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THE *HELLER* PROMISE VERSUS THE *HELLER* REALITY: WILL STATUTES PROHIBITING THE POSSESSION OF FIREARMS BY EX-FELONS BE UPHeld AFTER *BRITT V. STATE*?

Deborah Bone*

I. INTRODUCTION

With its decision in *Britt v. State*,¹ the North Carolina Supreme Court became the first court in the country to hold that a statute criminalizing firearm possession by an ex-felon is unconstitutional as applied to the challenging plaintiff under a state constitution.² In the wake of the United States Supreme Court's rulings in *District of Columbia v. Heller*³ and *McDonald v. City of Chicago*,⁴ will other state and local statutes prohibiting the possession of firearms by ex-felons be upheld? A close reading of both *Britt* and *Heller* in light of many of the firearm regulatory schemes currently in place in various jurisdictions indicates that felon possession statutes may very well be in danger, despite the *Heller* majority's unsupported assertion that these regulations are "longstanding" and "presumptively lawful."⁵

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¹ *Britt v. North Carolina*, 681 S.E.2d 320 (N.C. 2009).

² *Id.* at 321.

³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008) (holding that the Second Amendment creates an individual right to bear arms). Many state constitutions have amendments that have provisions similar to the Second Amendment that would present issues for upholding regulatory schemes. *See, e.g.*, CONN. CONST. art. I, § 15; MO. CONST. art. I, § 23; N.C. CONST. art. I, § 30.

⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

⁵ *Heller*, 128 S. Ct. at 2816–2817, 2817 n.26.

The question of whether states can lawfully prevent ex-felons from firearm possession merges Second Amendment jurisprudence with the debate over the reintegration of ex-felons and restoration of their rights. In this Comment, I argue that it will be difficult for regulations that prevent certain nonviolent ex-felons from possessing firearms to withstand scrutiny if firearm possession is indeed an individual right as *Heller* and *McDonald* suggest.⁶

Part II of this Comment will explore the various state and federal felon firearm possession regulatory schemes in place throughout the country. Part III will discuss and analyze the North Carolina Supreme Court's decision in *Britt v. State* and the particular facts that led the court to determine that the North Carolina statute was unconstitutional as applied. Part IV will suggest that the ruling in *Britt v. State* could easily occur in other jurisdictions, both local and federal, and evaluates whether the relevant felon possession statutes in particular jurisdictions will withstand constitutional scrutiny in light of *Heller* and *McDonald*. Part V of the Comment will consider whether nonviolent ex-felons should, in fact, be prevented from firearm possession after they have completed their sentences, and Part VI will suggest methods available to revise felon possession statutes to ensure that they both protect the rights of ex-felons and withstand scrutiny under an individual rights model.

II. THE CURRENT STATE OF THE LAW REGARDING EX-FELONS AND FIREARM POSSESSION

A. FEDERAL LAW

The Second Amendment of the United States Constitution protects “the right of the people to keep and bear [a]rms.”⁷ The Federal Firearms Statute, however, prohibits the possession of a firearm by any person “who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year.”⁸ The federal statute establishes an

⁶ In *Heller*, the Court shifted from the premise that the Second Amendment protected a collective right to bear arms (i.e. the right to bear arms in a militia) to an individual rights approach. Compare *id.* at 2797, with *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (upholding restrictions on the use of firearms in part because the Second Amendment protects only a collective right to bear arms). The Court continued to operate under an individual rights approach in *McDonald*. 130 S. Ct. 3020, 3036 (2010).

⁷ The Second Amendment provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

⁸ 18 U.S.C. § 922(g)(1) (2006).

exception for ex-felons who have had their civil rights restored by the sentencing jurisdiction from the otherwise broad prohibition against firearm possession, provided that the state restoration of rights does not otherwise restrict possession.⁹ Several circuit courts have interpreted this exception to mean that “[i]f state law has restored civil rights to a felon, without expressly limiting the felon’s firearms privileges, *that felon is not subject to federal firearms disabilities.*”¹⁰ Additionally, until 1961, the Federal Firearms Act was also limited in that it only prohibited ex-felons convicted of a “crime of violence” from possessing a firearm.¹¹

