly aware of the possibility that ex-felons might also become victims of violence in their own homes or businesses. The home and business exceptions may thus be viewed collectively as tantamount to a self-defense exception. However radical they might appear, when weighed in contemplation of a fundamental right of self-defense, the home and business exceptions represented the most narrowing of all the changes ever made to the Act.¹³⁷

4. *Two Decades of Relative Quiet*

In contrast to the boisterous tone of North Carolina's 1975 legislative session in its breakneck treatment of the Felony Firearms Act, the twenty years that followed seemed quite tame, notwithstanding several comparatively minor changes.

Most of the noteworthy substantive revisions made during this period involved tweaks to the language put in place by the Vickery amendment.¹³⁸ In 1977, a House bill¹³⁹ was introduced which, according to its own title, amended the Act "to include drug violators, [to] add weapons of mass death and destruction to the ones felons are prohibited to possess, [and to] make the Act again applicable to out-of-state felony-level offenses."¹⁴⁰ The title was accurate. The 1977 amendment expanded the list of firearms prohibited under disenfranchisement to include weapons of mass death and destruction.¹⁴¹ But more significantly, it extended disenfranchisement to persons having prior con-

penal statutes against [the practice of carrying *concealed* weapons]" (emphasis added)).

136. For a contemporary response to the state's growing violent crime rate, see Sidney S. Eagles, Jr., *Crime Prevention for the 1970's*, 8 WAKE FOREST L. REV. 31 (1971).

137. The court of appeals later interpreted the home exception as being limited to "the convicted felon's own premises over which he has dominion and control to the exclusion of the public." *State v. Cloninger*, 350 S.E.2d 895, 897 (N.C. Ct. App. 1986). Apparently, this area may include the felon's hotel room, but not the other premises of the hotel. *See id.*

138. The Vickery amendment is introduced *supra* in the text accompanying note 111.

139. *See* H.B. 1404, 1st Ed., 1977 Gen. Assem., Reg. Sess. (N.C. 1977).

140. *See* Act of July 1, 1977, ch. 1105, 1977 N.C. Sess. Laws 1396, 1396 (stating title of amendment).

141. For North Carolina's current statutory definition of such weapons, see *infra* note 394 (summarizing N.C. GEN. STAT. § 14-288.8(c) (2007)).

victions for “felonious” violations of “criminal laws of *other* states or of the United States *substantially similar* to the crimes covered in [certain of the General Statutes] which are punishable where committed by imprisonment for a term exceeding two years.”¹⁴² The “crimes covered” by the newly listed Article 5 of Chapter 90 were all drug violations.¹⁴³ The language of the 1977 amendment preserved the General Assembly’s control over the text defining criminal conduct that would trigger disenfranchisement, while filling the gap left by the Vickery amendment that shielded even a serial murderer from disenfranchisement so long as his crimes were “out of state.”

The remainder of changes made during this twenty-year period were concerned principally with bringing the Act into conformity with North Carolina’s freshly devised “structured sentencing” system,¹⁴⁴ and with adjusting (in an upward direction) the applicable punishment.¹⁴⁵ Other than evoking general criticisms incident to the enhancement of any law’s punishing power, these changes appear to have caused no hubbub. Until the summer of 1995, the Felony Firearms Act’s operative provisions remained largely undisturbed.

5. *The General Assembly Grows Gun-shy*

On July 26, 1995, the General Assembly passed Senate Bill 865, which purported in its title “to conform [state laws regarding the purchase of a handgun] to the requirements of the Brady Handgun Violence Prevention Act.”¹⁴⁶ This bill’s effect on the Felony Firearms

142. See Act of July 1, 1977, ch. 1105, sec. 2, 1977 N.C. Sess. Laws 1396, 1396. To the list of “triggering” Articles specified originally by the Vickery amendment, the 1977 bill added Article 5 of Chapter 90 of the General Statutes. *Compare id.*, with *supra* text accompanying note 112.

143. Article 5 of Chapter 90 contains the “North Carolina Controlled Substances Act.” N.C. GEN. STAT. § 90-86.

144. *E.g.*, Act of June 4, 1979, ch. 760, sec. 5, 1979 N.C. Sess. Laws 850, 869 (repealing the punishment specified within the text of the Act—that is, a maximum five years imprisonment or a fine of up to \$5,000, or both—to provide simply that any violator of the Act would be “punished as a Class I felon”).

145. *E.g.*, Act of July 24, 1993, ch. 539, sec. 1245, 1993 N.C. Sess. Laws 2730, 2800 (raising violation of the Act to “Class H felony” status for punishment purposes).

146. See Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417–18 (internal quotation marks omitted). The Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921-922 (2006)) was signed into law by President Bill Clinton on November 30, 1993, and became effective on February 28, 1994. This law created procedures governing the purchase of handguns from federally licensed dealers, which included a five-day waiting period during which the local sheriff would check the potential buyer’s background. To the extent the Brady Act “forces States and local law enforce-

Act, however, was more robust than its title revealed, as it both repealed the disqualification cap and eradicated the enumeration of specific General Statutes which if violated would “trigger” disqualification.¹⁴⁷ Adding injury to insult, the legislature passed another bill just two days later which elevated the punishment for a violation of the Act.¹⁴⁸

a. Reviving Permanent Disqualification

The *original* edition of Senate Bill 865 did not meddle with the disqualification cap at all, but instead merely set out changes in protocol relating to the issuance of handgun purchase permits.¹⁴⁹ Yet by the time it was ratified, the bill rendered the five-year sunset on disqualification completely stricken from the Act’s text.¹⁵⁰

But effectuating perpetual disqualification apparently took some doing. The Senate passed the bill and sent it to the House, which promptly used the occasion to conduct a near-overhaul of the Felony Firearms Act—to the apparent dismay of the Senate, which subsequently refused to concur.¹⁵¹ In addition to making changes broadening the Act’s scope,¹⁵² the House had repealed the disqualification

ment officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers,” it has been held an unconstitutional violation of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 935–36 (1997) (O’Connor, J., concurring); *see also id.* at 936 (“[T]he Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to administer or enforce a federal regulatory program.” (Thomas, J., concurring) (internal quotation marks omitted)).

147. *See* Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417–18.

148. *See* Act of July 28, 1995, ch. 507, sec. 19.5(k), 1995 N.C. Sess. Laws 1525, 1633–34.

149. *See* S.B. 865, 1st Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995). Initially unrelated to the Felony Firearms Act, this original edition of the bill had provided, *inter alia*, that a sheriff would be required to issue a handgun purchase permit once he or she had “[v]erified by a criminal history background investigation that it is not a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun,” “[f]ully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant,” and “[f]ully satisfied himself or herself that the applicant desires the possession of the weapon mentioned for (i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.” *Id.*

150. *See* Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417–18.

151. *See* 1995 Bill Tracking N.C. S.B. 865 (LexisNexis) (stating that the House adopted its Judiciary I Committee’s substitute bill, as well as an amendment made on the House floor).

152. S.B. 865, 3d Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995). The most important of those broadening changes are discussed *infra* in the text accompanying notes 157–64.

cap.¹⁵³ This would mean that once a person was convicted of a disenfranchising offense, he would be *forever* barred from possessing firearms.

Yet paradoxically, in what seems to have been an attempt to resurrect the long-repealed restoration exemption,¹⁵⁴ the House had also adopted an additional subsection for inclusion in the Act:

After a period of five years from the date of conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon conviction, whichever is later, a person subject to [disenfranchisement under the Act] may petition the superior court in the jurisdiction in which the person resides for a permit to purchase, own, possess, or control a firearm, *other than a handgun or a weapon of mass death and destruction*, the person's residence [sic]. The court may, for good cause shown, grant the petition and issue a permit.¹⁵⁵

In essence, this language would have converted the former sunset provision—which lifted disenfranchisement *automatically* upon the expiry of five years—into a timeline by which convicted felons might request a determination as to their gun-worthiness. But by the time the House and Senate managed to concur on the bill,¹⁵⁶ nothing was left of this provision, and the disenfranchisement cap remained repealed. Nonetheless, the eagerness to retain some sort of rights-restoration exemption to the Act suggests that at least some legislators were sensitive to even convicted felons' need for effective self-defense implements.

b. Giving the Act a Hair Trigger

The House's changes to Senate Bill 865 also included deleting the list—drafted by Senator Vickery two decades earlier—of specific Articles of North Carolina General Statutes which if violated would trigger disenfranchisement under the Act.¹⁵⁷ In place of this list, the bill provided that disenfranchisement would now apply to anyone with *any* North Caro-

153. 1995 Bill Tracking N.C. S.B. 865 (LexisNexis).

154. Recall the discussion *supra* accompanying notes 87–90.

155. S.B. 865, 3d Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995). It is possible that the next to last sentence of the quoted language was intended to end with such words as, “*for use only in the person's residence.*” See *id.* Otherwise, this block of text makes little sense, as the home and business exceptions to the Act were still in effect at the time of this short-lived proposal. See *id.*

156. The Senate's failure to concur sent the bill into Conference Committee on July 10, from which it did not emerge until two weeks later. See 1995 Bill Tracking N.C. S.B. 865 (LexisNexis).

157. See discussion *supra* in the text accompanying notes 111–25.

lina felony conviction¹⁵⁸ as well as to persons who violate “criminal laws of *other* states or of the United States . . . that are substantially similar [to the aforementioned North Carolina felonies and] which are punishable where committed by imprisonment for a term exceeding *one year*.”¹⁵⁹

The General Assembly thus chopped in half the existing requisite imprisonment period for a disintitling offense.¹⁶⁰ At the same time, it created a new and unbounded categorical trigger for disintitlement: the nominal felony. Interestingly, from its inception, North Carolina’s structured sentencing rubric has included “felonies” that are punishable by as little as three months in prison.¹⁶¹ Thanks to Senate Bill 865, disintitlement would be triggered by *any* North Carolina felony—regardless of its corresponding imprisonment term—as well as *any* “year and a day” offense in another jurisdiction.¹⁶²

The inevitable effect of this change was that even more crimes, wherever committed, would make the offender subject to the Act’s prohibitions. And because *nonviolent* crimes were (and continue to be) punishable by “felony punishment”¹⁶³ *or* imprisonment in excess

158. Prior to this amendment, the Act had been revised to redefine the term “conviction” as “a final judgment in any case in which *felony punishment, or* imprisonment for a term exceeding *two years*, as the case may be, is permissible.” Act of July 1, 1977, ch. 1105, sec. 2, § 14-415.1(b), 1977 N.C. Sess. Laws 1396, 1396 (emphases added). The July 26 bill kept this definition in place, but changed the relevant language to read “a term exceeding *one year*.” Act of July 26, 1995, ch. 487, sec. 3, § 14-415.1(b), 1995 N.C. Sess. Laws 1414, 1417. When we consider that North Carolina’s definition of “felony” includes any crime which “[i]s or may be punishable imprisonment in the State’s prison” *or* which “[i]s denominated as a felony by statute,” N.C. GEN. STAT. § 14-1 (2007), it becomes clear that the Act disintitles persons convicted of crimes which are felonies by name only as well as crimes which are not nominal felonies but which call for imprisonment in excess of one year.

159. Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417 (emphasis added). *But see* discussion *infra* note 303 (addressing an ambiguity in the statutory text).

160. *See id.* In other words, disintitlement formerly limited to those convicted of committing a two-year crime was extended by this bill to include persons convicted of committing a one-year crime.

161. *See* Act of July 24, 1993, ch. 538, sec. 1, 1993 N.C. Sess. Laws 2298, 2309 (introducing the state’s structured sentencing grid and prescribing a “mitigated” sentence of between three and four months imprisonment for Class I felony offenses).

162. *See* Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417.

163. *Supra* note 158.

of one year, smaller fish than ever before would face being caught in the net of disenfranchisement.¹⁶⁴

c. *Raising the Stakes*

Two days after expanding the Act's reach through Senate Bill 865, the General Assembly passed another bill that increased the punishment for those convicted of violating the Act.¹⁶⁵ Instead of remaining punishable as a Class H felony, violation of the Act became a Class G felony.¹⁶⁶ This change nearly *doubled* the applicable imprisonment terms.¹⁶⁷ Given the marked disagreement between legislative chambers with respect to Senate Bill 865, this change might seem to have been the proverbial "nail in the coffin," signifying that squabbling had come to an end and that the General Assembly's treatment of the Act was deliberate and evenhanded.

But it appears North Carolina's decision to double the possible jail time for those violating Act was *anything but* pointed and deliberate. Rather, the change was inserted discreetly into a dense 227-page appropriations bill bearing the heading, "An Act to Appropriate Funds to Provide Expansion Expenditures and Capital Improvements for State Departments, Institutions, and Agencies, and for Other Purposes."¹⁶⁸

164. The relative pettiness of some North Carolina crimes punishable by imprisonment in excess of one year—and the effect of this on the Act's constitutionality—is explored *infra* in the discussion accompanying notes 307-16.

165. See Act of July 28, 1995, ch. 507, sec. 19.5(k), 1995 N.C. Sess. Laws 1525, 1633-34.

166. See *id.*

167. While North Carolina's rather complex structured sentencing system is worth studying, for present purposes, it suffices to note that in 1995, a man convicted of a Class I felony only would have faced six months in jail, or up to eight months if the offense was "aggravated." See Act of July 28, 1995, ch. 507, sec. 19.5(l), § 15A-1340.17(c), 1995 N.C. Sess. Laws 1525, 1634-36. But if convicted of a Class G felony instead, the same man might serve up to thirteen months presumptively, or up to sixteen months with aggravating factors. See *id.* The July 28 amendment thus approximately doubled the sentences to be imposed upon persons violating the Felony Firearms Act.

168. See H.B. 230, Ratified Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995) ("This act shall be known and cited as 'The Expansion and Capital Improvements Appropriations Act of 1995.'"). The edition of this bill which was finally ratified on July 28 was 227 pages in length, having grown seventy-five pages since being approved by the House Appropriations Committee nearly a month earlier. See 1995 Bill Tracking N.C. H.B. 230 (LexisNexis); H.B. 230, 2d Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995) (having a length of 152 pages).

In theory, conscientious legislators considering a bill will have read and evaluated *all* of its provisions prior to voting to adopt it.¹⁶⁹ This presumption is strained, however, when the bill is hundreds of pages long, shuffles changes to substantive law among an innumerable miscellany of technical amendments, and is defined by extended debate over its *budgetary* provisions. Indeed, the presumption becomes irresponsible when changes affecting the personal liberty of a human being are “slipped in” as part of such an expansive piece of legislation. Even given the benefit of the doubt, lawmakers cannot be expected to conduct an individualized evaluation of inconspicuous and benign changes¹⁷⁰ which appear little more than an afterthought. But more on this later.¹⁷¹

6. *Shooting Blind: The Broadening Amendments*

The most momentous changes to the Felony Firearms Act since the 1970s occurred in the summer of 2004.¹⁷² With one small exception, the version of the statute fashioned by the sprawling “Act to Strengthen the Laws Against Domestic Violence” is still the law today.¹⁷³ This subsection describes the domestic violence bill’s amending language with respect to the Act, and the circumstances of its origin and passage.

169. *Cf. Russell v. Ayers*, 27 S.E. 133, 134 (N.C. 1897) (“It must be presumed that[, in passing a bill, the legislators] knew what they were doing and that they meant to do what they did.”).

170. In this instance, the entire change took place in two characters of text: it was achieved by striking through the letter “H” in subparagraph (a) of the Act and inserting the letter “G” in its place. *See* H.B. 230, Ratified Ed., 1995 Gen. Assem., Reg. Sess. (N.C. 1995) (showing changes on page 112).

171. This line of criticism applies with equal force to more recent and still current changes to the Act, which were brought about by way of a multi-part, many-paged bill persuasively labeled as strengthening laws against domestic violence—an invitation for rubber-stamping if ever there was one. *See infra* note 214 and accompanying text.

172. *See* Act of July 15, 2004, ch. 186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 716, 737-38.

173. *See* Act of July 15, 2004, ch. 186, 2004 N.C. Sess. Laws 716 (bearing the heading, “An Act to Strengthen the Laws Against Domestic Violence, to Provide Additional Assistance to Domestic Violence Victims, and to Make Other Changes as Recommended by the House Select Committee on Domestic Violence”). *Compare* N.C. GEN. STAT. § 14-415.1 (2007) (showing no changes to the Act since 2004 other than the addition of an “antique firearms” exception).

a. *Expanding the Range of Prohibited Firearms and Removing the Home and Business Exceptions*

Upending the General Assembly's former categorical¹⁷⁴ and measurement-based¹⁷⁵ methodologies for determining the types of firearms which would be barred to disintitled convicted felons, the domestic violence bill amended the Act to state that

[a] firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer.¹⁷⁶

Gone is the specification of a threshold barrel length or overall gun length—and with it, the legislature's thirty-year emphasis on prohibiting firearms to felons based on the *concealability* of the weapon.¹⁷⁷ Indeed, North Carolina's longstanding distrust of convicts carrying pocket-size deadly weapons appears to have been supplemented by a less explainable concern over felons toting even *mere components* of firearms.¹⁷⁸

More dramatic, however, was that this domestic violence bill completely discarded the home and business exceptions.¹⁷⁹ With a couple of lines in the twenty-seven-page bill,¹⁸⁰ the exception language so painstakingly added to the Act through committee substitutes and floor amendments in 1975 was unceremoniously deleted in its entirety

174. See *supra* text accompanying note 79.

175. See *supra* text accompanying note 91.

176. Act of July 15, 2004, ch. 186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 716, 737-38. This bill was passed by the General Assembly on July 15, 2004, but did not become effective until its approval by Governor Easley on Aug. 12, 2004. See 2003 Bill Tracking N.C. H.B. 1354 (LexisNexis).

177. These specifications are discussed *supra* in the text accompanying notes 70-80.

178. One might argue that extending disintitlement to cover gun components is necessary in the event that the illegal possessor attempts to disassemble an *intact* firearm prior to being apprehended by law enforcement. But this explanation just points out the inability of the Act to *prevent* firearm violence (as opposed to its power to punish its offenders) and thus highlights its punitive nature. *Contra* State v. Johnson, 610 S.E.2d 739, 744 (N.C. Ct. App. 2005) (overcoming appellant's *ex post facto* challenge by concluding that "the Act is not so punitive in effect that it should be considered punitive rather than regulatory").

179. Since 1975, the Act had provided, "Nothing in this [Act] would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business." See Act of June 26, 1975, ch. 870, sec. 2, 1975 N.C. Sess. Laws 1273, 1273.

180. See H.B. 1354, Ratified Ed., 2003 Gen. Assem., Reg. Sess. (N.C. 2004) (showing change on page 20).

by the General Assembly.¹⁸¹ This change in the law forbids a person with a disempowering conviction to keep a gun in their own home or business, even for the lawful purpose of self-defense.

b. Inside the Committee on Domestic Violence

It is at this juncture in our discussion of the Act's development that examining its influences and the motivations of the legislature becomes most important, since the changes brought about by the domestic violence bill continue to define the Act today. Several questions here demand attention. Whose idea was it to scrap the home exception? What convinced the General Assembly to approve such a momentous revision? The disappointing answers lie along the cusp of obscurity, shuffled among the minute books of the House Select Committee on Domestic Violence and its Subcommittee on Criminal Law Issues. These show that the 2004 changes to the Act can be traced to the unsubstantiated recommendations of two individuals: Sergeant John Guard, of the Pitt County Sheriff's Department, and Beth Froehling, of the North Carolina Coalition Against Domestic Violence.

Not long after the select committee was formed,¹⁸² Sergeant Guard appeared before it and gave a report on domestic violence (in the form of a computerized slide show), which was based on his experiences with the Pitt County Domestic Violence Prevention Unit.¹⁸³ Most of his presentation dealt with the need for a warrantless, mandatory arrest rule for domestic violence police calls, as well as the need for offender treatment programs.¹⁸⁴ But as a printout of Guard's slides discloses, he also attempted to highlight a relationship between firearms and domestic violence.¹⁸⁵

181. Compare *id.*, with Act of July 15, 2004, ch. 186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 716, 737-38 (reflecting the deletion).