Prior to *Heller*, the original Federal Firearms Act was challenged in two circuit courts under the Second Amendment, and both circuit courts upheld the statute on the grounds that the Second Amendment did not create an individual right to bear arms,¹² a premise that the Supreme Court has since rejected.¹³ In one case, the First Circuit particularly focused on the fact that the appellant was not using his weapon as a “member of any military organization or . . . us[ing] the weapon . . . in preparation for a military career.”¹⁴ The court went on to note that:

the only inference possible is that the appellant at the time charged in the indictment was in possession of, transporting, and using the firearm and ammunition purely and simply on a frolic of his own and *without any thought or intention of contributing to*

⁹ *See id.* § 921(a)(20). The statute provides that:

[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or *has had civil rights restored shall not be considered a conviction for purposes of this chapter*, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id. (emphasis added).

¹⁰ *Unites States v. Cassidy*, 899 F.2d 543, 546 (6th Cir. 1990) (emphasis added); *see also* *United States v. Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994); *United States v. Gomez*, 911 F.2d 219, 220 (9th Cir. 1990).

¹¹ Federal Firearms Act of 1938, ch. 850, § 1(6), 52 Stat. 1250, 1250–51 (1938), *as amended by* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87–342, 75 Stat. 757 (1961). A “crime of violence” included “murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.” *Id.* at 1250.

¹² *See* *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

¹³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008) (holding that the Second Amendment protects an *individual* right to bear arms).

¹⁴ *Cases*, 131 F.2d at 923.

the efficiency of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state.¹⁵

While the United States Supreme Court has never directly ruled on the constitutionality of prohibitions against the restoration of an ex-felon's right to possess firearms, the Supreme Court has, on more than one occasion, commented in dicta on the government's ability to regulate the possession of firearms by ex-felons.¹⁶

Most recently, the Supreme Court has suggested that prohibitions against the possession of firearms by ex-felons are valid. In both *District of Columbia v. Heller*¹⁷ and *McDonald v. City of Chicago*,¹⁸ the Court, in dicta, called prohibitions on the possession of firearms by felons "longstanding" and "presumptively lawful."¹⁹ The Court, however, did not cite to a single authority to support its assertion that regulations prohibiting the possession of firearms by felons are valid.²⁰

Similarly, in *United States v. Emerson*,²¹ the Fifth Circuit stated, also in dicta, that a ban on firearm possession by ex-felons "is in no way inconsistent with an individual rights model."²² To support the validity of laws preventing ex-felons from possession, the Fifth Circuit relied only

¹⁵ *Id.* (emphasis added).

¹⁶ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *Heller*, 128 S. Ct. at 2816–17; *Lewis v. United States*, 445 U.S. 55, 64–65 (1980).

¹⁷ *Heller*, 128 S. Ct. at 2783.

¹⁸ *McDonald*, 130 S. Ct. at 3047.

¹⁹ *Heller*, 128 S. Ct. at 2816–17. The D.C. Circuit made a similar assertion regarding felon possession regulations: "These regulations promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised." *Parker v. District of Columbia*, 478 F.3d 370, 399 (2007) (distinguishing *Lewis*, 445 U.S. at 65 n.8). As discussed *infra*, the Court's holding in *Lewis* was eroded by *Heller*.

²⁰ *Heller*, 128 S. Ct. at 2816–17 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."). The majority opinion in *McDonald* adopted this language verbatim, again without any citations or support. *McDonald*, 130 S. Ct. at 3047.

²¹ 270 F.3d 203 (5th Cir. 2001).

²² *Id.* at 226 n.21. In *Emerson*, a Texas court issued a temporary injunction that, *inter alia*, prevented a party to a contentious divorce proceeding from obtaining a firearm until the proceeding was complete. *Id.* at 211 n.2. The court's holding that felon possession statutes can exist in an individual-rights model is especially noteworthy after the Supreme Court's ruling in *Heller*.

upon law review articles from the 1980s to suggest that America at its founding excluded felons from the right to bear arms.²³

The closest the Supreme Court came to ruling on the constitutionality of felon possession laws was in *Lewis v. United States*.²⁴ In *Lewis*, the petitioner challenged his conviction for felon firearm possession under the Sixth and Fourteenth Amendments of the United States Constitution by arguing that his prior state conviction was invalid because he was not adequately represented by counsel.²⁵ The Court upheld the statute, focusing on the fact that the petitioner could have challenged the validity of his prior conviction in state court but failed to do so.²⁶ The Court went on to find that:

[t]he firearm regulatory scheme at issue . . . is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is some rational basis for the statutory distinctions made . . . or . . . [if] they have some relevance to the purpose for which the classification is made.²⁷

As was the case with the earlier circuit court cases, the Supreme Court pointed to the collective-right theory of the Second Amendment to support the validity of the regulatory scheme, a theory that *Heller* has since disposed of in favor of an individual rights model.²⁸ In essence, *Heller's* adoption of an individual rights theory of the Second Amendment invalidates the holding in *Lewis* and wipes the slate clean of case law

²³ *Id.* at 226 n.21 (citing Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983) (“Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms].”); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151 (1986) (“[V]iolent criminals, children, and those of unsound mind may be deprived of firearms”); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983) (“Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them.”). For a thorough criticism of the historical analyses conducted in these articles, see C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698–707 (2009).

²⁴ 445 U.S. 55 (1980).

²⁵ *Id.* at 56–58.

²⁶ *Id.* at 64–65.

²⁷ *Id.* at 65 (internal quotation omitted).

²⁸ *Id.* at 65 n.8 (“These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties”); see also *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment guarantees no right to keep and bear a firearm that does not have “some reasonable relationship to the preservation or efficiency of a well regulated militia.”). *But see* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008) (holding that the Second Amendment protects an individual right to bear arms).

directly supporting ex-felon possession restrictions—except, of course, that the *Heller* opinion calls such laws permissible.²⁹

B. STATE LAW

Prior to the Supreme Court's recent decision in *McDonald v. City of Chicago*,³⁰ states were generally thought to have the ability to regulate firearms pursuant to their general police powers.³¹ In *McDonald*, the Court held that the Second Amendment applies to state regulations.³² Since the Court's application of the Second Amendment to state regulation is extremely recent, it has yet to be seen how incorporation will impact state firearm regulatory frameworks and felon firearm possession laws more specifically.

Current state laws regulating firearms generally, as well as regulations regarding the prohibition and restoration of firearm ownership by ex-felons more specifically, vary greatly from state to state. Some jurisdictions, such as Montana, essentially permit automatic restoration of all rights, including the right to firearm ownership, upon the completion of an ex-felon's sentence.³³ Other states have a process by which an ex-felon can move to have his right to firearm possession restored upon the completion of his sentence, usually by petitioning the court and presenting evidence that he does not pose a danger to the community.³⁴ Many states have statutes similar to the federal provisions outlined in 18 U.S.C. § 922, prohibiting persons convicted of any felony from the possession of firearms, regardless

²⁹ *Heller*, 128 S. Ct. at 2816–17.

³⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

³¹ *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886) (finding that the Second Amendment “is a limitation only upon the power of Congress and the National government, and not upon that of the States”). Of course, most state constitutions have their own provisions regarding the right to bear arms. See, e.g., CONN. CONST. art. I, § 15; MO. CONST. art. I, § 23; N.C. CONST. art. I, § 30.

³² *McDonald*, 130 S. Ct. at 3036.

³³ MONT. CONST. art. II, § 28(2) (“Full rights are restored by termination of state supervision for any offense against the state.”). Another method is to automatically restore full rights after a certain number of years have passed since the completion of the felon's sentence. See OR. REV. STAT. § 166.270 (2007) (restoring full ownership rights after fifteen years).