182. H. SELECT COMM. ON DOMESTIC VIOLENCE, REPORT TO THE 2004 SESSION OF THE 2003 GENERAL ASSEMBLY OF NORTH CAROLINA (Apr. 21, 2004) [hereinafter DOMESTIC VIOLENCE REPORT] (stating, on an unnumbered page entitled "Preface," that the select committee was formed on August 12, 2003).

183. See MINUTES FOR H. SELECT COMM. ON DOMESTIC VIOLENCE., Sept. 25, 2003, 2003 Gen. Assem., Reg. Sess. (N.C. 2004) [hereinafter SELECT COMM. MINUTES FOR SEPT. 25, 2003].

184. See *id.*

185. See *id.* (designating the included copy of Guard's slide show presentation as "Attachment 1"). Notably, these slides claimed that 56% of all female homicide victims were killed with a firearm, and also that between 1976 and 1996, 65% of "intimate partner homicides" were committed with a gun. *Id.* (citing Lawrence A. Greenfield et al., *Violence by Intimates: An Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, in BUREAU OF JUSTICE STATISTICS FACTBOOK 10 (1998)).

The only arguably relevant statistic provided in these materials was that Guard's sparsely-staffed "Domestic Violence Prevention Unit" had been responsible for seizing about 72% of the total number of guns seized by the Sheriff's Department in Pitt County for a one-year period ending in November of 2002.¹⁸⁶ Yet there was no mention of whether these seizures were the result of anything more than "protective sweeps" or other lawful police techniques similarly unrelated to the nature of the act for which the searched person is being arrested.¹⁸⁷ Further, the materials failed to specify whether the Unit even seized these weapons from convicted felons. Certainly a single-county, single year statistic that, at best, only hints vaguely at a relationship between domestic violence and firearm seizure—lacking a profile the dispossessed persons—is irrelevant to the question of whether disarming convicted felons in their homes will serve to protect potential victims of domestic violence.

Following Guard's presentation, the members of the select committee asked him a battery of questions.¹⁸⁸ Conspicuously absent,

186. *See id.* Some of these questions included: whether domestic violence increased during difficult economic times; whether offender treatment programs were successful; whether enrollment in such programs ought to be mandatory; whether *incarcerated* offenders had access to such programs; how to protect the victim once their offender is released from prison; and (most remarkably) whether "publicizing the abuser's name and picture after conviction would *shame* them into not abusing again." *Id.* (emphasis added). This last question, raised by Representative Paul Stam—co-chair of the Criminal Law Issues Subcommittee, no less—prompted Representative Wilma Sherrill, co-chair of the select committee, to argue that "the family and children needed to be considered before publicizing the abuser's name." *Id.* Interestingly, none who were present thought it worthwhile to spring to the defense of the *offender*. The committee's unabashed zeal for punishing politically unpopular criminals is particularly revealing. Indeed, this same group of legislators would soon irreverently trash the home and business exceptions to the Felony Firearms Act. The inherent need of the "abuser" to be able to defend himself in his own home after serving his sentence was clearly the last thing on this committee's mind.

187. *See, e.g.,* State v. Johnson, 587 S.E.2d 445, 449 (N.C. Ct. App. 2003). In that case, while performing "a protective sweep of the residence in which they detained [an] individual," the police found "a shotgun at the foot of a bed . . . [and] a revolver by a couch," and seized these weapons after a search warrant arrived. *Id.* at 447-48. The court observed that "protective sweeps of a residence performed by law enforcement officers in conjunction with an in-home arrest are reasonable if [officers reasonably believe] that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 449 (emphasis added) (alteration omitted) (internal quotation marks omitted).

188. *See* SELECT COMM. MINUTES FOR SEPT. 25, 2003, *supra* note 183.

however, were questions about firearms.¹⁸⁹ Even when given the opportunity to place emphasis on gun violence, Guard did not do so. In fact, according to the minutes, “Representative Johnson asked Sergeant Guard if he could choose *one thing* for this committee to do to help curb domestic violence, what would it be.”¹⁹⁰ His response was that “the committee needed to tap into the resources of the state because everything is needed to come together, not just law enforcement, but society as a whole openly saying violence in the home is wrong.”¹⁹¹ This rather imprecise answer seems to have prioritized *funding* objectives—and the heroic goal of cultivating additional stigma for offenders—over any state interest in preventing gun violence in the home.¹⁹²

In October of 2003, roughly a month after the above-described meeting of the select committee, its Subcommittee on Criminal Law Issues convened.¹⁹³ The focal point of this meeting was a presentation by Beth Froehling, Public Policy Specialist (now Deputy Director) for the North Carolina Coalition Against Domestic Violence.¹⁹⁴ Froehling urged the subcommittee to adopt a variety of legal reforms ostensibly designed to protect existing and potential victims of domestic violence.¹⁹⁵

In her presentation, Froehling attacked “gun permit loopholes,” or the fact that pistol purchase permits, once issued, were valid and

189. Perhaps interest in discussing further gun regulation was lessened by the presentation’s discussion of N.C. GEN. STAT. § 14-269.8, which had already made it unlawful “for any person to own, possess, purchase, or receive or attempt to own, possess, purchase, or receive [any sort of gun or gun permit] if ordered by the court for so long as [any domestic violence-based protective order] is in effect.” See SELECT COMM. MINUTES FOR SEPT. 25, 2003, *supra* note 183.

190. *Id.* (emphasis added).

191. *Id.* One committee member then opined puzzlingly that “prevention and education in the schools is the key to helping eliminate the problem.” *Id.*

192. See *id.* The minutes also report that when Representative Gorman asked Sergeant Guard a question similar to the one posed by Representative Johnson, Guard answered that “the General Assembly could help by *funding* agencies that are trying to establish domestic violence as a crime that will not be tolerated.” *Id.* (emphasis added).

193. MINUTES FOR SUBCOMM. ON CRIM. LAW ISSUES, H. SELECT COMM. ON DOMESTIC VIOLENCE, OCT. 28, 2003, 2003 Gen. Assem., Reg. Sess. (N.C. 2004) [hereinafter CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003].

194. See *id.*; N.C. Coalition Against Domestic Violence: Our Staff, http://www.nccadv.org/who_we_are.htm (last visited Nov. 22, 2009).

195. See CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193. Some of these proposed reforms were: creating a harsher penalty for the crime of strangulation; imposing stiffer pretrial release conditions on offenders; and creation of an exception to the warrant requirement for the arrest of persons violating protective orders. See *id.*

could be used to purchase a handgun up to five years after the date of issuance.¹⁹⁶ She recommended that all such permits expire after one year.¹⁹⁷ Hearing this, Representative Gorman opined that “any crime should nullify a [purchase] permit.”¹⁹⁸

This must have provided a very nice segue into Froehling’s next talking point; for now she turned her attention to attacking, essentially, the Felony Firearms Act’s home and business exceptions.¹⁹⁹ Here, reproduced in full, is the impression that Froehling’s discussion of the Act appears to have left on the subcommittee’s recorder of minutes: “Felons having guns within their own homes or lawful place of business is not acceptable especially in a domestic violence situation. This is unacceptable and is not consistent with federal law.”²⁰⁰ Whatever the precise meaning of these criticisms might have been, they appear to have started the ball rolling on the subcommittee’s decision to delete the Act’s home and business exceptions.²⁰¹

In January of 2004, Sergeant John Guard appeared before the subcommittee and gave a presentation which was similar in many respects to the one he gave to the select committee itself the previous Septem-

196. *See id.*

197. *See id.*; Letter from N.C. Coalition Against Domestic Violence, to Reps. Paul Stam & Beverly Earle, N.C. Gen. Assem. (Feb. 11, 2004) [hereinafter NCCADV Letter] (on file with author). Note that the five-year expiration period to which Froehling objected is still law today. *See* N.C. GEN. STAT. § 14-403 (2007).

198. *See* CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193.

199. *See supra* notes 179–81.

200. CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193 (citation omitted); *accord* NCCADV Letter, *supra* note 197 (“We support the proposal to conform NC law with federal law in terms of prohibitions against felons possessing firearms.”).

201. The minutes indicate that another proposed amendment to the Act had been circulating in the House prior to this subcommittee meeting. *See* CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193 (remarking that, as Beth Froehling presented her objections to the home and business exceptions to the Act, “[t]he subcommittee recalled a House bill that dealt with felons possessing guns”). Indeed, it appears the amending language ultimately injected into the domestic violence bill by the select committee came from H.B. 1058, 1st Ed., 2003 Gen. Assem., Reg. Sess. (N.C. 2004) (bearing the short title, “Felons Can’t Possess Firearms”), which met its fate in May of 2003 when it was withdrawn from the House calendar for the second time and referred to the Rules Committee. *See* N.C. Gen. Assem., House Bill 1058 Information & History, <http://www.ncleg.net/gascripts/billlookup/billlookup.pl?session=2003&billid=h1058> (last visited Nov. 22, 2009). So while the 2004 changes to the Felony Firearms Act were not drafted from whole cloth by the select committee or its Subcommittee on Criminal Law Issues, it seems the features of House Bill 1058 would have been ignored and forgotten but for their resurrection by Beth Froehling and John Guard in the domestic violence committees.

ber.²⁰² This time, however, Guard's slide show featured materials attacking the home and business exceptions to the Act.²⁰³ He appears to have emphasized the same points as Beth Froehling likely did in the October meeting; namely, that the exceptions were (supposedly) "very dangerous in [the] context of domestic violence" and were "not consistent with federal law."²⁰⁴ But it seems Guard only offered support for the second of these contentions—and this was merely a two-sentence summary of what he apparently assumed to be the "federal law" governing felony gun possession.²⁰⁵ Indeed, the subcommittee's recorder of minutes only thought it necessary to report this contention—and not the first—in summarizing Guard's recommendations.²⁰⁶ Moreover, shortly after this presentation, the subcommittee's staff attorney passed out a draft of an amendment to the domestic violence bill which the minutes describe as "the State/Federal Firearm Law conformity [draft]."²⁰⁷ Conformity with federal law—not protection of potential domestic violence victims—thus seems to have been the catch phrase. Representative Weiss moved to give the select committee a favorable report regarding this amendment, and the motion carried.²⁰⁸

Subsequently, the select committee reconvened and adopted the language upon the subcommittee's favorable report—apparently without discussion.²⁰⁹ This gutted the home and business exceptions, and also changed the Act's proscriptions to include *all* firearms.²¹⁰

So it came to pass that these modifications were introduced together as part of what was essentially a "report" by the House Select Committee on Domestic Violence, which was little more than a draft of the domestic violence bill itself.²¹¹ With respect to the Act, the changes specified in this draft bill survived unmodified from their gen-

202. See MINUTES FOR SUBCOMM. ON CRIM. LAW ISSUES, H. SELECT COMM. ON DOMESTIC VIOLENCE, Jan. 7, 2004, 2003 Gen. Assem., Reg. Sess. (N.C. 2004) [hereinafter CRIM. L. SUBCOMM. MINUTES FOR JAN. 7, 2004].

203. See *id.* (warning that the Act "[p]rohibits possession of firearms by felons EXCEPT . . . within his own home or on [sic] his lawful place of business").

204. *Id.*

205. See *id.* (discussing, out of over a dozen Title 18 sections of the U.S. Code relating to firearms regulation, only 18 U.S.C. § 922(d)(1) (2000)).

206. See *id.* (stating that one of Guard's recommendations was to "have state law conform with federal law that a felon cannot possess a firearm even in his home").

207. See *id.*

208. See *id.*

209. See MINUTES FOR H. SELECT COMM. ON DOMESTIC VIOLENCE, Mar. 15, 2004, 2003 Gen. Assem., Reg. Sess. (N.C. 2004).

210. See *id.* (indicating that a copy of the adopted language appears as "Attachment 7" to the meeting's minutes).

211. See generally DOMESTIC VIOLENCE REPORT, *supra* note 182.

esis in the Subcommittee on Criminal Law Issues until their ratification.²¹² Remarkably, the bill passed as amended without a single “no” vote from the House and with only one negative vote from the Senate on the bill’s second reading.²¹³ It is quite possible that no one even noticed the changes to the Felony Firearms Act buried deeply amid the meandering sections of the domestic violence bill.²¹⁴

The circumstances of these changes’ introduction and passage indicate that the relevant amending provisions—which so dramatically broadened the Act’s scope—received little to no negative attention. There is no evidence of there ever having been a single discussion in either the select committee or its subcommittee regarding whether the changes would actually have any effect on *domestic violence*. Further, neither Sergeant Guard nor Beth Froehling appear to have cited a single relevant statistic that might have supported the notion that domestic violence offenses were being committed by ex-cons, *in their homes*, with firearms. Likewise, there is no record of any research having been conducted as to the *types* of firearms with which these assumed offenses were being committed, and thus no evidence that bringing all firearms within the Act’s scope had anything to do with domestic violence.²¹⁵ Froehling has admitted that there is no research “readily available” indicating how many firearms-related domestic violence offenses are committed by someone with a prior felony on their record.²¹⁶ This makes it appear unlikely that such figures existed in 2004 when the Coalition lobbied to extend the Act.

It is likely that the General Assembly, aware of the attendant political risks and benefits, was content to rubber-stamp a significant and deliberate change in the criminal law without considering its effect on North Carolina citizens’ right to self-defense *or* the likely ineffective-

212. Compare CRIM. L. SUBCOMM. MINUTES FOR JAN. 7, 2004, *supra* note 202 (attaching copy of relevant draft language), with Act of July 15, 2004, ch. 186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 716, 737-38.

213. See N.C. Gen. Assem., House Bill 1354 Information & History, <http://www.ncleg.net/gascripts/billlookup/billlookup.pl?session=2003&billid=h1354&votestoview=all> (last visited Nov. 22, 2009).

214. See H.B. 1354, Ratified Ed., 2003 Gen. Assem., Reg. Sess. (N.C. 2004) (showing its length to be twenty-seven pages).

215. “But the reason for the changes was conformity with federal law,” argues the reader. As I will explain, the state cannot be said to have a compelling interest in ensuring that its laws match those authored by Congress.

216. See E-mail from author to Elizabeth Froehling, Deputy Director, N.C. Coalition Against Domestic Violence (Mar. 19, 2009, 18:45:00 EST) (on file with author); E-mail from Elizabeth Froehling, Deputy Director, N.C. Coalition Against Domestic Violence, to author (Apr. 6, 2009, 14:35:00 EST) (on file with author).

ness of the amended Act itself in preventing gun violence. Legislators voted in favor the domestic violence bill knowing they would receive good press for making a heroic gesture in the name of combating domestic violence—and knowing they would be gambling away their reelection chances if they voted otherwise.

7. “*Curiouser and Curiouser!*”²¹⁷ *The Antique Firearm Exception*

Two years after whacking the home and business exceptions and expanding disentanglement to include *all* firearms, the General Assembly carved out a little exception for a particular category of guns. A portion of the deceptively-labeled 2006 Technical Corrections Act²¹⁸ announced that the Felony Firearms Act would “not apply to an antique firearm.”²¹⁹ This bill amended the definition of “antique firearm” to the following:

[a]ny firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898[;] . . . [a]ny replica of [one of the above] if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition[; or] . . . [a]ny muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.²²⁰

This was hardly a “technical” correction—unless one considers the .58 caliber musket ball and its ilk only “technically” responsible for hundreds of thousands of slain Civil War soldiers.²²¹

217. LEWIS CARROLL, *ALICE IN WONDERLAND* 14 (Charles A. McMurray ed., MacMillan 1914). The quoted phrase was uttered by the child Alice when, to her amazement, she began to grow disproportionately tall after consuming a cake marked “Eat Me.” See *id.* at 12–14. Like poor Alice, the Felony Firearms Act has changed shape dramatically throughout its development, which has been characterized by the sort of comical unpredictability often featured in children’s fantasy literature.

218. S.B. 1523, 3d Ed., 2005 Gen. Assem., Reg. Sess. (N.C. 2006) (providing the “short title” of the Act).

219. See Act of July 27, 2006, ch. 259, sec. 7(b), § 14-415.1(a), 2006 N.C. Sess. Laws 1232, 1237.

220. See *id.*, sec. 7(a), § 14-409.11, 2006 N.C. Sess. Laws at 1236–37. The definition of “antique firearm” continues in the exact same form today, and is codified at N.C. GEN. STAT. § 14-409.11 (2007). Note that the definition *excludes* any weapon which “[i]ncorporates a firearm frame or receiver,” is “*converted* into a muzzle loading weapon,” or which “is a muzzle loading weapon *that can be readily converted* to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.” *Id.* § 14-409.11(b) (emphasis added).

221. See MARGARET E. WAGNER ET AL., *THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE* 493 (2009) (describing muzzle-loading weapons used by Union and Confederacy troops); E.B. LONG WITH BARBARA LONG, *THE CIVIL WAR DAY BY DAY: AN ALMA-*

Quite remarkably, the antique firearms exception permits felons to own muzzle loading black powder weapons.²²² These differ from most modern “fixed ammunition” firearms in that they cannot fire more than one shot without being reloaded by hand. But reloading requires much more than just thumbing another pre-manufactured bullet into place.²²³ It would be foolish to rely on an antique firearm against an armed criminal in a self-defense situation today. Still, while muzzle loading weapons are time-consuming to load and difficult for most users to fire with accuracy, they are capable of providing lethal firepower. Hunters in North Carolina commonly use these rifles to dispatch larger game such as whitetail deer and bear.²²⁴

Note that the definition of excepted antique weapons also specifically includes “muzzle loading *pistols*.”²²⁵ This means the antique firearms exception not only countermands the current general prohibition against firearm possession by felons, but also rebuffs (less obviously) the Act’s traditional emphasis on preventing their *concealment* of guns.

So why did the North Carolina legislature create this exception? Was it really just a “conforming” change, as the Session Law’s heading

NAC, 1861-1865, at 711 (1985) (reporting that the war claimed roughly 623,000 fatalities).

222. See *id.* § 14-409.11(a). Black powder “substitute” is generally just a synthetic, smokeless form of gunpowder used in muzzle loading (or “black powder”) rifles.

223. To prepare for each shot, the black powder shooter must manually clean the rifle bore, measure out a quantity of gunpowder, pour that down the barrel, and then ram wadding—followed by the lead ball or projectile—down the barrel to rest on the powder charge. Additionally, before pulling the trigger will do any good, a new percussion cap (which ignites the internal powder charge when struck) must be positioned where the gun’s hammer will fall. This process requires considerable care and may take novices upwards of a minute to complete. *But see* History.com, Musket Loading: How Fast?, <http://www.history.com/search.do?searchtext=musket+loading> (follow “Musket Loading: How Fast?” hyperlink) (last visited Nov. 22, 2009) (“[A] trained Revolutionary War soldier in General George Washington’s army should [have been] able to load and fire three aimed shots per minute.”). Moreover, these guns’ notoriously sluggish powder ignition often creates a considerable delay between the moment of the trigger pull and the firing of the shot. See *id.* And “flintlocks” (which do not use a percussion cap) are even more primitive, complicated, and finicky. See JOHN ROBERT WEBER, FORKS, PHONOGRAPHS, AND HOT AIR BALLOONS: A FIELD GUIDE TO INVENTIVE THINKING 210-12 (1992) (detailing the various steps involved in loading and firing a flintlock rifle).

224. See N.C. WILDLIFE RESOURCES COMM’N, NORTH CAROLINA INLAND FISHING, HUNTING AND TRAPPING REGULATIONS DIGEST 38-43 (2007) (identifying the beginning and end of various hunting seasons and the specific days on which muzzle loading rifles can be used).

225. See N.C. GEN. STAT. § 14-409.11(a)(3) (2007) (emphasis added).

suggests?²²⁶ Indeed, the only explanation for the exception is buried deep in the minutes book of the House Judiciary I Committee, which adopted the exception as part of the version of the Technical Corrections Act it approved.²²⁷ The uninspiring purpose of the General Assembly in adding the antique firearms exception, it seems, was “to conform [North Carolina] law to federal law regarding antique firearms.”²²⁸ This it achieved.²²⁹ The minutes do not reveal, however, whose idea this was. Whatever its origin, this little exception will prove to be quite important in our strict scrutiny analysis.

B. *Looking for the Legislature’s Purpose*

Having described the Felony Firearms Act’s legislative history in considerable detail, we may now take another step towards the core of our constitutional analysis. This next challenge is that of determining in more precise terms what interests the State of North Carolina might assert in defending the current Act against a Fourteenth Amendment substantive due process challenge. In other words, before discussing whether the Act is narrowly tailored to a compelling state interest, we must take a shot at *identifying* that interest.

This task is made atypical by virtue of its revolving around the Act’s infringement of a “new” fundamental right—that of self-defense, which no court has yet described as an individual fundamental right in the Fourteenth Amendment sense, and at which *Heller* only hints.²³⁰ Fortunately, we are not without some starting point. North Carolina’s courts have addressed the Act, and their opinions discussing the more recent version of the Act tend to describe (in very vague terms) what

226. See Act of July 27, 2006, ch. 259, 2006 N.C. Sess. Laws 1234 (bearing the heading, “An Act to Make Technical Corrections *and Conforming Changes* to the General Statutes as Recommended by the General Statutes Commission, and to Make Various Other Changes to the General Statutes and Session Laws” (emphasis added)).

227. See MINUTES FOR H. JUDICIARY I COMM., July 25, 2006, 2005 Gen. Assem., Reg. Sess. (N.C. 2005) (addressing Senate Bill 1523). See also 2005 Bill Tracking N.C. S.B. 1523 (LexisNexis) (reporting that the House Judiciary I Committee’s substitute to Senate Bill 1523 was adopted on the House floor on July 25, 2006).

228. MINUTES FOR H. JUDICIARY I COMM., July 25, 2006, 2005 Gen. Assem., Reg. Sess. (N.C. 2005) (bill analysis included with minutes as “Attachment V,” prepared by Committee Co-Counsel Kory Goldsmith, summarizing the proposed committee substitute to Senate Bill 1523, Second Edition).

229. Compare N.C. GEN. STAT. § 14-408.11 (defining “antique firearm”), with 18 U.S.C. § 921(a)(16) (2006) (defining “antique firearm” in a substantially identical fashion).

230. See *supra* discussion accompanying notes 24-27.

ultimately must be considered the state's compelling interest: protection of the public.

The United States Supreme Court has held that a government's "general concern with *crime prevention*" is a compelling interest for substantive due process purposes.²³¹ Thus, we might reasonably conduct the remainder of our analysis of the Act against this public protection interest alone. However, because states are quite inventive in asserting alternative interests arguably furthered by the challenged law²³² (and since no case has weighed North Carolina's public safety interest against *the specific* fundamental right at issue here), I have endeavored to address some of these miscellaneous, potentially-assertable interests as well.

1. *North Carolina Courts and Minimum Scrutiny*

The North Carolina Court of Appeals has given a short series of pronouncements on the modern Felony Firearms Act's constitutionality. Criminal defendants convicted of violating the Act have leveled pre-*Heller* attacks against it,²³³ but their arguments have fallen flat under the application of what is essentially mere "rational basis" scrutiny.²³⁴ Because courts have only applied the *least* stringent level of constitutional review to the Act, the state has never been required—as it would be under an application of strict scrutiny—to identify with any precision the compelling interest or interests which the Act furthers.

231. See *United States v. Salerno*, 481 U.S. 739, 749-50 (1987) (emphasis added).

232. See *supra* note 57.

233. See, e.g., *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. 2004) (approving disenfranchisement where State demonstrated Act was rationally related to a legitimate state interest, such as the preservation of the health and welfare of its citizens); *State v. Tanner*, 251 S.E.2d 705, 706 (N.C. Ct. App. 1979) (rejecting appellant's equal protection argument and holding "there is clearly a reasonable relation between the classification, those convicted of a crime of violence, and the purpose of the statute, protection of the people from violence"). No litigant in the North Carolina state courts has raised a fundamental right-based substantive due process challenge to the Act since the federal Supreme Court's decision in *Heller* in June of 2008.

234. Under rational basis review generally, a law is presumptively valid and will be struck down only if the court believes it is not rationally related to any conceivable, legitimate government interest. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 540 (3d ed. 2006). The government is not even required to point out "the" interest it claims the law to further; instead, it need only rely on the court to imagine a legitimate interest, after which it will inevitably deem the law "reasonably related." See *id.* Arguably, this amounts to little more than guessing at the law's potential effect, then assessing the legitimacy of that effect. In this fashion, the *actual* reasonableness of the means employed by the government is rendered utterly inconsequential.

The cases that follow relate North Carolina courts' various descriptions of such interests. While these interests were not discussed in the context of substantive due process attacks and were labeled as merely "legitimate," it is reasonable to assume that the state would attempt to recharacterize these same interests as "compelling" should the need arise in defending the Act's constitutionality.

a. The Legitimate Interest in Protecting the Public: State v. Johnson

Carlton Johnson was convicted in 1983 of possession and sale of cocaine—a felony offense in North Carolina.²³⁵ In 2001, a police officer found Johnson with a pistol in his vehicle during a routine traffic stop.²³⁶ He was subsequently convicted of violating the Felony Firearms Act.²³⁷

Johnson appealed his conviction, arguing, among other things, that retrospective application of the 1995 repeal of the five-year disenfranchisement cap²³⁸ had (1) violated the state and federal ex post facto clauses²³⁹ and (2) stripped him of a vested right to bear firearms in violation of his right to due process.²⁴⁰

As to the first of these arguments, Johnson contended more specifically that

at the time of his previous felony conviction in 1983, [the Act] permitted him to possess a firearm five years after the date of discharge of the conviction, and thus, his conviction under [the Act] as amended in 1995, violate[d] the ex post facto clauses of the United States and North Carolina Constitutions. [The amendment in 1995, which removed the disenfranchisement cap,] . . . punished him for conduct that was not previously criminal.²⁴¹

But the court rejected this claim, characterizing the Act not as "punitive," but as merely "a retroactive civil or regulatory law," which as such did not violate the ex post facto clause.²⁴² Incident to drawing this conclusion, the court declared that the Act "remain[ed] rationally connected to the state's *legitimate interest in protecting the public.*"²⁴³

235. *State v. Johnson*, 610 S.E.2d 739, 741 (N.C. Ct. App. 2005).

236. *Id.*

237. *Id.*

238. The disenfranchisement cap is discussed in detail beginning *supra* in the text accompanying note 100.

239. *Johnson*, 610 S.E.2d at 741-42.

240. *Id.* at 746.

241. *Id.* at 741-42.

242. *Id.* at 743.

243. *Id.* at 744 (emphasis added) (quoting *United States v. O'Neal*, 180 F.3d 115, 124 (4th Cir. 2004)).

Johnson's second argument rested on due process grounds. He claimed that his rights of citizenship were restored²⁴⁴ in 1990 and had become "vested."²⁴⁵ These civil rights included his right to possess a firearm.²⁴⁶ Thus, he urged, application of the Felony Firearms Act as amended in 1995 deprived him of a vested right without due process of law.²⁴⁷ The court briefly considered this argument:

A statute cannot be applied retrospectively if it will interfere with rights that have vested. . . . A vested right is a right which is otherwise secured, established, and immune from further legal metamorphosis. . . . However, our case law has consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation. . . . The only requirement is that the regulation must be reasonable and be related to the achievement of *preserving public peace and safety*.²⁴⁸

Having stated the law in this fashion, the court then concluded that the "regulation" of Johnson's right to possess a firearm—in the form of disenfranchisement under the Act—was "reasonably related to *further securing the public's safety*."²⁴⁹ "Furthermore," said the court, "[the] defendant has not been *completely* divested of his right to bear arms [because the Act] *allows him to possess a firearm at his home or place of business*."²⁵⁰ Thus, Johnson's argument on these grounds was also held to be meritless.²⁵¹

With its responses to Johnson's arguments, the court invoked the same sort of language we might expect to find in most "rational basis scrutiny" cases. And while the facts and legal arguments of this case involved theories other than the interplay between substantive due process and deprivation of a fundamental right, the court's description of

244. Unfortunately, the opinion does not make clear whether these rights were restored to Johnson through a petition-based, statutory rights restoration procedure, or rather, by virtue of the terms of the former disenfranchisement cap.

245. *See id.* at 746.

246. *See id.*

247. *See id.*

248. *Id.* (emphasis added) (internal citations omitted) (internal quotation marks omitted).

249. *Id.* (emphasis added).

250. *Id.* (emphasis added). Recall that even though this appeal was decided in 2005—after the domestic violence bill in 2004 had eradicated the home and business exceptions, *see supra* text accompanying notes 172–213—Johnson himself was charged and convicted under the version of the Act in existence at the time of his arrest for the firearms violation in 2001. That version, of course, was pre-2004. Thus, it still featured the home and business exceptions even though the Act as it stood at the time of Johnson's appeal no longer included them.

251. *Johnson*, 610 S.E.2d at 746.

the *state interest* at stake is nonetheless useful for purposes of applying strict scrutiny.

To summarize: the *Johnson* court maintained that the Act was reasonably related to advancing the state's "legitimate" interest in protecting the public, preserving public peace and safety, and (curiously) "further" securing the public's safety.²⁵² Indeed, in addressing Barney Britt's claims in the following case, the court of appeals leaned heavily—too heavily, in fact—upon this rather broad enunciation of the state's interest.

b. New Statute, Hand-me-down Analysis: Britt v. State

Barney Britt was just twenty years old when he was convicted of a felony drug offense in 1979.²⁵³ He served a sentence which ended in 1982.²⁵⁴ In 1987, he regained the right to possess a firearm pursuant to the five-year disenfranchisement cap featured in the version of the Felony Firearms Act on the books at the time.²⁵⁵ With his rights of citizenship restored, Britt started a successful business in Raleigh and resumed hunting deer in his free time.²⁵⁶ He even earned a record for shooting the third-largest deer in North Carolina history.²⁵⁷

When he learned from a local sheriff that the General Assembly had modified the Act in 2004 such that it would prohibit him, absolutely, from possessing any gun, Britt brought a civil suit against the

252. See *id.* at 744, 746. The court's ill-advised use of the adverb "further" here may have the effect of suggesting the state's interest lies not in providing the public with a *first* line of defense against lawbreakers, but in fabricating a rather nominal benefit in the form of an incremental layer of prohibitions—a security blanket, in other words. If such is deemed to be the case by a federal court, the state's interest is likely to appear diminished in importance.

253. See *Britt v. State*, 649 S.E.2d 402, 404 (N.C. Ct. App. 2007); see also Press Release, Barney Britt, Legislature Revokes Rights of NC Citizens (Sept. 20, 2005), <http://www.prnewswire.com/cgi-bin/stories.pl?acct=104&story=/www/story/09-20-2005/0004111837> (describing Barney Britt's felony offense as "ignorant" and "youthful," and pointing out that he had "worked hard since making a mistake when [he] was only 20 years old" to become a "valuable member of society").

254. *Britt*, 649 S.E.2d at 404.

255. *Id.* The disenfranchisement cap is explained *supra* in the text accompanying note 100.

256. See Press Release, *supra* note 253.

257. WRAL.com: Garner Man Challenges Law Forbidding Convicted Felons From Carrying Guns (Sept. 22, 2005), <http://www.wral.com/news/local/story/120061> [hereinafter *Britt Story*].

State, arguing (on numerous grounds) that the Act was unconstitutional.²⁵⁸ The trial court granted summary judgment for the State.

On appeal, Britt faced an uphill battle: his principal argument was one of reasonableness,²⁵⁹ and the court of appeals had already demonstrated in *Johnson* that it would consider virtually *anything* reasonable as relating to the Act under rational basis, minimum scrutiny. Nevertheless, Britt maintained that because the Act prohibited all firearms to *all* convicted felons—even those whose crimes were nonviolent and were committed decades earlier, and whose civil rights had been fully restored²⁶⁰—the law “swept too broadly and [was] not reasonably related to a legitimate government interest.”²⁶¹ His challenge thus called for the application of rational basis scrutiny.

The court’s response, unfortunately, was neither surprising nor original:

The General Assembly made a determination that individuals who have been convicted of a felony offense shall not be able to possess *most* firearms. This statutory scheme, which treats all felons the same, serves to protect and preserve the health, safety and welfare of the citizens of this State.²⁶²

In rejecting Britt’s due process argument, the court recycled the exact same analysis²⁶³ which it used to reject an *ex post facto* challenge in *Johnson*, this time concluding that an entirely *different* version of the Act was nonetheless “rationally related to a legitimate state interest.”²⁶⁴

258. *Britt*, 649 S.E.2d at 408 (“Sheriff Harrison told [Britt] that if he saw [him] with a firearm on his own property, [Britt] would be charged under [the Felony Firearms Act] as a felon in possession of a firearm.”).

259. *See id.* at 405 (“Specifically, plaintiff contends [the Act] sweeps too broadly and is not reasonably related to a legitimate government interest.”).

260. Interestingly, several years prior to *Britt*, the Fourth Circuit had declined to discuss “whether North Carolina would allow a change in its laws to strip a felon of his *previously restored* right to possess firearms, and if so . . . whether that would violate the *Ex Post Facto* Clause.” *United States v. O’Neal*, 180 F.3d 115, 121 n.6 (4th Cir. 1999). The *Britt* court, however, seems to have assumed such a change in North Carolina law would have no effect on that constitutional issue.

261. *Britt*, 649 S.E.2d at 405.

262. *Id.* at 408 (emphasis added).

263. Like the “analysis” found in a struggling law student’s essay responses, the court of appeals’ discussion may be more accurately styled a conclusion in the absence of analysis; a type of assertion which begs the reader to ask, “*Why* is the law reasonably related to the state’s interest? *How* does it serve to protect citizens?”

264. *Compare id.* at 406, with *State v. Johnson*, 610 S.E.2d 739, 746 (N.C. Ct. App. 2005) (“[T]he regulation is reasonably related to further securing the public’s safety.”).

But as the dissenting judge pointed out, there were “major differences between the 1995 and current versions of the statute.”²⁶⁵ Specifically, the Act was upheld in *Johnson* in large part because disarming (1) did not apply to the felon’s home or lawful place of business and (2) was “limited to weapons that, *because of their concealability*, pose a unique risk to public safety.”²⁶⁶ But the home and business exceptions as well as the statute’s emphasis on restricting possession of concealable weapons were gutted from the Act as part of the broadening amendments passed in 2004.²⁶⁷ Thus, the holding in *Britt* and the rationale supporting it (which came from *Johnson*) were at odds with one another.²⁶⁸

Following the advent of the *Heller* decision, North Carolina’s supreme court reopened Barney Britt’s case.²⁶⁹ However, as explained in the Introduction to this Comment, the supreme court reversed the court of appeals on very narrow state law grounds: *as applied to Britt*, the Act was not a reasonable regulation of the right to bear arms under North Carolina’s constitution.²⁷⁰ Rather, given that Britt had been convicted of a relatively minor, nonviolent offense, and in light of his subsequent decades of sterling behavior even after having had his firearm rights restored, the court concluded that “the State unreasonably divested [him] of his right to own a firearm.”²⁷¹ In so holding, the majority opinion did not identify a state interest at all.²⁷² However, Justice Timmons-Goodson’s dissent announced that the Act was reasonably related to a “compelling interest in the public welfare and safety.”²⁷³

Note that because *Britt* was an “as applied” decision, the court’s holding did not alter the applicability of the Act to any other individual disarmed by it. This means the Act is still vulnerable to wholesale

265. *Britt*, 649 S.E.2d at 410 (Elmore, J., dissenting).

266. *Id.* at 409 (emphasis added) (quoting and distinguishing *Johnson*, 610 S.E.2d at 744).

267. *See supra* Part III.A.6 (discussing these amendments).

268. Even if one somehow managed to reconcile these two cases, they would be rendered inapposite by recognition of an individual, fundamental right of self-defense, and along with it, the need for strict scrutiny of the Act.

269. *See Britt v. State*, 681 S.E.2d 320, 322 (N.C. 2009) (“On 24 March 2009, this Court retained [Britt’s] notice of appeal based upon a substantial constitutional question . . .”).

270. *See id.* at 322–25.

271. *Id.* at 323.

272. The court did note that the trial court had described the Act as “rationally related to a legitimate government interest.” *Id.* at 322.

273. *Id.* at 324 (Timmons-Goodson, J., dissenting).

attack on other grounds; namely, substantive due process arguments predicated on a fundamental right guaranteed by the Second Amendment.²⁷⁴

In the event a court squarely addresses a challenge to the Felony Firearms Act under the federal Constitution, it will not be able to characterize the Act as being narrowly tailored to that interest even if that court declares North Carolina's legitimate public safety interest "compelling." However, the court might also investigate whether the statute is narrowly tailored to different interests. For as Britt's attorney observed, the statute "was denominated as an act to conform state law to federal and to 'prevent domestic violence.'"²⁷⁵ The legislative history makes that clear.²⁷⁶ Thus, our discussion now turns to address these and other legislative concerns to decide whether they might reasonably be cited by the State as alternative compelling interests.

2. *Considering Potential Alternative Interests*

As just explained, it is important to find out whether the Felony Firearms Act may reasonably be said to serve *other* interests—interests potentially less deserving of constitutional respect. I have arrived at four such alternatives. The first of these—namely, discouragement of recidivism—would perhaps constitute a valuable legislative interest; but recognizing this interest might render the Act an unconstitutional *ex post facto* law. The second alternative interest—stewardship of prison resources—is perhaps even more compelling than the first; but this also appears to have been foreclosed by the Act's own history and interpretation. Another alternative—prevention of domestic violence—is a worthy goal, but (as we will see later in the discussion) concerns an interest to which the Act's proscriptions cannot be said to be narrowly tailored. The last of these alternatives—conformity with federal law—is the most preposterous of the four, but is supported, oddly enough, by the Act's legislative history. Ultimately, none of these can help the Felony Firearms Act pass strict judicial scrutiny.

274. See *supra* discussion accompanying notes 6–14.

275. Posting of Dan Hardway to http://sentencing.typepad.com/sentencing_law_and_policy/2008/05/another-good-te.html (May 19, 2008, 16:41:51 EST). Mr. Hardway has characterized the Act as "a retroactive ban of any possession of any firearm by anyone ever convicted of any felony anywhere[, with] no exceptions[, even] for home defense." *Id.* "By the Court's reasoning," he says, "there are *no rights* for felons in North Carolina—only privileges subject to the whim and good will of the General Assembly." *Id.* (emphasis added).

276. See *supra* discussion accompanying notes 179–215.

a. *Deterring Violent Recidivists?*

The primary purpose of a “recidivist statute” is to deter repeat offenders.²⁷⁷ One of the actual interests at stake, then, might be that of dissuading felons from using firearms in post-conviction crimes, or from doing *anything* which would draw attention to them and the fact that they may be keeping a firearm illegally.²⁷⁸ The Act may be said to serve this goal by promising felons they will meet with a stiffer sentence for wielding such dangerous weapons in another crime, or even for being pulled over for speeding and being found with a gun. The potential deterrent effect of longer jail time should militate towards a reduction in the use of firearms by repeat offenders, and might make all felons who insist on keeping firearms more careful in their conduct. Practically speaking, then, this view paints the Act as operating to impose only nominal “real” restrictions on felons’ possession of firearms in their own homes, with its true effect instead being that of creating harsher punishment for those felons who use guns to commit crimes or who simply get caught with a gun in their possession—a recidivist statute masquerading as a substantive law, if you will.²⁷⁹

277. *State v. Wood*, 647 S.E.2d 679, 686 (N.C. Ct. App. 2007).