³⁴ In Washington, for example, a felon who has not been convicted of a sex offense, a class A felony, or a felony that carries a maximum sentence of twenty years can petition the court for the restoration of his right to possess a firearm if he completed his sentence at least five years prior to the date of the petition and has had no subsequent felony charges. WASH. REV. CODE § 9.41.040(4) (West, Westlaw through all 2010 legislation).

of the amount of time that has passed since the completion of the felon's sentence.³⁵

North Carolina is one of the many jurisdictions that have an outright prohibition against the possession of firearms by ex-felons that is similar to the federal restrictions. Under North Carolina law, it is "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 or any weapon of mass death and destruction"³⁶ The version of the statute that was at issue in *Britt* became effective in 2004.³⁷

III. ANALYSIS OF *BRITT V. STATE*

A. MR. BRITT'S STORY

In 1979, Barney Britt, a resident of Wake County, North Carolina, was convicted of felony possession with intent to sell and deliver a controlled substance in violation of state law.³⁸ Britt completed his sentence in 1982 and his civil rights were restored in 1987 pursuant to North Carolina law.³⁹ At that time, N.C. GEN. STAT. § 14-415.1 allowed ex-felons to regain their rights to the possession of certain firearms, and Britt purchased several sporting rifles and shotguns for use on his property.⁴⁰ In 2004, the North Carolina legislature amended the statute making it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in

³⁵ See, e.g., MO. ANN. STAT. § 571.070 (West 2009).

³⁶ N.C. GEN. STAT. § 14-415.1 (2009).

³⁷ *Id.* as amended by Act of Aug. 12, 2004, ch. 186, § 14.1, 2004 N.C. Sess. Laws 716, 737. There were two prior versions of N.C. GEN. STAT. § 14-415.1. Prior to 1995, the statute prohibited the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches" by persons convicted of certain violent felonies, "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." Act of June 26, 1975, ch. 870, § 1, 1975 N.C. Sess. Laws 1273. Between 1995 and 2004, the statute no longer took the date of conviction or completion of sentence into consideration, but continued to permit limited possession of a firearm within an ex-felon's own home or lawful place of business. Act of July 26, 1995, ch. 487, § 3, 1995 N.C. Sess. Laws 1414, 1417.

³⁸ *Britt v. North Carolina*, 681 S.E.2d 320, 321 (N.C. 2009).

³⁹ *Id.*

⁴⁰ *Id.*; see also N.C. GEN. STAT. § 14-415.1 (1975). In 1995, N.C. GEN. STAT. § 14-415.1 was amended to prohibit certain uses of firearms by ex-felons, but the amended law still permitted possession of firearms within the ex-felon's home or business. Act of July 26, 1995, ch. 487, § 3, 1995 N.C. Sess. Laws 1414, 1417.

his custody, care, or control any firearm or any weapon of mass death and destruction.”⁴¹

Before the new law became effective, Britt voluntarily handed over his firearms to the Wake County sheriff.⁴² Britt had not been charged with any crimes in the thirty years since his first and only felony conviction, and there had been no determinations made by any court or agency that Britt was potentially dangerous.⁴³ Britt filed suit against the State, alleging that N.C. GEN. STAT. § 14–415.1 infringed his state constitutional right to bear arms.⁴⁴

The trial court granted the State’s motion for summary judgment, finding that the amended statute was rationally related to a legitimate government interest and held that the law was constitutional both on its face and as applied to plaintiff.⁴⁵ Britt appealed the trial court’s holding, but the North Carolina Court of Appeals affirmed the finding, again holding that the law was rationally related to a legitimate state interest.⁴⁶

Britt appealed his case to the state supreme court. The only issue under review by the court was “[w]hether the application of the 2004 amendment . . . to plaintiff violates his rights under [the North Carolina Constitution].”⁴⁷

The Supreme Court of North Carolina held that N.C. GEN. STAT. § 14–415.1 is an “unreasonable regulation” as applied to the plaintiff.⁴⁸ The North Carolina constitution provides that “[a] well regulated militia being

⁴¹ Act of July 15, 2004, ch. 186, § 14.1, 2004 N.C. Sess. Laws 716, 737. The statute makes no distinctions regarding the date of conviction.

⁴² *Britt*, 681 S.E.2d at 322.

⁴³ *Id.*

⁴⁴ *Id.* The North Carolina constitution provides, in a manner similar to the federal Constitution, that “[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.” N.C. CONST. art. I, § 30.

⁴⁵ *Britt*, 681 S.E.2d at 322.

⁴⁶ *Britt v. State*, 649 S.E.2d 402, 409 (N.C. Ct. App. 2007). Judge Elmore dissented from the Court of Appeals’ decision, arguing that the statute unconstitutionally “stripped plaintiff of his constitutional right to bear arms without the benefit of due process.” *Id.* at 410 (Elmore, J., dissenting).