278. That the state might reasonably have anticipated felons’ determined efforts to continue carrying firearms for self-defense, notwithstanding their convictions, is supported by this ultimatum: “Die or go to jail? That’s a hell of a decision.” T.I., *Ready for Whatever*, on PAPER TRAIL (2008 Atlantic Records). “If your life was in jeopardy everyday, [are] you telling me you wouldn’t need weaponry—just because of your felonies?” *Id.* While these lyrics are written from the perspective of a person already imprisoned for felony gun possession, rapper T.I. actually recorded them “while under house arrest for weapons possessions charges,” awaiting his “year-long prison sentence beginning in 2009.” See Rolling Stone, Online Album Review (Oct. 16, 2008), <http://www.rollingstone.com/reviews/album/23094260/review/23306351>. Scolding those who would misperceive him as “just another ignorant rapper who had a chance at success and [did] nothing but horrible things with it,” T.I. has emphasized that while he accepted his federal gun possession conviction, his attempts to secure weapons for self-defense purposes were justified and necessary: “[Do] you know how many attempts have been made against my life?” CNN.com, *Hip-Hop Star Discusses Firearms Conviction* (Oct. 13, 2008), <http://www.cnn.com/2008/showbiz/music/10/13/qa.ti/index.html>.

279. A similar sort of reasoning might have applied when Texas attempted to defend its anti-sodomy law against substantive due process challenge in *Lawrence v. Texas*, 539 U.S. 558 (2003). Texas might have conceded that it would not often be able to invade the bedrooms of sodomites to detect a violation of the anti-sodomy statute. Since the Court appeared to reject “morality” as a legitimate basis for lawmaking, Texas might have argued, for example, that the statute was *really* used to effectuate a more robust sentence for adults who raped child victims of the same sex—crimes which involve illegal acts of sodomy, albeit incidental. Similarly, North Carolina might be forced to concede that it has little chance of enforcing the Felony Firearms

But according to the North Carolina Court of Appeals, deterring repeat offenders is *not* the purpose of the Felony Firearms Act.²⁸⁰ In *State v. Wood*, the appellant argued that the Act's requirement that the state prove he had been convicted of a felony revealed that the predominant purpose of the statute was to deter and punish *repeat* offenders.²⁸¹ Proof of his prior felony, therefore, was merely a "recidivist component."²⁸² Because of this, he argued, his violation of the Act could only serve as a "sentencing enhancement" for a separate, substantive offense—one with which he had not been charged, of course. While *Wood* does not make this clear, it seems the appellant's argument was that ratcheting up his jail sentence based on his mere possession of a firearm would be "punishing him for conduct that was not previously criminal," in violation of the *ex post facto* clause.²⁸³

Batting down Mr. Wood's argument, the court of appeals cited the General Assembly's "inherent power to define and punish *any* act as a crime,"²⁸⁴ concluding that while the Act "has characteristics of a recidivist statute, a plain reading of [it] shows that it . . . creates a substantive offense . . . and not a sentencing requirement aimed at reducing recidivism."²⁸⁵ This conclusion, alas, involved no inquiry into the precise societal difficulty at which the legislature's creation of the substantive offense *itself* was aimed. Given the court's eagerness to explain that "courts must . . . construe [a criminal statute] with regard to the evil which it is *intended* to suppress,"²⁸⁶ its refusal to follow its own rule and conduct an investigation into the actual intentions of the

Act (or even detecting violations of it) other than by way of tips from informants who peek around inside felons' homes looking for guns. From this position, the state might maintain that the Act is not really implemented with respect to its "substantive" character, but is instead applied to make a gun-crime by a convict more costly to him, sentencing wise.

280. See *Wood*, 647 S.E.2d at 686 (stating that while the Felony Firearms Act "has characteristics of a recidivist statute, a plain reading of the statute shows that it creates a new substantive offense").

281. See *id.*

282. *Id.*

283. See *State v. Johnson*, 610 S.E.2d 739, 742 (N.C. Ct. App. 2005). The *Johnson* court pointed out that "only laws which retroactively increase punishment or impose a penalty violate the *ex post facto* clause, but retroactive civil or *regulatory* ones generally do not." *Id.* at 743 (referencing *State v. White*, 590 S.E.2d 448, 454 (N.C. Ct. App. 2004)) (emphasis added).

284. *Wood*, 647 S.E.2d at 686 (emphasis added).

285. *Id.* at 687; cf. *State v. Bowden*, 630 S.E.2d 208, 213 (N.C. Ct. App. 2006) ("The mere fact that a statute is directed at recidivism does not prevent [it] from establishing a substantive offense.").

286. *Wood*, 647 S.E.2d at 686 (emphasis added).

legislature—an altogether different task than describing the bare effect of the statute—is unsettling.

In any event, whether or not preventing or discouraging recidivism in such a fashion could be deemed a compelling interest, Mr. Wood's interpretation of the Act would render it punitive in nature. The courts have made it clear that the purpose of the Act is *not* punitive, but rather, regulatory.²⁸⁷ We must therefore reject this as a viable alternative state interest.

b. Lessening the Burden on State Prisons?

Stiffening up disenfranchisement—as did the broadening amendments of 2004—would make a bit more sense if denying felons gun possession rights could be characterized as a more efficient correctional alternative to outright incarceration. Of course, such a notion runs contrary to the courts' utterances on the subject, which have pointed out that the Act's prohibitions are “regulatory” in nature and not “punitive.”²⁸⁸ While such reasoning proved useful to the courts in beating down *ex post facto* challenges,²⁸⁹ it is futile in the context of a substantive due process challenge to a state's deprivation of the fundamental right of self-defense.

But even assuming absolute, perpetual firearms disenfranchisement is justified by the state's “compelling” interest in implementing substitute forms of criminal correction to alleviate an overwhelmed prison system—and assuming acknowledging this interest would not render the Act punitive and thus an *ex post facto* law—there is no evidence that the General Assembly ever believed the 2004 changes to the Act would address the corrections system's problem at all.

In fact, there is evidence to the contrary. According to the legislature's Fiscal Research Division, the domestic violence bill was simply to make “conforming changes to state firearm laws to mirror existing federal law” and was “expected to have *no* state level fiscal impact.”²⁹⁰ Surely a report like this, which highlighted in detail the mounting cost of incarceration and the accompanying lack of prison space, would

287. The court had previously explained that “any law that aggravates a crime, or makes it greater than it was . . . when committed is prohibited as an *ex post facto* law.” *Johnson*, 610 S.E.2d at 743 (citations omitted) (emphasis omitted) (quotation marks omitted).

288. *Id.* at 742.

289. *E.g., id.*

290. See N.C. GEN. ASSEM. FISCAL RESEARCH DIV., LEGISLATIVE FISCAL NOTE, HOUSE BILL 1354 (FIFTH EDITION) 7 (2004) available at <http://www.ncleg.net/sessions/2003/fiscalnotes/house/pdf/hfn1354v5.pdf> (indicating report was produced July 9, 2004).

have pointed out any relevant fiscal benefit reasonably deducible from the proposed changes to the Act—if such benefit existed. Indeed, a fiscal note prepared the previous year for an earlier, failed bill (predecessor to the changes to the Act which appeared in the domestic violence bill) indicated quite plainly that removal of the home and business exception and expansion of the types of firearms prohibited to felons would lead to “an *increase* in defendants” and would likely require *more* prison beds—not less.²⁹¹

In addition, the Fiscal Research Division explained that because “[t]he [Sentencing and Policy Advisory] Commission assumes for each bill that increasing criminal penalties does *not* have a deterrent or incapacitative effect on crime . . . , the Fiscal Research Division . . . does *not* assume savings due to deterrent effects for this bill”²⁹² The cost-sensitive nature of this report rebuts the notion that the legislature may have been shrewd enough to realize (1) that the Act’s survival hinges in some part on its “regulatory” nature, and (2) that highlighting any fiscal benefits to the correctional system would risk prompting the courts to recharacterize the Act as punitive.

The legislature never seemed to think the Act would lessen the burden on North Carolina’s correctional system, and the Act cannot rightfully be said to serve a compelling interest in reducing that strain.

c. *Combating Domestic Violence?*

Crimes of domestic violence, and the betrayal of trust and intimacy they often embody, are unquestionably horrific and perverse. Throughout the development of the *Britt* case in 2007, one of the most vocal supporters of the 2004 amendments to the Felony Firearms Act—which, among other things, stripped it of the home and business exceptions—was the North Carolina Coalition Against Domestic Violence.²⁹³ Recall that the Coalition was instrumental in persuading the legislature to modify the Act.²⁹⁴

291. N.C. GEN. ASSEM. FISCAL RESEARCH DIV., LEGISLATIVE FISCAL NOTE, HOUSE BILL 1058 (FIRST EDITION) 2, 3, 5 (2003), available at <http://www.ncleg.net/sessions/2003/fiscalnotes/house/pdf/hfn1058.pdf> (emphasis added) (indicating report was produced on April 22, 2003).

292. *Id.* at 2.

293. See *Britt* Story, *supra* note 257.

294. See *supra* text accompanying notes 193–215. As one of its spokespersons revealed, the Coalition’s view seems to have been that *any* criminal law is acceptable as long as it is passed in the talismanic name of preventing domestic violence. Reacting to Barney Britt’s litigation, the Coalition’s public policy specialist Beth Froehling announced a justification for upholding the drastically broadened Act: it would be “too difficult [for the state] to pick and choose which convicted felons should carry a gun

Surely it is important that the state seek to prevent acts of violence by and against members of a common family or household. One might even concede that this is a *compelling* goal, constitutionally speaking. But an interest in protecting potential victims of domestic violence is hard to distinguish as anything more than a cross-section of the state's "general concern with crime prevention"²⁹⁵ or its "legitimate interest in protecting the public."²⁹⁶ This means any arguments ren-

and which should not." Britt Story, *supra* note 257. Continuing, she explained that she considered this "a public safety issue." *Id.* She asked, "Do we want convicted felons to be allowed to have firearms?" *Id.* The rhetorical question Froehling neglected to ask, of course, is whether "we" want *anyone* having guns. The Coalition's likely answer would reveal that it is not content to deprive only "convicted felons" (an unquestionably evil group of persons, in the Coalition's estimation) of their right of self-defense. Instead, it appears to have a predilection for disarmament; for instance, the Coalition objected to the idea of giving mere information about obtaining a firearm for self-defense to the *survivors* of domestic violence. See Lynn Bonner, *Weapons Counseling Stays in Bill*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 1, 2005, at B5, available at 2005 WLNR 13735643 (discussing the Coalition's negative reaction to H.B. 1311, 2005 Gen. Assem., Reg. Sess. (N.C. 2005), which required the clerk of court, upon issuing a protective order to certain domestic violence victims, to provide information to the victim explaining, *inter alia*, her right to apply for an expedited concealed handgun permit, pursuant to section 14-415.15, as a person facing an "emergency situation"); see also N.C. GEN. STAT. § 50B-3(c1)(6) (2007).

295. *United States v. Salerno*, 481 U.S. 739, 749-50 (1987). Another example of an important function of the Act—which should be distinguished from the interests underlying it—arises in regard to the Act's focus on the felon's "access to the firearm [without any regard to] the firearm's operability at any given point in time." *State v. Jackson*, 546 S.E.2d 570, 574 (N.C. 2001) (emphasis added). The North Carolina Supreme Court refused to read the Act as requiring that the firearm in the felon's possession be "operable." *Id.* at 574-75. The court justified this interpretation as an extension of "the intuitively logical objective of the statute to prevent a show of force by felons, either real or apparent." *Id.* (emphasis added). The idea was that it is dangerous and harmful for people to run about the countryside pointing guns (operable or otherwise) at one another in the course of breaking other laws. Thus one might attempt to argue, citing *Jackson*, that the state has an interest in preventing such "show[ings] of force." *Id.* However, that opinion explained that the Act was created to address the "heightened risk and public concern associated with convicted felons possessing firearms." *Id.* at 573-74 (emphasis added). The court understood the Act as operating to protect the public from those who would use a gun (or something that resembling one) to facilitate their bad acts, and thus as serving the state's interest in protecting the public from crime. See *id.* This means the "logical objective" of preventing felons from making a show of force in committing other crimes is not a state interest as such, but only a theoretical effect of the Act by which it serves the general public protection interest. An interest in preventing the "stick up" scenario and an interest in crime control are one and the same, and do not require separate narrow tailoring analyses.

296. *State v. Johnson*, 610 S.E.2d 739, 744 (N.C. Ct. App. 2005).

dering the Act constitutionally defective under the state's interest in public safety will apply to this more fact-specific variant as well. However, there may be some subtle differences in the contours of the constitutional analysis conducted in light of an asserted interest in combating domestic violence, so it is recognized here for the sake of discussion.

d. Conforming to Federal Law?

Classifying “conformity with federal law” as a compelling *state* interest should immediately strike us as outlandish. But this was a prominent justification during the legislature’s 2004 removal of the home and business exceptions, which were labeled as “unacceptable and . . . not consistent with federal law.”²⁹⁷

If achieving conformity with federal law is ever deemed a compelling interest, there can be no such thing as a “less restrictive means” to that end. Only complete conformity to the federal law can be rightly said to be “narrowly tailored” toward furthering a state’s interest in conforming to such law. Because there can be only one means to that end—revision of the text of state law—the means and the ends become one and the same.

This cuts both ways; for if conformity were a compelling interest, strict scrutiny analysis would be inapposite wherever states succeeded in mimicking the substance of federal statutory schemes. In other words, the applicable analytic process would no longer be a form of judicial review, but a mere proofreading for differences in the federal and state codes.

It is one thing for state law to mirror federal law *incidentally* as it is modified in an attempt to achieve some other compelling interest. It is quite another for both the state interest and the state’s means of furthering it to be indistinguishable from one another. Despite the manifest problems with this interest, I will nevertheless refer to it periodically in analyzing the current provisions of the Act.

IV. SCRUTINIZING NORTH CAROLINA’S SHOTGUN APPROACH: THE CURRENT LANGUAGE OF THE FELONY FIREARMS ACT

This Comment’s analysis of the Felony Firearms Act now shifts from history to the heart of strict scrutiny: the narrow tailoring analysis. I will first describe the import or logical effect of certain provisions of the Act, and then evaluate the particular effect in light of arguably compelling North Carolina interests to determine to what

297. See CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193.

extent the provision in question is narrowly tailored towards furthering the state's interest. In making that determination, I give special attention to the Act's over- and underinclusiveness.²⁹⁸ I will then consider whether there are less-restrictive means by which North Carolina may achieve its goals.

To a certain extent, the approach of this Comment draws from Justice Scott's dissenting opinion in *Posey v. Commonwealth*, a case decided by the Kentucky Supreme Court.²⁹⁹ Justice Scott's compelling discussion was organized around Kentucky's constitutional history and the various features of that state's version of the Act,³⁰⁰ giving less attention to the question of state interests.³⁰¹ In any event, the inquiries just explained will reveal that the Act is not carefully tailored to further any compelling state interest and thus impinges unconstitutionally upon the individual, fundamental right of self-defense.

A. *Persons Subject to the Act: Demons or the Demonized?*

Who loses their right to firearm possession under the Felony Firearms Act? The current text of the Act answers quite simply, "any person who has been convicted of a felony."³⁰² It goes on to provide that

298. Recall the discussion of over- and underinclusiveness appearing *supra* at note 48 and accompanying text.

299. *Posey v. Commonwealth*, 185 S.W.3d 170, 183-205 (Ky. 2006) (Scott, J., concurring in part, dissenting in part).

300. KY. REV. STAT. ANN. § 527.040(1) (LexisNexis 2002), which is the Kentucky analogue to the North Carolina Felony Firearms Act, provides that "[a] person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court . . ." Interestingly, the statute also provides that "with respect to handguns, [its proscriptions] apply only to persons convicted after January 1, 1975, and with respect to *other* firearms, to persons convicted after July 15, 1994." *Id.* § 527.040(4). Furthermore, felons in Kentucky are exempt from this statute if they have been granted a full pardon by the state's governor or the President of the United States, or "granted relief by the United States Secretary of the Treasury pursuant to the Federal Gun Control Act of 1968, as amended." *Id.* § 527.040(1)(a), (b).

301. Writing two years prior to the United States Supreme Court's *Heller* decision, Justice Scott argued persuasively that section 527.040 violates the Kentucky constitution. See *Posey*, S.W.3d at 183-205 (Scott, J., concurring in part dissenting in part). Kentucky's Bill of Rights provides that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of enjoying and defending their lives and liberties . . . [and] [t]he right to bear arms in defense of themselves and of the state, subject to the power of the General Assembly to enact laws to prevent persons from carrying *concealed* weapons." KY. CONST. § 1 (emphasis added).

302. N.C. GEN. STAT. § 14-415.1(a) (2007).

convictions which cause disenfranchisement . . . shall only include . . . [f]elony convictions in North Carolina that occur before, on, or after December 1, 1995; and . . . [v]iolations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to [the North Carolina felony convictions just described] which are punishable where committed by imprisonment for a term exceeding one year.³⁰³

The Act also defines a “conviction” as “a final judgment in any case in which felony punishment, *or* imprisonment for a term exceeding one year, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed.”³⁰⁴

To summarize this language: North Carolinians are subject to disenfranchisement under the Act if they have *ever* committed (1) a crime labeled as a felony in the North Carolina General Statutes and punishable by over one year in prison, (2) a violation of the laws of another jurisdiction that is “substantially similar” to a crime from the previous category, or (3) a violation of *any* law for which “felony punishment” of *any* duration is permissible.³⁰⁵

As Justice Scott poignantly suggested, it is important that one understands “the vast area of non-threatening human activity covered by the term ‘felony.’”³⁰⁶ Indeed, the dreaded “convicted felon”—the person the state has been so eager to disarm in the name of public safety—may not be that frightening at all.

For example, in North Carolina, it is a felony for a person to act as a notary public knowing her commission has expired.³⁰⁷ By committing her wicked, un-commissioned notarial act, the renegade notary will earn all of five dollars.³⁰⁸ The state, meanwhile, may reward her with up to eight months in prison.³⁰⁹ And even if she is sentenced only to community service, her conviction for this Class I felony

303. *Id.* § 14-415.1(b)(1), (2).

304. *Id.* § 14-415.1(b)(3) (emphasis added).

305. *See id.*; *supra* note 158 (explaining legislative history of relevant language).

306. *Posey v. Commonwealth*, 185 S.W.3d 170, 187 (Ky. 2006) (Scott, J., dissenting).

307. *See* N.C. GEN. STAT. § 10B-60(e) (“It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under [the Notary Public Act].”).

308. *See id.* § 10B-31 (“The maximum fee[] that may be charged by a notary for . . . acknowledgments, jurats, verifications or proofs, [is] five dollars . . .”).

309. *See id.* § 15A-1340.17(c) (indicating that a Class I felon with no prior record may receive between three and eight months imprisonment, depending on whether her offense has mitigating or aggravating factors).

means she is forever deprived of her right to have a gun for self-defense purposes.³¹⁰

Like the example just given, a host of acts made unlawful by the state do not involve violence or any sort of threat to personal safety, yet are labeled and punished as felonies. Disenfranchisement will befall anyone who is convicted for making a bootleg video at the movie theater,³¹¹ selling a time share without designating a registrar,³¹² running a “pyramid” scheme,³¹³ writing a bad check,³¹⁴ removing pine needles from posted land,³¹⁵ or even operating a bingo game without a license.³¹⁶ Browsing through Chapter 14 of North Carolina’s General Statutes will reveal that these sorts of examples are numerous.

1. *The Public Protection Interest*

Nearly thirty years ago, North Carolina’s court of appeals expressed its belief that “the purpose of the [Felony Firearms Act is] protection of the people from *violence*.”³¹⁷ It has since reaffirmed this conclusion, but only with increasingly imprecise remarks about the Act’s ability to “protect and preserve [public] health, safety and welfare.”³¹⁸ Yet the Fourth Circuit—writing before the drastic changes to the Act in 2004—asserted that “[the] legislature’s ‘judgment that a convicted felon . . . is among the class of persons who should be disabled from . . . possessing firearms *because of potential dangerousness* is rational.’”³¹⁹ North Carolina’s courts have echoed this reasoning.³²⁰

Arguably, then, if the Act disenfranchises persons who are not characterized by this “potential dangerousness,” its rationality score should suffer. And that it does; for although it may at one time have been “reasonably related” to an interest in public safety,³²¹ the Act in its current form is by no means carefully or narrowly tailored to that

310. See *id.* § 14-415.1(b) (providing that felony convictions trigger disenfranchisement under the Act “without regard to the plea entered or to the sentence imposed,” so long as “felony punishment . . . is permissible”).