⁴⁷ *Britt*, 681 S.E.2d at 322.

⁴⁸ *Id.* at 323 (“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 statute] 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.”).

necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”⁴⁹ The state supreme court relied primarily upon *State v. Dawson*, a decision where the court previously held that any regulation on the state constitutional right to bear arms must be “reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.”⁵⁰ Unlike the lower courts, the state supreme court found that the State could not reasonably imply that Mr. Britt individually possessed a significant threat to public safety.⁵¹ The court focused heavily on the fact that Mr. Britt’s felony conviction was for a nonviolent crime, and that Mr. Britt had not only been a law-abiding citizen for the past thirty years, but had also safely possessed firearms for thirteen of those thirty years.⁵²

While the court only found that the law was unconstitutional as applied to this particular plaintiff, the holding is still extremely significant in that it is the first time any state court has held a state felon firearm possession law to be unconstitutional on any grounds, as applied or otherwise.⁵³

Dissenting justices argued that the statute was a reasonable regulation both on its face and as applied to the plaintiff, and that *State v. Dawson* illustrated that the right to bear arms is in fact subject to regulation.⁵⁴ The dissent compared the statute to laws preventing mentally ill persons from possessing firearms, noting that both regulations further the public policy of protecting the safety and general welfare of the public at large.⁵⁵ The dissent also cited dicta from *State v. Jackson*,⁵⁶ where the court associated a heightened public danger with felons possessing firearms and applauded

⁴⁹ N.C. CONST. art. I, § 30.

⁵⁰ 159 S.E.2d 1, 10 (N.C. 1968).

⁵¹ *Britt*, 681 S.E.2d at 323.

⁵² *Id.*

⁵³ *Id.* at 323 (Timmons-Goodson, J., dissenting) (“Because the majority has crafted an individualized exception for a sympathetic plaintiff, *thereby placing North Carolina in the unique position of being the first jurisdiction, either federal or state, to hold that the inherent police power of the State must yield to a convicted felon’s right to own a firearm*, I respectfully dissent.”) (emphasis added).

⁵⁴ *Id.* at 323–24.

⁵⁵ *See id.* at 324 (“In addition to regulating the place and manner in which an individual may exercise his right to bear arms, the General Assembly may also properly regulate—to the point of absolute restriction—certain *classes* of persons reasonably deemed by the legislature to pose a threat to public peace and safety. Thus, in addition to convicted felons, our statutes unequivocally prohibit incompetents, persons acquitted by reason of insanity of *any* crime (whether violent or nonviolent), and persons subject to domestic violence orders from purchasing, owning, or possessing firearms.”) (citations omitted).

⁵⁶ 546 S.E.2d 570, 573–74 (2001).

N.C. GEN. STAT. § 14–415.1, which was actually slightly less restrictive at the time of the case.⁵⁷

B. THE *BRITT* AFTERMATH

Since, under North Carolina law,⁵⁸ Mr. Britt had his civil rights restored after he completed his sentence, he was not prohibited from possessing a firearm under the Federal Firearms Act unless North Carolina prohibited possession.⁵⁹ As of yet, it is unclear whether the North Carolina Supreme Court’s holding will automatically extend to other felons in North Carolina who present the same absence of lawlessness and dangerousness that Mr. Britt established. The North Carolina Court of Appeals has, however, developed a test for similar claims in the wake of the *Britt* holding.⁶⁰ A North Carolina appellate court interpreted the state supreme court’s holding to have developed a five-factor test that evaluates:

(1) the type of felony convictions, particularly whether they “involved violence or the threat of violence[.]” (2) the remoteness in time of the felony convictions; (3) the felon’s history of “law-abiding conduct since [the] crime,” (4) the felon’s history of “responsible, lawful firearm possession” during a time period when possession of firearms was not prohibited, and (5) the felon’s “assiduous and proactive compliance with the 2004 amendment.”⁶¹

These factors are used to determine whether the statute “is a reasonable regulation which is ‘fairly related to the preservation of public peace and safety’ as to defendant.”⁶²

It is certainly still reasonable to assume, as did the dissent in *Britt*, that additional ex-felons of more similar standing to Mr. Britt will come forward

⁵⁷ *Britt*, 681 S.E.2d at 324 (“Just as there is heightened risk and public concern associated with firearms on educational property, which the legislature addressed through [N.C. GEN. STAT. § 14–269.2,] *there is also heightened risk and public concern associated with convicted felons possessing firearms*, which the legislature addressed through [N.C. GEN. STAT. § 14–415.1]. Both are exceptional situations, which have been addressed through dedicated statutory law.” (quoting *Jackson*, 546 S.E.2d at 573–74 (2001))).

⁵⁸ See N.C. GEN. STAT. § 14–415 (2005).

⁵⁹ See 18 U.S.C. § 922(g)(1) (2006).

⁶⁰ *State v. Whitaker*, 689 S.E.2d 395, 404 (N.C. Ct. App. 2009).

⁶¹ *Id.* (quoting *Britt*, 681 S.E.2d at 322).

⁶² *Whitaker*, 689 S.E.2d at 404 (quoting *Britt*, 681 S.E.2d at 323). The court held that the plaintiff in *Whitaker* did not pass the five-factor test and therefore the statute was not unconstitutional as applied to him. The plaintiff in *Whitaker* was convicted of three felonies—with one conviction as recent as 2005, and including a crime against a child. Mr. Whitaker’s criminal record is therefore not comparable to that of Mr. Britt. *Whitaker*, 689 S.E.2d at 404–05.

to make similar claims in the wake of the court's holdings.⁶³ Indeed, the North Carolina state legislature has already proposed revisions to the state Felony Firearms Act to permit limited hunting privileges upon the completion of their sentences for ex-felons convicted of nonviolent felonies.⁶⁴

IV. COULD COURTS IN OTHER JURISDICTIONS HOLD SIMILARLY TO THE NORTH CAROLINA COURT?

Whether or not a similar holding would be possible in other jurisdictions depends largely on the interplay between each jurisdiction's specific constitutional provisions protecting the right to bear arms and the jurisdiction's statutory framework prohibiting ex-felons from firearm possession.⁶⁵ After *McDonald*, state regulations must also pass muster under the Second Amendment.⁶⁶ Even regulations that are valid under the Second Amendment, however, may be struck under state constitutional theories. The following paragraphs explore state and federal firearm regulatory frameworks to determine the viability of statutes prohibiting gun ownership by ex-felons.

A. IMPLICATIONS FOR OTHER STATES

Many states have broad statutes similar to North Carolina's⁶⁷ that prohibit the possession of firearms by all ex-felons, and similarly broad

⁶³ *Britt*, 681 S.E.2d at 325 (Timmons-Goodson, J., dissenting) ("Today's decision opens the floodgates wide before an inevitable wave of individual challenges to not only the Felony Firearms Act, but to our statutory provisions prohibiting firearm possession by incompetents and the mentally insane.").

⁶⁴ H.B. 1444, 2009 Gen. Assem., 2009 Sess. (N.C. 2009). If passed, the bill would permit applicants who (1) have had rights of citizenship restored; (2) have "only one felony conviction and the rights of citizenship lost because of the conviction for that felony were restored pursuant to Chapter 13 of the General Statutes at least 20 years before the date of the permit application[;]" (3) have "not been convicted of any subsequent felony or any subsequent misdemeanor[;]" and (4) have "been of good behavior for the period since the date of conviction of the felony conviction" to possess certain firearms, provided the applicant was not convicted of offense that include assault or the possession of a firearm or suffers from a physical infirmity. § 14-415.42(a).

⁶⁵ The Federal Firearms Act does not prohibit ex-felons who have had their civil rights restored by the appropriate jurisdiction from possessing firearms. 18 U.S.C. § 921(a)(20) (2006). Absent a change to the federal statute, only the states that restore civil rights upon reentry, such as North Carolina, need be concerned about ex-felons gaining the ability to own firearms. N.C. GEN. STAT. § 13-1 (2009).

⁶⁶ 130 S. Ct. 3020, 3036 (2010).