311. See *id.* §§ 14-440.1(b), (c)(1).

312. See *id.* § 93A-58(b).

313. See *id.* § 14-291.2.

314. See *id.* § 14-107.

315. See *id.* § 14-79.1.

316. See *id.* § 14-309.5.

317. *State v. Tanner*, 251 S.E.2d 705, 706 (N.C. Ct. App. 1979) (emphasis added).

318. *Britt v. State*, 649 S.E.2d 402, 408 (N.C. Ct. App. 2007).

319. *United States v. O’Neal*, 180 F.3d 115, 124 (4th Cir. 1999) (quoting *Lewis v. United States*, 445 U.S. 55, 67 (1980)) (emphasis added).

320. *E.g.*, *Britt*, 649 S.E.2d at 407 (citing *O’Neal*, 180 F.3d at 124).

321. *State v. Johnson*, 610 S.E.2d 739, 746 (N.C. Ct. App. 2005).

interest, being both vastly overinclusive as well as tellingly underinclusive.

So first, the Act is overbroad because many of the individuals the Act disarms are *not* potentially dangerous, and cannot reasonably be described in that way. Nevertheless, courts appear to have latched onto a puzzling logic: “persons who have been convicted of a felony . . . are thus ‘unfit to be entrusted with . . . dangerous instrumentalities.’”³²² This is not right. While a person may be convicted of a felony due to heinous actions which themselves indicate he is “unfit” to have a gun, an individual is not dangerous just because he or she has been convicted of a felony.

Recall for a moment our example of that incorrigible scalawag, the notary public.³²³ Suppose she is so sinister as to notarize a testamentary document for her terminally-ill friend one day after learning her commission has expired. Suppose for a moment she forgot what she learned in the handful of hours she spent attending the required training course, and mistakenly believed she could lawfully update her commission over the phone the next morning. And suppose the document she sealed ends up being revoked anyway. Is she really “among [a] class of persons who should be [disarmed] because of potential dangerousness”?³²⁴ Unthinkable. But if she is convicted, the state’s answer is “yes.” What the courts and the General Assembly appear to have contented themselves in assuming, quite perniciously, is that her violation of a technical rule functioning to enhance the authenticity and uniformity of legal instruments³²⁵ (hardly a public safety mechanism) amounts to a full-blown propensity not just for carelessness or even lawlessness, but for *gun* violence.³²⁶ In actuality, we cannot rea-

322. *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. 2004) (quoting *O’Neal*, 180 F.3d at 124) (alteration omitted) (emphasis added); see *Johnson*, 610 S.E.2d at 744 (quoting *Farrow* approvingly for this proposition).

323. See *supra* text accompanying notes 307–08.

324. Cf. *O’Neal*, 180 F.3d at 124 (using this language to describe disintitiled persons).

325. See N.C. GEN. STAT. § 10B-2 (2007).

326. *But see State v. Oaks*, 594 S.E.2d 788 (N.C. Ct. App. 2004). In *Oaks*, the court of appeals vacated a trial court order which, citing federal law, imposed a permanent and unconditional prohibition on firearms possession by a man convicted of misdemeanor marijuana and drug paraphernalia possession. See *id.* at 793. The court of appeals criticized the order for “apparently presum[ing] that [the person] will always be an unlawful user of controlled substances, and therefore may never possess firearms.” *Id.* The court also took exception “to the trial court’s conclusion of law that defendant and [his wife] ‘may not possess firearms or ammunition on their own premises *even for their own personal protection.*’ Our concern is that the trial court’s language is *unconditional* and *without any time limits.*” *Id.* (emphasis added). This case

sonably conclude that her “potential” for dangerousness is any greater than that of most ordinary North Carolinians with *no* criminal history. But perhaps they, too, should be statutorily disarmed.

Which brings us to underinclusiveness: what sorts of criminals actually *evade* the Act’s proscriptions? The irony of the answer should come as no surprise: dangerous ones. The Felony Firearms Act announces the judgment of the General Assembly that an individual convicted dozens of years ago of a nonviolent felony³²⁷ is more likely to commit firearm violence than is the individual who has not been convicted of a “felony,” but who *has* been convicted of a violent or destructive misdemeanor, such as erecting a burning cross in someone’s yard,³²⁸ “hazing” one’s classmates,³²⁹ pointing a gun at someone as a “joke,”³³⁰ desecrating gravestones,³³¹ willfully obstructing police officers,³³² or taking indecent liberties with students of a school where one works as a janitor.³³³ Even the habitual,³³⁴ wanton blowing up of dynamite or exploding of bombs is not enough to earn disenfranchisement under the Act.³³⁵

One might ask, “What ‘potential’ for dangerousness does one violent misdemeanor show?” The answer is, “Certainly *at least* as much potential as a single, nonviolent ‘felony’ which presents no safety risk to anyone.” Even if a person is convicted of committing five or six of these dangerous misdemeanors, they remain categorized as a misdemeanor and are not punishable by imprisonment in excess of one year.³³⁶ Thus, even where the person *does* have a propensity for engag-

suggests North Carolina courts might be willing to concede that wrongdoing (even where admitted by the accused) is no indicator of violent criminal propensity. Also encouraging is the court’s sensitivity to the harshness of “unconditional” firearms disenfranchisement “without any time limit” in light of individuals’ need for “personal protection.” *See id.* But where is this sensitivity in cases where the underlying, nonviolent crime bears the “felony” label? *E.g.*, *Johnson*, 610 S.E.2d at 744. The Act thus may be said to dull, inexplicably, the courts’ otherwise keen sense of fairness.

327. Recall the nonviolent, yet “felonious” criminal acts discussed *supra* in the text accompanying notes 307-16.

328. *See* N.C. GEN. STAT. § 14-12.12.

329. *See id.* § 14-35.

330. *See id.* § 14-34.

331. *See id.* § 14-148.

332. *See id.* § 14-223.

333. *See id.* § 14-202.4.

334. *See infra* note 336 and accompanying text.

335. *See* N.C. GEN. STAT. § 14-283.

336. *See id.* § 15A-1340.23(c) (providing that, even with five or six prior convictions under his belt, a person convicted of committing even the most severe misdemeanor offense—punished at the A1 level—will not serve more than 150 days in prison).

ing in harmful behavior, the Act does not take away their right to possess a firearm.³³⁷

Assuming the Act's aim is to protect the public by disarming those who are potentially dangerous, its failure to extend disenfranchisement to these overtly malicious criminals is nothing short of amazing. But more than that, these oversights are *revealing*. The legislature's willingness to deprive "convicted felons" of their right of self-defense is irreconcilable with its lack of interest in disarming evildoers who demonstrate malicious or dangerous tendencies. This suggests that the public safety interest the state will naturally trumpet as "compelling" is really not so compelling after all. In fact, it appears the state did not feel "compelled" to disarm dangerous misdemeanants. Why, then, should a conviction for a nonviolent, non-dangerous felony—potentially one that occurred decades ago—trigger disenfranchisement? It should not. The statute is not carefully tailored to the state's public safety interest.

2. *Other Interests*

Let us consider now whether the Act's selection of criminals deserving of disenfranchisement is narrowly tailored to the "alternative" state interests introduced earlier in this Comment; namely, prevention of domestic violence and conformity with federal law. I concede for the sake of argument that both of these are "compelling" government interests. The first, of course, is only a variation on the general "public safety" interest already addressed, reduced to the context of the family domicile. The second is kept in the game because it will highlight the outrageousness of the legislature's indiscriminate use of the phrase "conform to federal law" in justifying its policies.

With respect to the state's interest in combating domestic violence, the over- and underinclusiveness of the Act persists. By disarming even those persons convicted of a nonviolent, non-dangerous felony,³³⁸ the Act goes further than the state's interest requires: why should these folks be deemed more likely than the everyday jaywalker to commit firearm violence against members of their own households—or against anyone, for that matter? But the statute also goes too far for another reason. It is overbroad under a domestic violence prevention interest in a way that it is *not* under the general public safety interest. This is because even convictions for extremely violent crimes do not necessarily mean the felon has a propensity to harm his *own*

337. See *id.* § 14-415.1; *supra* text accompanying notes 302-04.

338. See *supra* notes 307-16 and accompanying text.

family or household. In fact, a person may be convicted of a violent and dangerous felony against a *non*-family member precisely because he acted out of an impulse to avenge wrongs done to his own family, household, or intimate partner.³³⁹ Because even gruesome, indefensible crimes may originate from the offender's sense of loyalty to and responsibility for his or her family and not from a propensity to compromise the harmony of the home, the Act's undistinguishing disentitlement of all felons is overinclusive as concerns an interest in preventing domestic violence. Furthermore, since the Act ignores violent and even habitual misdemeanants³⁴⁰—even those which have actually engaged in hostile behavior towards their spouse for an extended period³⁴¹—its proscriptions are also underinclusive with respect to this interest.

339. See, e.g., *State v. Allen*, 626 S.E.2d 271, 277 (N.C. 2006) (describing how the defendant, after fatally shooting another man, assured his girlfriend that the victim “would never call her a ‘bitch’ again”); *State v. Robertson*, 81 S.E. 689, 690–91 (N.C. 1914) (rejecting an argument that the defendant was “defending ‘his castle’” when he shot and killed a man who appeared to have been prevailing against a family guest in a vicious hand-to-hand struggle in the defendant’s home). In *State v. Holloway*, a man named Worsley came by the home of John Holloway in search of a stolen wallet, firing shots at the front door and making threats before leaving. 171 S.E.2d 475, 477 (N.C. Ct. App. 1970). John feared Worsley would proceed to track down and harm his youngest son, Phillip, who had not been home. *Id.* John and his eldest son, Larry, armed themselves and set out to warn Phillip. *Id.* When they arrived at the place where they thought Phillip would be, Worsley ambushed them and a struggle ensued between him and John. *Id.* Larry spent his shots trying to break things up, and then dove into the fracas to aid his father; but Worsley managed to wrestle John’s gun away. See *id.* At that moment, Phillip entered the building through the back door and—seeing Worsley aiming to shoot his brother and father—fired a single shot, killing him. *Id.* On these facts, the court of appeals ordered a new trial, holding that it was error not to “instruct the jury that they could return a verdict of guilty of voluntary manslaughter” based on “the right to kill in defense of one’s family.” *Id.* at 478–79.

340. See *supra* note 336 and accompanying text.

341. E.g., N.C. GEN. STAT. § 14-33 (describing a variety of misdemeanor assaults, none of which are punishable by imprisonment exceeding one year). Presumably, a man could slap his wife across the face on a monthly basis for years on end and still not become disentitled under the Felony Firearms Act, since he would remain a misdemeanor. See *id.*; *id.* § 14-415.1. Note however, that state law does permit domestic violence protective orders to require a person to relinquish his firearms if he has used them unlawfully, has seriously injured his spouse or a minor child, or has threatened to do either of these things or to kill himself. See *id.* § 50B-3.1(a). The person may file a motion to recover the firearms after the protective order expires, but the court must conduct an inquiry and deny the motion “if [it] finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law.” *Id.* § 50B-3.1(f). For an example of this system of disarmament at work, see *Gainey v. Gainey*, 669 S.E.2d 22 (N.C. Ct. App. 2008) (reversing trial court’s grant of defendant’s motion

As for the question of whether the Act's reach is narrowly tailored to a compelling interest in conforming state law to federal law, we see rather quickly that it is not. The first problematic difference between the Act and 18 U.S.C. § 922(g)(1), its federal analogue, is that North Carolina disarms *all* felons,³⁴² whereas Congress has seen fit to disentitle felons that were "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."³⁴³ The inclusion of this "year and a day" prerequisite indicates Congress's awareness of the disparity among the definitions of "felony" throughout the various states.³⁴⁴ Put simply, the Felony Firearms Act disarms persons who would not be affected by § 922(g)(1), and thus overreaches any state interest in mimicking that law. At the same time, the Act fails to reach a variety of other individuals who would become disentitled under other subsections of § 922, such as "fugitive[s] from justice,"³⁴⁵ persons dishonorably discharged from the armed forces,³⁴⁶ anyone "adjudicated as a mental defective or . . . committed to a mental institution,"³⁴⁷ and (lo and behold) any person "who has been con-

to recover firearms where judge failed to conduct the inquiry required by N.C. GEN. STAT. § 50B-3.1(f) and where return of the firearms to defendant would appear to have been unlawful under 18 U.S.C. § 922(g)(4) (2006) given defendant's commitment to a mental institution, and thus also unlawful under the aforementioned North Carolina provision).

342. See N.C. GEN. STAT. § 14-415.1; *supra* discussion accompanying notes 302-04.

343. 18 U.S.C. § 922(g). Moreover, the federal rule specifies that the *actus reus* involves possessing the firearm "in or affecting commerce." *Id.* This latter element, however, appears to have been reduced to a mere formality required of most federal criminal law by the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. See *United States v. Williams*, 410 F.3d 397, 400 (7th Cir. 2005) (explaining that a person's possession of a weapon is "in or affecting commerce" if it crossed state lines at any point prior to their possession). Even where certain prohibited weapons never cross state lines, such as homemade machine guns, courts uphold federal bans on such weapons, explaining that the restriction is part of a comprehensive regulatory scheme and that the aggregate effect of homemade machine guns could substantially affect the market for them. See, e.g., *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006). However, if a person actually *does* ship or receive a firearm across state lines, it is unlawful even if he is only under *indictment* for a "year and a day" offense. See 18 U.S.C. § 922(n). Thus, an actual conviction is not necessary where the interstate shipment or receipt renders the act within the very text of the Commerce Clause. See *id.*

344. *Cf.* *United States v. McKenzie*, 99 F.3d 813, 820 (7th Cir. 1996) ("[W]hile states may vary on what offenses are punishable by a term exceeding one year, it does not alter Congress' intent to keep guns out of the hands of anyone that a given state determines to be a felon.").

345. 18 U.S.C. § 922(g)(2).

346. *Id.* § 922(g)(6).

347. *Id.* § 922(g)(4).

victed in any court of [even] a *misdemeanor* crime of domestic violence.”³⁴⁸ Clearly the notion that the current Act may be justified on the grounds that it was at some point modified to conform to federal law is an erroneous one, because this conformity still does not exist where it reasonably could have been attempted.

3. *Narrow Tailoring: Learning from the Involuntary Commitment Debate*

If the state insists on disarming its citizens, there are more precise ways for it to go about selecting its victims. The solution is simple: amend the Act so that it really *does* impose disenfranchisement upon people based on their “potential for dangerousness.”³⁴⁹ The General Assembly’s narrow tailoring impulse in other lawmaking contexts supports the conclusion that it would *not* be “too difficult [for the state] to pick and choose which convicted felons should carry a gun and which should not.”³⁵⁰ A recent example makes this evident.

Following a rather dramatic series of exchanges on the Senate floor in the summer of 2008, the General Assembly demonstrated a bipartisan preference for making case-by-case determinations as to who should be denied the right to have a firearm for self-defense purposes.³⁵¹ Senate Majority Leader Tony Rand introduced a bill in May of that year which would have required entry into the National Instant Criminal Background Check System (NICS)³⁵² of any persons “involuntarily committed for either inpatient *or* outpatient mental health

348. *Id.* § 922(g)(9) (emphasis added); *see also supra* text accompanying notes 338-41.

349. *Britt v. State*, 649 S.E.2d 402, 407 (N.C. Ct. App. 2007) (quoting *United States v. O’Neal*, 180 F.3d 115, 124 (4th Cir. 1999)); *see also supra* discussion accompanying notes 317-24.

350. *Cf. Britt Story*, *supra* note 257 (reporting on statement by Beth Froehling made on behalf of the North Carolina Coalition Against Domestic Violence).

351. *See Capital Beat*, http://blog.news-record.com/staff/capblog/archives/2008/07/gun_bill_takes.shtml (July 10, 2008, 21:55 EST) (reporting that the Senate’s deliberations on Senate Bill 2081, *infra* note 353, proceeded so unpredictably that even the bill sponsor and fellow-democrat Doug Berger were “going at it pretty good” by the end of the debates).

352. This computerized background check system was first established as part of the Brady Act. *See Brady Handgun Violence Prevention Act*, Pub. L. No. 103-159, § 103, 107 Stat. 1536, 1541-44 (1993) (“[T]he Attorney General shall establish a national instant criminal background check system that any [licensed firearms dealer] may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate [federal or state law].”); *supra* note 146.

treatment.”³⁵³ The practical effect of this would have been to deny these persons the ability to purchase any firearm under federal law,³⁵⁴ or a handgun under state law.³⁵⁵

When this bill finally came before the Senate for consideration on July 10, 2008, Senate Minority Leader Phil Berger (of Rockingham County) introduced a floor amendment limiting the NICS reporting requirement to those cases in which the involuntarily committed person had actually been found by the court “to be a danger to self or others.”³⁵⁶ Senator Rand argued against the amendment, insisting that the involuntariness of the commitments contemplated by the bill would be enough to indicate the committed person’s dangerousness.³⁵⁷ He continued:

[W]hat we’re talking about here is whether or not you want to allow a person who is mentally ill . . . to buy a firearm. I do not think that’s in society’s best interest. I support the Second Amendment. I think the right to bear arms, and the hunters, and all that—that’s a part of America. But when you’re talking about mental illness and you’re talking about the possibility that one will take the lives of others . . . in a significant way, I think society has a right . . . to protect itself. And I don’t think anybody who is found to be mentally ill . . . should be allowed to buy a gun.³⁵⁸

353. S.B. 2081, 1st Ed., 2007 Gen. Assem., Reg. Sess. (N.C. 2008) (emphasis added).

354. See 18 U.S.C. § 922(d)(4) (2006) (making it unlawful to “sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution”); *id.* § 922(t)(1), (4) (prohibiting dealers from selling or otherwise transferring a firearm to any person before contacting the National Instant Criminal Background Check System and being informed by that system that “the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate [federal] or State law”).

355. See N.C. GEN. STAT. § 14-402(a) (2007) (making it illegal sell or transfer “any pistol or crossbow” unless the purchaser or transferee presents a valid purchase permit issued to him by the sheriff in his county of residence); *id.* § 14-404(a)(1) (requiring local sheriff, prior to issuing such a permit, to conduct a criminal records check of the applicant by inquiry to the National Instant Criminal Background Check System); *id.* § 14-404(c)(4) (prohibiting local sheriffs from issuing the purchase permit if the applicant “has been adjudicated mentally incompetent or has been committed to any mental institution”).

356. S. Amend. 1, S.B. 2081, 3d Ed., 2007 Gen. Assem., Reg. Sess. (N.C. 2008).

357. See Capital Beat, *supra* note 351 (“Rand argued that court-ordered mental treatment is a pretty good indication that something is wrong enough with someone they shouldn’t be buying a weapon.”).

358. Audio File: N.C. Gen. Assem., Senate Floor Debate of Senate Bill 2081 (July 10, 2008), available at <http://blog.news-record.com/staff/capblog/gun0701008c.mp3>

Senator Berger disapproved of Senator Rand's rhetoric:

[T]hrowing around the concept "mentally ill" in an effort to try to create an emotional fear with reference to what's going on here is a very easy thing to do. But "mental illness" can be a very broad term, and it doesn't necessarily deal with things that result in people acting in a dangerous manner.³⁵⁹

His rejoinder also emphasized the value of individual rights and the importance of exercising caution—not political exuberance—when interfering with them through legislation:

We need to make sure that when we are dealing with people's constitutional rights—the Second Amendment is an individual constitutional right—that what we are doing is we are *carefully crafting* the legislation to meet the problem. The language in the bill that would have *every* involuntary commitment, whether inpatient or outpatient, for those individuals to automatically be reported and ineligible to acquire a firearm, reaches too far. The amendment cures that problem. And if you want to make an argument that will sound good in a political commercial, and if you want to stir people up, just throw around [the term] "mentally ill," and that will do [it]. But our job here is *not* to do that. Our job here is to pass legislation that addresses problems that are real.³⁶⁰

Hearing this, Senator Rand responded with what was essentially a variation on his first argument, using—and emphasizing—the words "mental illness" or "mentally ill" at least five more times in his ninety-second riposte.³⁶¹

It was at this point that Senator Doug Berger (of Franklin County),³⁶² a Democrat, surprised everyone in the Chamber³⁶³ by siding with the Republicans on the issue. His opposition to the Majority Leader's position was unequivocal:

"[M]ental illness" does *not* equate to being dangerous, and it does *not* equate to even being in and of itself a defense in a capital case A

(statement of Sen. Tony Rand, Majority Leader). Note that all audio recordings cited to herein are also available on file with the author.