⁶⁷ *See, e.g.*, MO. ANN. STAT. § 571.070 (West 2010).

constitutional protections for the right to bear arms.⁶⁸ These states are most likely to encounter challenges to their firearm possession regulations. Several states, however, have more narrowly tailored provisions that may better withstand challenges on individual rights grounds.⁶⁹

1. Viable State Felon Possession Laws Based on State Constitutional Provisions

Idaho is the only state to explicitly provide in its constitution that the state can pass legislation to prohibit a felon's possession of firearms.⁷⁰ The Florida constitution has a broader exception to the right, as it explicitly qualifies that the right to bear arms "shall not be infringed, *except that the manner of bearing arms may be regulated by law.*"⁷¹ The Florida state legislature passed a broad felon firearm possession statute that prohibits persons convicted of any felony from owning, possessing, or controlling a firearm.⁷² In Florida, if the statute were challenged as an unconstitutional violation of the state constitutional right to bear arms, the regulations would most likely be upheld since the state constitution explicitly provides that the state can regulate this right, although there still would be room for as-applied challenges.⁷³

2. Viable State Felon Possession Laws Based on Narrowly Drafted Statutes

Other states have more narrowly tailored statutory schemes. Wyoming, for example, only prohibits "[a]ny person who has previously pleaded guilty to or been convicted of committing or attempting to commit a *violent* felony or a felony [against a peace officer]" from using or possessing a firearm.⁷⁴ Wyoming's state constitution, on the other hand, is very broad: "The right of citizens to bear arms in defense of themselves and

⁶⁸ See, e.g., MO. CONST. art. I, § 23.

⁶⁹ Compare, e.g., WYO. CONST. art. I, § 24, with WYO. STAT. ANN. § 6-8-102 (2009).

⁷⁰ "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not . . . prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon . . ." IDAHO CONST. art. I, § 11.

⁷¹ FLA. CONST. art. I, § 8(a) (emphasis added).

⁷² FLA. STAT. ANN. § 790.23 (West 2007).

⁷³ A few other states have similar constitutional provisions giving state legislatures some level of authority to regulate the right to bear arms. See GA. CONST. art. I, § 1, ¶ VIII; UTAH CONST. art. I, § 6.

⁷⁴ WYO. STAT. ANN. § 6-8-102 (emphasis added); see also, e.g., N.H. REV. STAT. ANN. § 159:3 (LEXIS through 2009 Sess.) (prohibiting only those who have committed a felony against the person or property of another, or who have committed a drug-related felony from possessing firearms).

of the state shall not be denied.”⁷⁵ If the Wyoming statute were challenged, the regulations would likely be upheld even if the same standard from the North Carolina court were used. Under the Wyoming statute, it will be much easier for the state to prove a legitimate state interest in prohibiting firearm possession, since the Wyoming statute only prevents felons with a violent history from possessing firearms, unlike the statute in North Carolina.⁷⁶

Still, many states’ constitutional provisions and statutory schemes are very similar to those of North Carolina.⁷⁷ These state courts could potentially decide, as the North Carolina Supreme Court did,⁷⁸ that felon firearm possession statutes are unconstitutional if challenged by similarly sympathetic plaintiffs. Many felonies are nonviolent in nature, and proving that ex-felons who commit these crimes are indeed “dangerous” may be difficult if states do not revise their regulatory frameworks.⁷⁹ In the wake of *Britt*, it is likely that more nonviolent ex-felons will come forward to challenge state laws.⁸⁰

B. PRIOR STATE CHALLENGES

Thus far, few plaintiffs have challenged their state’s felon firearm possession statutes on constitutional grounds, and none had done so successfully until *Britt*.⁸¹ Generally, the statutes that have been challenged are actually less restrictive than the statute at issue in *Britt*.⁸² Still, much of the reasoning that the courts in previous cases relied upon has been eroded

⁷⁵ WYO. CONST. art. I, § 24.

⁷⁶ WYO. STAT. ANN. § 6-8-102 (2009); *see also* *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009) (“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.”) (emphasis added).