359. Audio File: N.C. Gen. Assem., Senate Floor Debate of Senate Bill 2081 (July 10, 2008), *available at* <http://blog.news-record.com/staff/capblog/gun0701008d.mp3> (statement of Sen. Phil Berger, Minority Leader).

360. *Id.*

361. Audio File: N.C. Gen. Assem., Senate Floor Debate of Senate Bill 2081 (July 10, 2008), *available at* <http://blog.news-record.com/staff/capblog/gun0701008e.mp3> (statement of Sen. Tony Rand, Majority Leader).

362. Senator Doug Berger is no relation to Senator Phil Berger.

363. Incidentally, those physically present in the Senate Chamber that day included the author of this Comment.

“mentally ill” person can know the difference between right and wrong. . . . I disagree again with Senator Rand, [who] suggest[s] that depression is not a “mental illness.” You could have a circumstance where an elderly person . . . has lost their life partner: they’re living alone, they’re extremely depressed, [and] they won’t eat. And a family member tries to get them to eat, [but] they won’t eat. [So] they go through a process of having them involuntarily committed so that someone will make sure that they eat. But again, think about that. That person may be a person who’s *alone*; who will go back to a home that’s *alone*; who late at night, may have somebody try to break in[to] their house. And it comes back to the core issue that we’re talking about a constitutional right—a constitutional right to have a gun to *protect* yourself.³⁶⁴

In addition, later in the debate, Senator Berger (of Franklin) commented that one of the serious problems afoot was that of “liberally letting people be involuntarily committed on an *outpatient* basis.”³⁶⁵ He argued that amending the bill, as proposed by Senator Berger (of Rockingham), to require a judicial finding of the person’s dangerousness prior to adding them to the NICS database would make mental health care providers “think twice, in terms of being thorough, about who they’re putting back out here on the streets.”³⁶⁶ In other words, in the event a mentally ill person ends up shooting someone, “he never should have been out on an *outpatient* basis in the first place.”³⁶⁷

“But let’s just say he was,” hypothesized Senator Rand.³⁶⁸ The embattled Majority Leader then described a fact pattern in which a confessed murderer was subsequently involuntarily committed on an outpatient basis after being found to be mentally incompetent.³⁶⁹ In a scolding tone, he then asked, “You’d let him go buy a gun then?”³⁷⁰

Senator Berger answered:

[H]e never should have been out in the first place. He can get a knife; he can get all kinds of weapons. This comes back to—we’re talking about the right to bear arms, a constitutional right. You’re not trying to get rid of *knives*; you’re not trying to get rid of *cars*. You’re focusing

364. Audio File: N.C. Gen. Assem., Senate Floor Debate of Senate Bill 2081 (July 10, 2008), available at <http://blog.news-record.com/staff/capblog/gun0701008f.mp3> (statement of Sen. Doug Berger).

365. Audio File: N.C. Gen. Assem., Senate Floor Debate of Senate Bill 2081 (July 10, 2008), available at <http://blog.news-record.com/staff/capblog/gun0701008g.mp3> (statement of Sen. Doug Berger).

366. *Id.*

367. *Id.*

368. *Id.* (statement of Sen. Tony Rand, Majority Leader).

369. *Id.*

370. *Id.*

on guns, and you're doing a broad sweep where you're going to affect law abiding citizens who need to be able to protect themselves.³⁷¹

Senator Rand dismissed this reasoning as “fairly amazing,” and called for a vote on the amendment.³⁷² But the arguments of Senators Phil Berger and Doug Berger appear to have won the day, as the amendment passed by a vote of thirty in favor, ten against.³⁷³ The House subsequently concurred on the bill as amended, with almost no discussion.³⁷⁴

What this episode demonstrates is that the General Assembly is not incapable of putting together a narrowly tailored firearms law. Senator Rand's attempt to bring about this law seemed based almost entirely on his assumption that the classification “mentally ill” was determinative concerning individuals' dangerousness and that “throwing around” this label would persuade the other legislators.³⁷⁵ But this tactic earned him stiff criticism, even from members of his own political party. Moreover, his opponents rallied around the importance of self-defense and the right and ability to exercise it, calling for a “carefully craft[ed]” approach rather than a “broad sweep.”³⁷⁶ Of particular interest is that the Majority Leader's position drew fire for exploiting the public's distrust of the mentally ill and its fear of gun violence, conveniently focusing on regulating firearms but ignoring other dangerous instruments, such as knives or motor vehicles.³⁷⁷ In short, the Senate appears to have agreed that the bill—and Senator Rand's strategy—was both overinclusive and underinclusive, as well as based on an appeal to “emotional fear,”³⁷⁸ and that the proper course was to require a specific finding of dangerousness prior to rendering the individual in question unable to obtain a firearm.³⁷⁹

371. *Id.* (statement of Sen. Doug Berger).

372. *Id.* (statement of Sen. Tony Rand, Majority Leader).

373. See N.C. S. Roll Call, S. Amend. 1, S.B. 2081, 3d. Ed., 2007 Gen. Assem., Reg. Sess. (N.C. 2008), available at <http://www.ncleg.net/gascripts/votehistory/rollcallvote/transcript.pl?session=2007&schamber=s&rcs=1645>.

374. See Capital Beat, *supra* note 351.

375. See *supra* text accompanying notes 359, 364.

376. See *supra* text accompanying notes 360, 364, 371.

377. See *id.*

378. *Supra* text accompanying note 359.

379. See *supra* note 373 and accompanying text; Act of July 18, 2008, ch. 210, sec. 1, § 122C-54(d1), 2008 N.C. Sess. Laws 896, 896 (showing that the ratified bill included the insertion added by Senator Berger's amendment, which specified that “[r]eporting of an individual involuntarily committed to outpatient mental health treatment under this subsection shall only be reported if the individual is found to be a danger to self or others”).

The importance of this debate and its outcome for purposes of scrutinizing the Felony Firearms Act cannot be overstated. If the legislature was so vehement in protecting the gun ownership and self-defense rights of persons involuntarily deemed to be *mentally ill*, why can it not do the same for people convicted of non-dangerous, nonviolent felonies? Senate members knew that the term “mental illness,” as referred to in the mental health field, encompassed not only such innocuous quirks as nicotine addiction and insomnia, but also severe and dangerous mental defects.³⁸⁰ Yet in the face of these potentialities, they voted to require a specific finding of dangerousness. After all, if someone truly *does* present a danger to self or others, a judicial finding to that effect ought not be too hard to come by.

Thus, one way to improve the Felony Firearms Act would be to add a provision limiting its applicability to those who, when convicted of the underlying crime, were deemed dangerous by the court. This might be accomplished in a variety of ways. One approach might be to amend the Act to specify that a felony does not trigger disenfranchisement unless it was actually *punished*—as opposed to merely “punishable”—by a sentence of more than one year in prison.³⁸¹ Presumably, a sentencing judge will not allow a convicted person to live and work in free society if she thinks that person poses a serious threat to the public. As Senator Doug Berger might argue, if someone is truly dangerous, we ought to “think twice” about giving them “outpatient” treatment with respect to their correction and rehabilitation.³⁸² And as Justice Scott explained,

the only *successful* way to keep “hardened criminals” away from weapons and “hurting people”—is to put them in prison where they can’t hurt anybody else. We don’t need to take away someone else’s right to defend themselves, or their family, to do that.³⁸³

The arrangement just described might help tailor the Act to disarm only dangerous offenders; but its provisions could be narrower still. For instance, this approach would not take into account the

380. See Audio File, *supra* note 359 (statement of Sen. Phil Berger, Minority Leader).

381. This would require striking certain phrases from a sentence in subsection (b) of the Act so that, as amended, it would read as follows: “The term ‘conviction’ is defined as a final judgment in any case in which imprisonment for a term exceeding one year is imposed.” Cf. N.C. GEN. STAT. § 14-415.1(b) (2007) (currently defining the term “conviction” as “a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed” (emphasis added)).

382. Audio File, *supra* note 365 (statement of Sen. Doug Berger).

383. *Posey v. Commonwealth*, 185 S.W.2d 170, 184-85 (Ky. 2006) (Scott, J., dissenting) (emphasis added).

decades of good behavior shown by people who may have received their sentences while Nixon was still the President.³⁸⁴ Nor would it limit disenfranchisement to only those criminals who violently harmed life or limb, since it includes persons sentenced to year-and-a-day imprisonment for other wrongs, such as counterfeiting.³⁸⁵ It would, however, reach crimes against the habitation, such as arson.³⁸⁶

Another possible approach has its roots in the Act's own legislative history. Recall the amendment to the Act proposed by Senator Vickery in 1975.³⁸⁷ A solution harkening back to the Vickery amendment would involve listing, in the text of the Act, certain dangerous, violent crimes—as defined in particular sections of the General Statutes—for which disenfranchisement ought to be imposed. While the thought of poring over the criminal code in search of crimes indicative of dangerousness may sound tedious or daunting, it is certainly not impossible.³⁸⁸

At this point, suffice it to say that the current Felony Firearms Act, at least with respect to the persons on whom it imposes disenfranchisement, is not narrowly tailored to further any compelling state interest. The

384. The problem of perpetual disenfranchisement is not addressed in this Section, which focuses on the “who” element of the Act, but in Section B, *infra* text accompanying notes 394-477, which analyzes the constitutionality of the “what” element (that is, what disenfranchisement really means for the subject individual).

385. See N.C. GEN. STAT. § 14-119(b) (describing a Class G felony, which may be punished by up to sixteen months in prison if a first offense, according to section 15A-1340.17(c)).

386. See *id.* § 14-58.

387. See *supra* discussion accompanying notes 111-25.

388. A more adventurous attempt at narrowing might be to add a provision making the Act applicable only to those with convictions—both felony *and* misdemeanor—which required a specific finding that the accused either (1) acted with malice and with the purpose of causing another person immediate bodily harm or emotional distress, or (2) acted recklessly and unreasonably in creating a substantial and unjustified risk of immediate and *serious* bodily harm to self *and* others. This language, of course, is simply an example provided for purposes of discussion, and sustained nitpicking might reveal its inapplicability to a miscellany of dangerous criminal convictions. Yet even in its current form, it would ensure that our notary public would not find herself disarmed and defenseless after completing a sentence for her non-commissioned notarial act. See *supra* text accompanying notes 307-10. It would also ensure that a person convicted of assaulting his own wife for cruelly and disgracefully striking her in the face could not avoid disenfranchisement purely because his act was a misdemeanor offense instead of a felony. See example *supra* note 341. In any event, the task of the legislature would be to craft language which would select for disarmament only those criminals whose crimes actually *demonstrated* their “potential for dangerousness.” *Britt v. State*, 649 S.E.2d 402, 407 (N.C. Ct. App. 2007) (quoting *United States v. O’Neal*, 180 F.3d 115, 124 (4th Cir. 1999)).

statute is both overinclusive and underinclusive, and can be modified so as to more carefully define the person it disarms. But let us now shift our focus from the Act's victims to the particulars of its vices.

B. Disentitlement: The Unreasonable Imposition of Defenselessness

So what does disentitlement really entail? The conduct the Act purports to prohibit is possession of any firearm. This prohibition is not qualified in any way, which means it applies in all places and in all situations—including those in which the disentitled person needs to protect herself.³⁸⁹ In addition, disentitlement lasts forever; that is, a person convicted even forty years ago of any felony is no closer to regaining his right to keep arms for self-defense than a person convicted yesterday of a far more brutal crime. Neither is there any statutory mechanism in place by which a person might petition to have his rights restored.

Persons convicted of violating the Act are punished as Class G felons.³⁹⁰ Under North Carolina's intricate structured sentencing rubric, the "presumptive range" of the sentence for a person convicted of any Class G felony, even assuming his antecedent conviction was for the most minor of felony offenses, is between twelve and fifteen months of active imprisonment.³⁹¹ In comparison, an actual assault on emergency room nurses—arguably a more harmful act than the mere possession of an old shotgun—is only a Class I felony,³⁹² and is presumptively punishable by no more than six months of jail time.³⁹³

Recall again the example of Joe Smith, the fellow introduced in the Introduction. Imagine Joe somehow acquires a firearm notwithstanding the 1964 drug conviction that would render him disentitled under the Felony Firearms Act. Faced with the prospect of being clubbed to death in his own home by a gang of truants, he may very well deter-

389. See N.C. GEN. STAT. § 14-415.1.

390. See *id.* § 14-415.1(a).

391. See *id.* §§ 15A-1340.14, -1340.17(c). But see Act of Aug. 28, 2009, ch. 556, 2009 N.C. Sess. Laws, <http://www.ncleg.net/enactedlegislation/sessionlaws/pdf/2009-2010/sl2009-556.pdf> (reducing the upper limit of this presumptive range to fourteen months for violations committed after December 1, 2009).

392. See *id.* § 14-34.6(b).

393. See *id.* § 15A-1340.17(c). Ironically enough, Republican Senator Phil Berger (quoted at length *supra* in the discussion accompanying notes 349-88) sponsored a bill in February of 2007 which would have raised the penalty for a violation of the Felony Firearms Act to the Class F level, which calls for between fifteen and nineteen months imprisonment, presumptively, see *id.*, but the bill died in a Senate Judiciary Committee. See S.B. 311, 2007 Gen. Assem., Reg. Sess. (N.C. 2007); 2007 Bill Tracking N.C. S.B. 311 (LexisNexis).

mine that the possibility of being prosecuted under the Act is not enough to deter him from keeping his gun. If asked, Joe might explain his fear that the state will not be able to do anything to stop his attackers until after it is too late. Indeed, until dusty old statute books can somehow discourage evildoers (who have never read them) from doing violence to life and limb, it seems unjust to expect someone like Joe to be deterred by the Act from doing something he feels is essential to preserving his life—something that in and of itself is patently harmless: keeping a gun.

Now granted: the casual observer might find this disentanglement business appealing. After all, an armed “convicted felon” is surely more dangerous than an unarmed one. Yet while naïve citizens and influence-peddling lawmakers might be content to conclude the Act has the desired effect, such a conclusion requires mistaking the proscription of nonviolent conduct with actual prevention of violence. This mistake is costly, for it wrongfully deprives many individuals of the ability to exercise their fundamental right of self-defense. Indeed, if preserving public safety is the state’s compelling interest, the Act’s prohibitive provisions are not a good fit, being both overinclusive and underinclusive with respect to that end.

1. *What Conduct Violates the Act?*

Under the Act today, a disentitled person is not allowed “to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction.”³⁹⁴ But the *actus reus* of this crime is rather slippery. Indeed, if the statute means what it actually says, its *actus* element is overinclusive for at least two reasons: (1) it criminalizes ownership, which shares no factual relationship with the dangers it seeks to mitigate, and (2) it is too vague with respect to the timing of the offense. These overinclusive features create confusion and the potential for capricious enforcement of the statute.

394. N.C. GEN. STAT. § 14-415.1(a). For convenience, this discussion will refer in some instances to all of these prohibited acts collectively as “possession.” Note that the definition of “weapon of mass destruction” includes (1) “[a]ny explosive or incendiary;” (2) “[a]ny type of weapon [generally excluding shotguns] which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter;” (3) automatic weapons and short-scale shotguns and rifles; and (4) “[a]ny combination of parts either designed or intended for use in converting any device into any weapon described above.” *Id.* § 14-288.8(c).

So first, notice that “own[ership]” of a firearm is among the conditions which amount to illegal conduct under the Act.³⁹⁵ While there may be good reasons, practically speaking, to list ownership in the statute,³⁹⁶ ownership of firearms, standing alone, is not a condition or action that is tied in any meaningful way to the problem of gun violence. Even the most hardened and scurrilous of ex-cons does not endanger society by owning a gun, because ownership is altogether different from possession; one can have an ownership interest in something without ever having possession of it. As a general matter, bans on possession of firearms might be described as owing to society’s fear of the possibility that the possessor might actually use the gun in an unlawful manner, taking advantage of the mere possession. But insofar as disqualification prohibits mere *ownership*, it no longer functions to keep harmless possessive conduct from becoming unlawful, dangerous misuse. In other words, it is not possible for a convicted felon to take advantage of his mere ownership of a firearm in such a way that he would cause the types of harms the Act seeks to prevent. To hurt someone by way of his mere ownership, the felon must also engage in an additional form of conduct listed in the statute, such as exercising “control” of the firearm.³⁹⁷ If Betty, for example, is the owner of a rifle which is held in the care and custody of someone else in a far away state, she is incapable of harming society through her ownership of that gun unless she *also* has such “control” of it that she could direct the weapon’s custodian to use it to harm someone. It is not impossible to imagine that a disqualified person might inherit a valuable firearm and want to retain ownership of it without inviting criminal liability, perhaps anticipating a later sale. Allowing mere ownership of a gun to constitute a violation of the Act goes too far.

Next, consider the question of time. The Act appears on its face to apply without regard to the timing or circumstances of the felon’s violation.³⁹⁸ This presents problems. For instance, suppose Dave is convicted of a crime which triggers his disqualification. His sentence is suspended, and he receives probation. As the sentencing judge is pounding the final gavel, police receive a tip saying Dave has an old pistol under his bed at home. Can Dave be charged with “own[ing]” his firearm five minutes after he walks out of the courtroom as a convicted man? What about five minutes after he enters his house? If not,

395. *Id.* § 14-415.1(a).

396. Such practical concerns include avoiding the raising of certain types of questions: “Is it okay if I just let my next door neighbor keep my guns for me?”

397. *See id.*

398. *See id.*

why not? If something like “lack of opportunity to dispose of the firearm” is any excuse, Dave might also be excused if he had a friend keep the gun for him, yet continued to “own” it while waiting for someone to purchase it at a decent price—or if he had “sold” it to the friend with the understanding that he would need it back. Or would either of these arrangements still amount to “control” of the firearm?³⁹⁹ Moreover, even assuming Dave managed to make it home and dispose of the gun at some point during his first few days of life as a convicted felon, what is to stop the state from saying he was nevertheless in possession of a firearm *at some point* after having been convicted of a felony? Under the language of the statute, the prosecution should prevail.⁴⁰⁰ To hold otherwise would be to say that a felon being pursued by police could escape liability under the Act by throwing his *stolen* handgun out the car window and into the Cape Fear River, since the gun would no longer be in his possession, care, or control when he is apprehended by authorities. It is clear that the Act must apply to violations occurring in the past. The problem is that it looks (potentially) as far back into the past as the date of the felony conviction which triggered disenfranchisement. The vagueness of the Act regarding *when* someone becomes criminally liable for the conduct it describes is thus overbroad.

In short, the Act can be read as allowing almost anything gun-related, done at any time by a person after receiving a felony conviction, to constitute a violation. The statute contains no requirement that the prosecution even produce the weapon allegedly possessed (or owned) by the felon. All that is necessary is for the state to show the felon had been convicted of a felony and thereafter was in possession (actual or constructive) of a firearm. This it can accomplish by the testimony of a single, uncorroborated witness. A more narrowly tailored statute would, at the very least, delete the ownership prong of the *actus reus* and would remedy the timing issues discussed.

399. The court of appeals has held that a person may be deemed to have “constructive possession” of an item even when it is not in his “physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Alston*, 508 S.E.2d 315, 318 (N.C. Ct. App. 1998).

400. Whether practical factors would prevent these scenarios from ever arising can have no bearing on an analysis of the plain meaning of the language appearing in the statute. See *In re Banks*, 244 S.E.2d 386, 388-89 (N.C. 1978) (“When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.”).

2. *What Firearms Are Prohibited?*

The range of instruments a disentitled individual is prohibited from possessing is overinclusive, especially in light of the approving interpretations given to prior, less inclusive versions of the Act. In *United States v. Farrow*, for example, the Fourth Circuit Court of Appeals held that the Act was “regulatory” in nature instead of punitive (and thus presented no *ex post facto* problem) because its prohibitions were “limited to weapons that, because of their *concealability*, pose a unique risk to public safety.”⁴⁰¹ At the time *Farrow* was decided, disentitlement was still based on overall gun length or barrel length.⁴⁰² Accordingly, the court emphasized that “in prohibiting the possession of handguns and other short firearms, [the Act was] narrowly tailored to regulate ‘only the sorts of firearm possession by felons that, because of the concealability, power, or location of the firearm, are *most likely* to endanger the general public.’”⁴⁰³

In contrast, the definition of “firearm” in the current Act—which includes short guns, long guns, and even the lone frame or receiver of a gun⁴⁰⁴—includes those that do not even “pose a unique risk to public safety.”⁴⁰⁵ Of the range of weapons now prohibited by the statute, perhaps concealable pistols and other small guns are most likely to present a threat—or unique risk—due to the difficulty law enforcement might face in detecting them. This is something the legislature seemed to recognize back in 1971.⁴⁰⁶ But the Act now bars possession even of granddad’s old double-barrel shotgun, which—even if it could be stowed against the body in an ominous trench coat—could never be

401. *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. 2004) (emphasis added).

402. Recall that the original 1971 version of the Act applied only to a “hand gun or pistol.” See Act of July 19, 1971, ch. 954, sec. 1, 1971 N.C. Sess. Laws 1538, 1538 (codified as amended at N.C. GEN. STAT. § 14-415.1 (2007)). In 1974, the legislature replaced the term “pistol” with the words “other firearms with a barrel length of less than 18 inches or an overall length of less than 26 inches.” Act of Apr. 8, 1974, ch. 1196, sec. 1, § 14-415.1(a), 1973 N.C. Sess. Laws 320, 320. But soon after *Farrow* was decided, the General Assembly expanded the Act to prohibit the possession of “any firearm” by felons. Act of July 15, 2004, ch. 186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 716, 737-38 (emphasis added).

403. *Farrow*, 364 F.3d at 555 (quoting *United States v. O’Neal*, 180 F.3d 115, 123 (4th Cir. 1999)) (emphasis added).

404. The term “firearm” is defined as “any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or . . . any firearm muffler or firearm silencer.” N.C. GEN. STAT. § 14-415.1(a).

405. *Farrow*, 364 F.3d at 555.

406. See *supra* discussion accompanying notes 70-81.

tucked neatly inside a shirt pocket. Indeed, it makes owning that gun illegal even if it has become completely inoperable by misuse, mechanical failure, or perhaps rust.⁴⁰⁷

Moreover, the current Act falls short of the *Farrow* court's expectations, as it is logically impossible for *all* firearms to be the "sorts of firearm[s] . . . most likely to endanger the general public."⁴⁰⁸ Not all members of a group can be described as being superlative to one another as concerns a single defining characteristic.⁴⁰⁹

In addition, the inclusion of "weapons of mass death and destruction" in the Act's proscription is completely redundant in light of another statute, which makes it unlawful "for *any* person [not just felons] to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction."⁴¹⁰

But the range of prohibited firearms listed in the statute is also *underinclusive* given the exception made for "antique firearms."⁴¹¹ The definition of antique firearms includes the muzzle loading pistol—arguably a concealable weapon which at any time might be used in a calculated, deadly fashion.⁴¹² Moreover, the exception includes any gun "manufactured on or before 1898."⁴¹³ Older weapons, of course, may be just as lethal as newly manufactured guns. And even if they have been rendered completely inoperable by the elements or their own obsolescence, antique firearms are certainly *at least* as dangerous as the mere "frame or receiver" of a modern firearm, which, although useless for firing projectiles on their own, are also prohibited to disarmed persons.⁴¹⁴

407. See *State v. Jackson*, 546 S.E.2d 570, 574 (N.C. 2001) (affirming the trial court's refusal to instruct the jury that the firearm possessed by the defendant must be "operable" in order to make his possession of it illegal).

408. *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. 2004) (quoting *United States v. O'Neal*, 180 F.3d 115, 123 (4th Cir. 1999)).

409. In other words, if Group Z consists of three unique members, A, B, and C, it could be logical to argue that A is the most dangerous of the three members of Group Z. It would never be logical, however, to insist that *all* of the members are at once *the most dangerous* members of that group.

410. N.C. GEN. STAT. § 14-288.8(c) (2007) (emphasis added).

411. See *id.* § 14-415.1(a); *supra* text accompanying notes 217-29.

412. See N.C. GEN. STAT. § 14-409.11(a) ("The term 'antique firearm' [includes a] muzzle loading pistol . . . designed to use black powder substitute, and which cannot use fixed ammunition.").

413. *Id.*

414. See *id.* § 14-415.1(a) (2007).

With respect to a state interest in combating domestic violence,⁴¹⁵ it is possible that the Act's current, broad definition of firearms is not overinclusive, since a homicidal householder might murder someone in the home with a non-concealable long gun just as easily as he might with a concealable handgun. But the Act still only provides protection here if all a home's inhabitants have prior felony records and thus come under its disenfranchisement.⁴¹⁶ Yet even ignoring that argument, the range of weapons prohibited under the statute could easily be described as underinclusive when evaluated under strict scrutiny. A look at the homicide statistics compiled by the North Carolina Coalition of Domestic Violence shows that while guns are a popular tool for these killers, their brutal acts are also carried out by more improvisational means.⁴¹⁷ For many victims, death came at the edge of a knife, or by strangulation.⁴¹⁸ In one case, the murder weapon was a hammer.⁴¹⁹ In another, it was the family car.⁴²⁰ One killer used arson.⁴²¹ Additionally, a study by the Bureau of Justice Statistics reports that firearms are not the only threat to potential victims of domestic violence.⁴²² To put it bluntly, if the Act were truly motivated by a compelling interest in preventing domestic violence, it would also prohibit the convicted felon from having knives, carpentry tools, the car keys, and even matches.⁴²³ Not to mention the old antique firearm sitting above the mantle.⁴²⁴

415. See *supra* text accompanying notes 293-96.

416. Note that according to the Bureau of Justice Statistics, 67% of family assault defendants nationwide did *not* have a prior felony conviction. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 47 (2005) [hereinafter FAMILY VIOLENCE STATISTICS], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

417. See N.C. Coalition Against Domestic Violence: 2008 Domestic Violence Homicides, http://www.nccadv.org/homicides_partners_2008.htm (last visited Nov. 22, 2009) (listing and describing the eighty-four domestic violence homicides occurring in North Carolina from January 1 through December 29, 2008).

418. See *id.*

419. See *id.*

420. See *id.*

421. See *id.*

422. See FAMILY VIOLENCE STATISTICS, *supra* note 416, at 20 ("When an offender kills the victim, the weapon is usually a firearm, knife, or blunt object such as a club. Less frequent are murders that result from the offender's use of hands, fists, or feet. Murders can also involve the use of . . . poisons, narcotics, or incendiary devices.").

423. Cf. Audio File, *supra* note 365 (statement of Sen. Doug Berger) (criticizing a legislative attempt to keep guns—but not knives, cars or other weapons—out of the hands of persons involuntarily committed for mental treatment).

424. See *supra* text accompanying notes 411-14.

Oddly enough, the current range of prohibited weapons fits more squarely with any interest the state may have in conforming to federal law, which also uses the all-inclusive “any firearm” language but excepts antique firearms.⁴²⁵ The federal version, however, also prohibits the possession of ammunition.⁴²⁶

3. *Where Does Disentitlement Apply?*

For almost thirty years, disentitlement under the Act could reach no further than the front door of one’s home or lawful place of business. This allowed disentitled persons to possess firearms for self-defense purposes, while nevertheless prohibiting their carrying guns around on the street, or in public. But the broadening amendments in 2004 quite literally gave the Act a “no-exceptions” character that is not remotely tailored to achieving the protection of the public.

First of all, the living room of a convicted felon is not the stomping ground of the “public.” Statistically speaking, the “public” has nothing to fear from the ex-con who sits in his own bedroom cleaning an old hunting rifle—it is his coming *out* of the home with the gun that creates a problem. According to the Bureau of Justice Statistics, roughly 66.3% of all violent crimes committed against strangers between 1998 and 2002 took place on public or commercial property—not in residences.⁴²⁷

But even if this were not the case, it would hardly justify depriving the householder of his right to possess a firearm—arguably the most potent means of defending himself against the froward molestations of an armed and unwelcome houseguest.⁴²⁸ If a member of the public happens to find himself within the home of a convicted felon who is bent on causing violence to visitors, it is unreasonable to assume that the guest is in any less danger of harm if the felon has no firearm. What makes firearms dangerous is their ability to kill or inflict grave wounds instantly from a removed position—not their mere presence in a dresser drawer. Within the closer confines of a home, a gun may

425. See 18 U.S.C. § 922(g)(1) (2006) (prohibiting felon from possessing “any firearm”); *id.* § 921(a)(3) (defining the term “firearm” so as to exclude antique firearms); *id.* § 921(a)(16) (defining the term “antique firearm”).

426. See *id.* § 922(g)(1).

427. See FAMILY VIOLENCE STATISTICS, *supra* note 416, at 9 (Table 2.2).

428. Justice Scalia might agree. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (describing the home as the place where “the need for defense of self, family, and property is most acute” and referring to firearms as the means of protection “overwhelmingly chosen by American society for that lawful [self-defense] purpose”).

become only a *louder* way to kill or inflict injury. It does not require much imagination to realize that a homicidal villain's unsuspecting houseguest could be maimed or slain just as horrifically with a knife, a baseball bat, or a golf club.⁴²⁹

But lifting the home exception rendered the Act overinclusive for another reason. Because a convicted felon cannot have a firearm "in his custody, care or control,"⁴³⁰ a felon's disenfranchisement within his own home also operates to limit the self-defense capability of his spouse or other cherished cohabitants. Disenfranchising the felon burdens the fundamental right of self-defense held by his family, whose lawful exercise of that right becomes unmanageably complex.⁴³¹ Without convenient access to a gun, how can a petite housewife resist an overwhelming physical assault by her burly ex-con husband, who, in the apparent estimation of the state, is certain to seek her injury at some point following his rehabilitation? Moreover, if a law-abiding woman married to a felon owns a handgun but is continually required to keep it out of her husband's "control" at the risk of sending him back to the big house, it seems impossible that she will ever be able to store the firearm in such a way as to be able to access it quickly in the case of a sudden threat. What's more, if a gun is *not* deemed to be within the husband's possession or "control" by virtue of its being merely "accessible" to him, the state is powerless to prevent the wife from purchasing a gun herself and thereafter storing it at home such that it might be purloined by her husband.⁴³² Thus, lacking an exception for home possession, the Act is either unconstitutionally overinclusive because of its limiting effect on the spouse's fundamental right, or is so underinclusive that it is *unenforceable* against the convicted felon where his spouse's or family member's right to possess firearms for self-defense purposes continues to be honored.

Removal of the home exception doesn't seem to add anything to the Act's effectiveness as a means of achieving the protection of the general public. On the other hand, removing the *business* exception

429. Cf. *supra* text accompanying note 417-24.

430. N.C. GEN. STAT. § 14-415.1(a) (2007).

431. In this instance, Professor Volokh's "burden analysis" has more applicability. See Posting of Eugene Volokh, *supra* note 39.

432. For example, the police might search the couple's home following drug charges against the husband. After finding a small handgun in the nightstand drawer beside the couple's bed, police determine that it was purchased and is owned by the wife. However, because the husband could have accessed it easily, the gun may be constructively deemed to be within the husband's "care or control." Arguably, the wife might face criminal liability for being complicit in her husband's violation of the Felony Firearms Act.

may bear the proper relationship to an interest in public safety. The problem is that business owners and operators become easier targets once statutorily disarmed. Consider the elderly jewelry store proprietor who was convicted of a non-dangerous, nonviolent felony some twenty years ago. Surely he should have some effective means of instant resistance when a trio of urbanites decides to invade his place of business. It seems disingenuous to suppose the proprietor—who has a natural incentive to earn (and keep) the trust and loyalty of those who buy his merchandise—would suddenly yield to an aberrant impulse to shoot up his own store. Certainly he is no more susceptible to such an impulse than the ordinary non-felon. Market forces thus militate against an abuse of the business exception.

Might the Act, bereft of the home and business exceptions, nevertheless be said to be narrowly tailored to a compelling state interest in preventing domestic violence? Surely it seems to relate to some sort of interest in making a *felon's home* a safe place in general, as opposed to making the public safe. Perhaps this is why the removal of the exception can be found lying in the swath of a very broad “domestic violence” measure.⁴³³ But even as concerns preventing domestic violence, the unlimited, unqualified disenfranchisement imposed by the Act is a poor fit. When the home and business exceptions were stripped away, the sole explanation of the relationship between these changes and an interest in preventing domestic violence was that “[f]elons having guns within their own homes or lawful place[s] of business is not acceptable *especially* in a domestic violence situation”⁴³⁴ and is “very dangerous in [the] context of domestic violence.”⁴³⁵

But *why* was it “not acceptable” for a felon to have a firearm in his home or business? Fueling such an assumption must be the notion that “felons” are necessarily unfit to keep arms for self-defense simply by virtue of their classification as felons. This notion I have assailed at length already.⁴³⁶ Moreover, if the home and business exceptions were “not acceptable,” how exactly did they become “especially” unacceptable “in a domestic violence situation”?⁴³⁷

First, the suggestion that the Act’s *business* exception posed special dangers for potential victims of domestic violence is obviously

433. See DOMESTIC VIOLENCE REPORT, *supra* note 182, at 24.

434. CRIM. L. SUBCOMM. MINUTES FOR OCT. 28, 2003, *supra* note 193 (emphasis added) (citation omitted).

435. CRIM. L. SUBCOMM. MINUTES FOR JAN. 7, 2004, *supra* note 202.

436. Recall the discussion *supra* accompanying notes 306–37 (examining the strained relationship between the Act and the prevention or punishment of violence).

437. CRIM. L. SUBCOMM. MINUTES FOR JAN. 7, 2004, *supra* note 202.

wrong, as even the violent use of a gun by a felon in his lawful place of business is, by definition, *not* a “domestic violence situation.” One might ask, “But what if a person shows up at her spouse’s lawful place of business and is fired upon by the gun-wielding spouse?” This is not domestic violence as such, but rather, violence against a spouse outside the domicile and inside the workplace—in other words, it is *workplace* violence committed incidentally against a spouse. Thus, not even a compelling interest in combating domestic violence justifies expanding disqualification to the felon’s place of business.

Second, this domestic violence justification seems to assume that a family or household of which a felon is a member is in constant danger of being set upon by the felon, and therefore it is dangerous for the felon to have a firearm. But if this is true, the Act is actually under-inclusive; for, as already discussed, in order to mitigate the ongoing domestic threat posed by any convicted felon, the statute ought to place every sharp object and every blunt instrument out his reach—not just guns.

Perhaps the no-exceptions Act, as such, fits tightly with our “*arguendo* interest” in conforming state law to federal law,⁴³⁸ since it is true that the Act’s federal analogue does not provide any home or business exception. Yet the federal law provides for the possibility of other exceptions—such as through a process in which a disqualified person may apply to the Attorney General for relief from his or her firearms disability.⁴³⁹ Thus the Act may still be overinclusive with respect to a

438. Recall the discussion of this interest beginning *supra* with the text accompanying note 297.

439. Indeed, unlike North Carolina law, the federal code regulating firearms provides that

[a] person who is prohibited from possessing . . . firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief *if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety* and that the granting of the relief would not be contrary to the public interest.

18 U.S.C. § 925(c) (2006) (emphasis added). The question of whether relief is ever actually granted under this provision, however, is an altogether different inquiry. Since 1992, Congress has refused to fund the processing of these relief applications. See *United States v. Bean*, 537 U.S. 71, 74–75 (2002). Thus, no relief from a federal firearms disability has been granted—or even formally denied—by the Attorney General in many years. See *id.* But this is inapposite as concerns the point being made in

conformity-to-federal-law interest. This brings us to the next problem with the statute: the perpetuity of its application.

4. *How Long Will Disentitlement Last?*

If a person has been convicted of a disempowering felony, the Act disarms her forever. As the North Carolina Court of Appeals explained, the statute's language "contains no time bar."⁴⁴⁰ As we have learned, this was not always the case.⁴⁴¹ But it is now clear, even to the federal courts, that the Act's disempowerment continues "regardless of how much time has passed since conviction, release, or termination of the sentence."⁴⁴²

But even though the Act does not itself allow for relief from disempowerment, it appears a person might recover her rights to possess a firearm by receiving an "unconditional pardon" of her underlying felony from the Governor.⁴⁴³ Such pardons appear to be granted only to those "who have maintained a good reputation in their community, following the completion of their sentence."⁴⁴⁴ In addition, the person applying for pardon ordinarily "must wait to apply until at least five years have elapsed since [she] was released from State supervision."⁴⁴⁵

While the possibility of receiving an unconditional pardon after five years of one's felony might seem to mitigate against the Act's prescriptive perpetuity, the reality here is more grim. By the end of his final year as North Carolina's highest executive official, former two-

the text accompanying this footnote, since Congress may at any time decide to fund the § 925(c) process anew.

440. *State v. Gaither*, 587 S.E.2d 505, 510 (N.C. Ct. App. 2003) (describing N.C. GEN. STAT. § 14-415.1 (2003)).

441. See Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273, 1273 (creating a five-year limit to disempowerment); *supra* discussion accompanying notes 149-56 (describing the demise of the disempowerment cap in 1995).

442. *United States v. Clark*, 324 F. Supp. 2d 20, 22 (D. Me. 2004).

443. N.C. Office of Executive Clemency: Glossary of Terms, <http://www.doc.state.nc.us/clemency/glossary.htm> (last visited Nov. 22, 2009) (describing an "unconditional pardon" as one that is "granted primarily to restore an individual's right to own or possess a firearm," and which "is granted without any conditions or restrictions"); see also N.C. CONST. art. III, § 5, cl. 6 ("The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."); N.C. GEN. STAT. § 13-1(2) (2007) ("Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the . . . unconditional pardon of the offender.").

444. See N.C. Office of Executive Clemency, *supra* note 443.

445. *Id.*

term Governor Mike Easley had granted only five of the 756 requests for pardons he received.⁴⁴⁶ There is no indication that Easley's successor, Governor Bev Perdue, will operate any differently.⁴⁴⁷ These sobering facts mean disenfranchisement under the Felony Firearms Act, once earned, is virtually everlasting.

This arrangement allows a person's constitutional rights to be defined by the subjective decision of a single official who cannot be held accountable for his or her decision. As such, the possibility of a pardon does not remedy the Act's overinclusiveness. Consider the case of the young woman who is convicted of a non-dangerous, nonviolent felony. She serves her prison sentence and is then permitted to reintegrate into society. In light of the Act's tenuous logical connection with any compelling interest, it seems peculiarly senseless and unnecessary to disarm this person for the rest of her life—especially since she remains just as vulnerable to the acts of violent criminals as the rest of us, if not more so.⁴⁴⁸ If she lives the life of a model citizen for the next forty years, she may find herself an elderly woman with no way to stop an armed intruder.⁴⁴⁹ Instead of inviting this scenario, a *fair* statute would allow this woman to demonstrate her willingness to obey the law to some adjudicative body, which could then restore her rights.

But even if we generously assume for the moment that the Act is narrowly tailored to a compelling interest in all *other* respects (that is, assuming the state is entitled to disarm all felons in all places regardless of their potential dangerousness to society in those places), it does not necessarily follow that such a deprivation of rights must last forever to further the state's interests. If the General Assembly wishes to legislate with a public safety interest in mind, it can create an effective mechanism that might nevertheless respect the self-defense needs of

446. See Mark Johnson et al., *Easley Unlikely to Hand Out Pardons Like Candy*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 14, 2008, at B3, available at 2008 WLNR 23960207 (reporting on pardons as of the date of publication and noting that Easley's last day in office would be January 10, 2009); cf. Capital Beat, http://blog.news-record.com/staff/capblog/archives/2009/01/easley_on_the_w.shtml (Jan. 10, 2009, 8:47 EST) (reporting that Easley issued no pardons on the way out of office, though he did reduce the sentences of two convicts).

447. See A Priori Concepts, <http://jeffreysykes.wordpress.com/2009/01/10/pardon-me> (Jan. 10, 2009, 18:43 EST) (“[W]ith Easley declining to give me a pardon . . . [,] I’m not going to wait around for Bev Perdue to consider my request.”).

448. Perhaps the stigma of her former offense would make it difficult for her to reunite with a family or to form a new support group that otherwise might help shield her from some of the hazards of post-confinement life as a convicted felon.

449. Compare Audio File, *supra* note 365 (statement of Sen. Doug Berger) (providing an analogous example).

felons who have served their sentence and lived blamelessly in free society for a number of years. Indeed, as the following example shows, the state has made these sorts of compromises before.

5. *Narrow Tailoring: Learning from Driving Laws*

North Carolina has demonstrated its willingness and ability to adopt very precise and elaborate statutory schemes in the interest of keeping certain privileges out of the hands of those persons who have proven themselves to be dangerous. The way in which the General Assembly has responded to the serious problem of intoxicated driving provides a template, more or less, for improving the Felony Firearms Act so as to make disqualification more narrowly tailored to compelling interests.

While the state has been criticized by some as having inadequate firearms regulations,⁴⁵⁰ it has at times been praised for being “tough on drunk drivers.”⁴⁵¹ But the word “tough” may be misleading. It seems, rather, that in comparison to the Felony Firearms Act, the statutory scheme addressing intoxicated drivers is reasonable and fair.

Under current law, if a person is convicted of an offense which calls for mandatory revocation of her driving privileges (a revocation offense),⁴⁵² the Division of Motor Vehicles (DMV) is required to suspend or revoke her license for a period of time.⁴⁵³ Each revocation offense calls for punishment of a slightly different type and duration, depending on the severity and dangerousness of the particular offense

450. See, e.g., Thomasi McDonald, *North Carolina Group Wants Lawmakers to Close “Gun-Show” Loophole*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 12, 2003 (reporting Lisa Price, Executive Director of North Carolinians Against Gun Violence, as suggesting that the legislature should be “embarrassed” about loopholes allegedly contained in the state’s gun laws).

451. WRAL.com: Governor’s Commission Looking to Make Tough Drunk Driving Laws Tougher (Dec. 2, 1998), <http://www.wral.com/news/local/story/131481> (saying also that “North Carolina is leading the country in the fight against drunk driving”). But see About.com: 60 Year Sentence!, <http://alcoholism.about.com/library/weekly/a000116a.htm> (last visited Nov. 22, 2009) (“It’s good to see that North Carolina is finally beginning to take responsibility for maintaining the safety of its highways by putting Melissa Marvin behind bars for 60 years, but it’s a bit too late for [the teenagers she killed while driving with a blood alcohol content of .21].” (discussing *State v. Marvin*, No. 99-CRS-2022-26, 2002 WL 416560 (N.C. Ct. App. Mar. 19, 2002))).

452. These offenses are listed in N.C. GEN. STAT. § 20-17 (2007) (“The Division shall forthwith revoke the license of any driver upon receiving a record of the driver’s conviction for any of the following offenses . . .”). Our discussion will focus on the offense of “impaired driving,” which is made a revocation offense by section 20-17(a)(2).

453. *Id.* § 20-19.

as well as the likelihood of a repeat offense.⁴⁵⁴ Moreover, the law spells out how—and whether—the DMV is to go about restoring the driving privileges of these offenders prior to expiration of the revocation period.⁴⁵⁵ Restoration is accompanied by various mandatory restrictions or conditions, as well as other conditions which might be imposed according to the discretion of the DMV.⁴⁵⁶ Impaired driving is a revocation offense.⁴⁵⁷

For example, if a person is convicted of impaired driving for the first time, the law requires the DMV to revoke her driver's license for a one-year period.⁴⁵⁸ Assuming she behaves herself and does not drive during this period, her license will be restored at its conclusion. When the DMV restores her license, it is required to do so on the condition that she not drive with a blood alcohol concentration (BAC) of 0.04% or more for the next three years.⁴⁵⁹ If she is caught driving either before her privilege has been restored or after it is restored but with a BAC of 0.04% in violation of the DMV's restriction, she will earn another one-year revocation.⁴⁶⁰

If she continues her drinking and driving after this and is convicted of yet another impaired driving offense within three years of her first one, her license will be mandatorily revoked again—this time for *four* years.⁴⁶¹ If her license is restored after this, it will be on condition

454. *See id.*

455. *See id.*

456. *See id.*

457. Impaired driving means operating a vehicle either “[w]hile under the influence of an impairing substance” or after having consumed enough alcohol to achieve, “at any relevant time after the driving, an alcohol concentration of 0.08[%] or more.” *Id.* § 20-138.1(a). Being “under the influence of an impairing substance” is defined as “having [one’s] physical or mental faculties, or both, appreciably impaired by an impairing substance.” *Id.* § 20-4.01(48b).

458. *See id.* § 20-19(c1) (“When a license is revoked [pursuant to a conviction for impaired driving] . . . , the period of revocation is one year.”).

459. *See id.* § 20-19(c3)(1) (“When the Division restores a person’s drivers license which was revoked [for impaired driving], it shall place the [following] restriction on the person’s drivers license . . . : For the first restoration of a drivers license for a person convicted of driving while impaired . . . , that the person not operate a vehicle with an alcohol concentration of 0.04[%] or more at any relevant time after the driving.”); *id.* § 20-19(c3) (“The restrictions placed on a license under this subsection shall be in effect (i) seven years from the date of restoration if the person’s license was permanently revoked, (ii) until the person’s twenty-first birthday if the revocation was for [impaired driving], and (iii) three years in all other cases.”).

460. *See id.* (“A violation of a restriction imposed under this subsection or the willful refusal to submit to a chemical analysis shall result in a one year revocation.”).

461. *See id.* § 20-19(d).

that she not drive with a BAC of more than 0.00%.⁴⁶² If even a sip of beer at a party shows up on the breathalyzer test, she will have again violated the condition of her restored privilege, and will be in even more hot water.

But interestingly, the law also provides that after at least two years of the revocation period have elapsed, the DMV is allowed to restore the person's driving privilege if she can prove to the DMV that:

- (1) [She] has not in the period of revocation been convicted in North Carolina or any other state or federal jurisdiction of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any other criminal offense involving the possession or consumption of alcohol or drugs; and
- (2) [She] is not currently an excessive user of alcohol, drugs, or prescription drugs, or unlawfully using any controlled substance.⁴⁶³

These standards become even higher, the revocation period even longer, and the restrictions and conditions more severe if the person makes the mistake of committing a third impaired driving offense.⁴⁶⁴ But even after license revocation becomes "permanent" due to this third offense, the statutes provide for restoration after three years if the person proves both of the elements above, or after two years if she also shows that she "has not consumed any alcohol for the [twelve] months preceding the restoration while being monitored by a continuous alcohol monitoring device of a type approved by the Department of Correction."⁴⁶⁵ However, everything changes if the person commits a fourth impaired driving offense.⁴⁶⁶ If convicted, she will lose not only her right to drive a car, but also her freedom.⁴⁶⁷

Note carefully what these impaired driving laws do *not* do. They do not make it illegal for the unlicensed individual to "purchase, own, [or] possess" a motor vehicle, or to have one in her "custody, care, or control."⁴⁶⁸ Rather, the statutes make it illegal for her to *do* a certain thing with that vehicle in certain places; namely, to drive it on the highway.⁴⁶⁹ Thus, for example, they do not prohibit her from driving

462. See *id.* § 20-19(c3)(2).

463. *Id.* § 20-19(d).

464. See *id.* § 20-19(e)-(e3).

465. *Id.* § 20-19(e2)(1).

466. See *id.* § 20-138.5.

467. See *id.* § 20-138.5(b) ("A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended.").

468. *Id.* § 14-415.1(a).

469. See *id.* § 20-7(a) ("To drive a motor vehicle on a highway, a person must be licensed . . . to drive the vehicle and must carry the license while driving the vehicle.");

around in an old pickup truck on her family's farmland to help with the crops. She may even take the farm tractor itself out on the roads with no penalty, presumably because a slow-moving piece of farm machinery is not as dangerous a weapon as a minivan hurtling along at ninety miles per hour.⁴⁷⁰ Nor do these laws keep her from riding a moped, as this lightweight transport cannot reasonably be said to endanger the highway drivers of sport utility vehicles or other standard cars.⁴⁷¹ The penalty imposed on impaired driving offenders is directly related to the state's objective of preventing the likely misuse—not possession—of dangerous instrumentalities.

The Felony Firearms Act should be amended to follow suit. Just as license laws do not keep the DUI offender from driving on her own land, firearms disenfranchisement need not extend into the home of the convicted felon. Nor should it reach his private lands, on which he might very well need to carry a firearm to protect himself from wild beasts as he harvests timber from his wooded acreage. And just as license laws do not apply to less-dangerous vehicles like tractors and mopeds, the Act's disenfranchisement should not apply to weapons like shotguns, whose spread patterns have a fairly short effective range and thus do not create the same degree of risk as bullets fired from, say, a high-powered rifle that is poorly aimed or accidentally discharged.⁴⁷²

Consider also that these impaired driving provisions do not treat all impaired drivers alike in every instance. For instead of kowtowing to media hysteria and public outrage whenever a tragic drunk driving accident has claimed innocent lives, the legislature has recognized that the better approach is to administer "different strokes for different folks." A first-time offender has not necessarily proven herself to be road hazard to the same extent as the person who has just been con-

id. § 20-4.01(13) (defining the term "highway" as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic," and stating that "[t]he terms 'highway' and 'street' and their cognates are synonymous").

470. *See id.* § 20-8(2).

471. *See id.* § 20-8(7).

472. *See* DuckHuntingChat.com: Shotgun Shell Ballistics & Penetration (Dec. 17, 2008), <http://www.duckhuntingchat.com/shotgun-shell-ballistics.php> (describing, for example, how even if fired at a velocity of 600 feet per second from a distance as close as 37 yards, a No. 7 shotgun pellet only penetrates ballistic gel to a depth of 0.79 inches). A person firing a blast of shotgun pellets at an intruder inside his home is unlikely to injure the next door neighbor. On the other hand, a round fired off indoors by a hunting rifle might travel straight through the wall of the home and injure those nearby.

victed of his third DUI in as many months. An automobile can surely be a deadly weapon in the wrong hands, and it only takes one accident to ruin many lives forever—and many have been ruined.⁴⁷³ Yet the General Assembly has been careful to distinguish between habitual, recalcitrant offenders who ought to be kept off the road permanently, and those who should instead regain their privileges after having proven themselves capable of behaving soberly, safely, and responsibly. The Felony Firearms Act could be amended to provide for a similar system, involving perhaps the conditional restoration of firearms rights, or a disenfranchisement of shorter duration for persons convicted of their first offense or minor, nonviolent crimes.

It is also important to recognize that unlike many of the felonies which trigger disenfranchisement under the Act, impaired driving is an offense that actually shows the offender to pose a risk of harm—a risk stemming directly from an abuse of the *same privilege* the law revokes. Disenfranchising events under the Felony Firearms Act, on the other hand, include even those acts which may have nothing at all to do with a person's abuse of *the* right the Act operates to infringe. The Act declares, "The state has labeled you a 'felon,' so I must take away your fundamental right to keep and bear arms even though you might not have done anything to abuse that right." Meanwhile, North Carolina's impaired driving laws say to the offender, "You have used your driving privilege improperly and unsafely, so we must withhold *that* privilege from you."

The careful tailoring of the laws relating to impaired driving offenses becomes all the more remarkable when we realize the "right" at issue when a driver's license is revoked is a privilege inferior, constitutionally speaking, to the fundamental right of self-defense. If the state is willing to treat the privilege to drive a car on the highway with such reverence, surely it can fashion an improved version of the Felony Firearms Act which pays proper respect to the importance of an individual right to keep arms for lawful self-defense purposes. And if there is any confusion as to how to go about fixing the Act, the General Assembly need look no further than the statute's own legislative history for examples of measures which kept disenfranchisement tailored to the state's interest, to wit: prohibiting only short-scale or concealable

473. See N.C. GOVERNOR'S HIGHWAY SAFETY PROGRAM, HIGHWAY SAFETY: ANNUAL REPORT (2007), available at http://www.nhtsa.dot.gov/nhtsa/whatsup/safeteaweb/fy07/fy07annrpts/ncarolina_2007annrpt.pdf (Table: Crash Data/Trends) (reporting that in North Carolina, every year from 1997 through 2006, between 1483 and 1596 people died in car crashes, and that between 354 and 469 of these driving fatalities each year were alcohol related).

guns,⁴⁷⁴ excepting home and business possession,⁴⁷⁵ and limiting disenfranchisement to a certain number of years⁴⁷⁶ or at least providing for a rights-restoration process.⁴⁷⁷

To summarize this Section briefly, the actual contours of disenfranchisement under the Act are far too broad to render the statute narrowly tailored to any of the state interests addressed. First, while there may be significant reasons for denying *concealable* weapons to persons convicted of violent felonies, the Act goes too far in dispossessing persons of *all* types of firearms—particularly when it clumsily allows “antique” firearms to remain in circulation among felons, together with other dangerous implements such as automobiles or garden tools. Second, for *no* reason should the Act continue to operate without the home exception, which has been missing since 2004. Extending disenfranchisement past the threshold of the convicted felon’s home was a mistake. If a person truly cannot be trusted with a gun in his own home, he should not be released from prison to start with. Moreover, imposing disenfranchisement on the felon in his home leaves his family members disarmed as well, or at least incalculably complicates their lawful exercise of the right of self-defense. Finally, there is simply no support for the notion that a person—even one convicted of something like felonious assault—should continue to suffer disenfranchisement four or five decades after he has served his sentence. The General Assembly has been able to fashion a sensible and flexible system allowing restoration of driving privileges for convicted impaired motorists who meet certain requirements; surely it should be just as eager to restore the powers of self-defense to trustworthy persons whenever it is reasonable to do so.

C. *Hunting for Results-based Proof of Narrow Tailoring*

In the nearly four decades that have transpired since the Felony Firearms Act became law, not once has the North Carolina legislature conducted a study to determine whether it has had the desired effect.⁴⁷⁸ Perhaps the Act (like other gun restrictions) may have served

474. See *supra* text accompanying notes 89-94.

475. See *supra* text accompanying notes 126-36 (describing the home and business exceptions).

476. See *supra* text accompanying notes 100-09 (describing the disenfranchisement cap).

477. See *supra* text accompanying notes 87-90 (describing the restoration exemption).

478. Indeed, former Senator Ed Knox, who introduced the original Act, reports that when he ran for governor in 1984, he received criticism for having once proposed a reexamination of North Carolina’s gun possession laws. Telephone Interview, *supra* note 65. Knox says his opponents distorted that proposal, insinuating that he

the political interests of legislators, who congratulated themselves in the public eye for having supported such a noble, protective statute; who convinced themselves that even the *appearance* of fighting crime would be reason enough for keeping the law around. But has the Act ever done any good? Is there any evidence that would suggest its provisions—which appear so vastly overinclusive and so anemically underinclusive—are nevertheless accomplishing the purposes of the state?

First of all, the number of firearm-related deaths annually in North Carolina has remained fairly constant over the entire course of the Act's development.⁴⁷⁹ Further, North Carolina's violent crime figures have tracked the national average with remarkable consistency throughout this period.⁴⁸⁰ And interestingly, the largest percentage drops in the state's violent crime rate and firearm homicide figures appear to coincide with the narrowing amendments enacted in 1975 and with the advent of the Brady Act.⁴⁸¹ Similarly, domestic violence homicides in North Carolina have actually increased slightly since the broadening amendments of 2004.⁴⁸² This suggests that the Act has very little to do with how many individuals in the state are put in danger by firearms.

One reason for the Act's statistical lack of effectiveness is that it is only logically capable of preventing opportunistic or impulsive gun violence, which is nonetheless intentional conduct. The sensibleness of disenfranchisement depends on assuming that a person convicted of any significant "intent crime" (one requiring proof of intent to satisfy its *mens rea* element) will commit intentional wrongdoing again. But another assumption is necessary if the Act is to marry with its objec-

intended to put guns into the hands of dangerous criminals. *Id.* Ironically, this tactic ignored Knox's role in *disarming felons*.

479. Bureau of Justice Statistics, U.S. Dep't of Justice, Homicide: State Level, <http://bjsdata.ojp.usdoj.gov/dataonline/search/homicide/state/statehomicide.cfm> (follow "One Year of Data" hyperlink) (select "Weapons Type" variable for North Carolina and produce data table for each year beginning with 1976 and ending with 2005).

480. See Data Chart: N.C. Violent Crime Rate Compared to Neighboring States and National Average (2009) (on file with author) (using Bureau of Justice Statistics data to track relevant violent crime rates between 1960 and 2006 in relation to the amendments to the Felony Firearm Act enacted during that period).

481. See *id.*

482. See North Carolina Coalition Against Domestic Violence, Homicides, <http://www.nccadv.org/homicides.htm> (last visited Nov. 27, 2009) (follow hyperlinks to domestic violence homicide figures for years 2002 through 2008) (reporting 79 domestic violence murders in 2002, 46 of which were committed with guns; 72 in 2003, 34 with guns; 81 in 2004, 46 with guns; 71 in 2005, 39 with guns; 79 in 2006, 41 with guns; 86 in 2007, 40 with guns; and 87 in 2008, 45 with guns).

tive: we must assume that the convicted felon, possessed once again of evil intent, will lust for—rather than any other weapon—a firearm with which he might inflict dread casualty upon an innocent. We must also assume that this violent man will be substantially deterred from his quest if the law has instructed him not to keep a gun handy, and that he will not content himself with an alternative weapon equivalently suited for the task.

Simply put, violent people are given no reason to stop being violent simply because they are told they cannot have a firearm. When the state elects not to keep such a criminal imprisoned, but instead to turn him out into free society, his capacity for violence suffers no *real* limitation other than that imposed by the borders of his own creativity.

While this Comment does not pretend to make an exhaustive inquiry into the relevant statistics, available data nevertheless indicates that the answer to the above question—that is, whether the Act has been effective in reducing overall violent crime, firearm injuries or deaths, or domestic violence—is simply “no.”

V. CONCLUSION

This Comment has assumed that all persons have an individual, fundamental right to self-defense protected by the Constitution’s Due Process Clause. In its current form, North Carolina’s Felony Firearms Act infringes on that right by denying an impermissibly broad classification of individuals the ability to acquire, own, control, or otherwise possess a firearm—even in their own home, faced with a life-threatening situation. Even when the person whose rights have been deprived has shown a flawless respect for the law for the past forty years. Even when that person’s original “felony” was nothing more than an innocuous violation of a technical rule. Even when other, comparatively more violent criminals get to keep their firearm. While the *Britt v. State* decision ultimately turned out well for Barney Britt, individuals in his situation should be able to preserve their fundamental right to self-defense *without* being forced to spend nearly half a decade locked in litigation.

The Act’s objectives, however, can be substantially realized through a more narrowly-tailored legislative approach. The General Assembly is indeed capable of more careful statutory craftsmanship, as it has demonstrated in addressing the rights of involuntarily committed persons and the privileges of intoxicated drivers. There seems to be no reason that the state’s lawmakers should not step up to the task once again. Of course, it will be difficult for elected representatives and senators to muster the courage to vote in a way that will be

construed by the press as putting guns into the hands of “convicted felons.” North Carolina may indeed choose to continue disarming some of its most productive and loyal citizens, blissful in its false confidence that the *Britt* decision represents the high-water mark of post-*Heller* challenges to firearms restrictions. But if she has any sense, the Old North State will take new aim at the Felony Firearms Act, will pin this unjust, ineffective statute under the crosshairs of the Second Amendment and the fundamental right of self-defense, and will pull the trigger.

It’s worth a shot.

Matthew Jordan Cochran