⁷⁷ *Compare, e.g.*, ARK. CONST. art. II, with ARK. CODE ANN. § 5-7-103(a) (1987); *compare also* CONN. CONST. art. I, § 15, with CONN. GEN. STAT. ANN. § 53a-217 (West 1958); MO. CONST. art. I, § 23, with MO. ANN. STAT. § 571.070 (West 2003).

⁷⁸ *See Britt*, 681 S.E.2d at 322–23.

⁷⁹ *See infra* Part VI for suggestions on how jurisdictions can improve their regulatory frameworks to secure the validity of felon firearm possession laws.

⁸⁰ *See Britt*, 681 S.E.2d at 324 (Timmons-Goodson, J., dissenting).

⁸¹ *See, e.g.*, *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006); *State v. Hirsch*, 114 P.3d 1104 (Or. 2005); *State v. Smith*, 571 A.2d 279 (N.H. 1990).

⁸² The Oregon felon firearm possession statute only excludes persons convicted of a felony from firearm possession until fifteen years have passed after the completion of the felon’s sentence. *Compare* OR. REV. STAT. § 166.270 (1998) (applied in *Hirsch*, 114 P.3d at 1106), with N.C. GEN. STAT. § 14–415 (2005) (applied in *Britt*, 681 S.E.2d at 322).

by the United States Supreme Court's holdings in *Heller* and *McDonald*.⁸³ If courts continue toward an individual rights interpretation of the right to possess firearms, the precedents upholding states' ability to restrict firearm possession may no longer be valid case law.

In *State v. Hirsch*,⁸⁴ for example, the Oregon Supreme Court upheld Oregon's felon firearm possession statute.⁸⁵ Oregon's constitution provides that "[t]he people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."⁸⁶ The state supreme court found that the drafters of the state constitution did not intend to create an "absolute right to the possession of arms."⁸⁷ The court interpreted the provision as "preclud[ing] the legislature from infringing on the people's right to bear arms for purposes of defense, but not for purposes other than defense."⁸⁸

The North Carolina court did not delve into the same sort of historical analysis of the intent of the drafters in *Britt*, but the Oregon case is still easily distinguishable from the facts in *Britt*. The statute at issue in *Hirsch* was less restrictive than the statute in *Britt*.⁸⁹ The Oregon felon firearm possession statute only excludes persons convicted of a felony from firearm possession until fifteen years after the completion of the felon's sentence.⁹⁰ Under the North Carolina court's reasonableness test, even the Oregon statute probably would have been upheld considering the North Carolina court's focus on the remoteness of the felony conviction at issue.⁹¹ Under the Oregon statute, ex-felons with convictions that are particularly remote in time would be legally able to possess firearms.⁹²

⁸³ See, e.g., *Posey*, 185 S.W.3d at 179.

⁸⁴ *Hirsch*, 114 P.3d at 1104.

⁸⁵ *Id.* at 1106; OR. REV. STAT. § 166.270 (2009).

⁸⁶ OR. CONST. art. I, § 27.

⁸⁷ *Hirsch*, 114 P.3d at 1106, 1134 (describing the holding of the Oregon Court of Appeals, which was ultimately upheld).

⁸⁸ *Id.* at 1110. It is interesting to note that the Oregon court used the language regarding "defense" much differently than the United States Supreme Court used the language regarding "the militia" in the Second Amendment of the United States Constitution. Compare *id.*, with *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008). The Supreme Court held that the prefatory phrase regarding militias in the Second Amendment "does not limit the latter [clause], but rather announces a purpose." *Id.* at 2789.

⁸⁹ Compare N.C. GEN. STAT. § 14-415.1 (2009), with OR. REV. STAT. § 166.270 (2009).

⁹⁰ OR. REV. STAT. § 166.270.

⁹¹ See *State v. Whitaker*, 689 S.E.2d 395, 404 (N.C. Ct. App. 2009) (citing *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009)) (outlining the North Carolina court's five-factor test, including remoteness of the conviction as a factor).

⁹² Incidentally, the plaintiffs in *Hirsch* were not nearly as sympathetic as Mr. Britt. Mr. Hirsch was charged with possessing a firearm while still on parole, and Mr. Friend was

Another case where a state's felon firearm possession regulations were upheld was *State v. Smith*.⁹³ Like, North Carolina, New Hampshire has a broad constitutional protection of the right to bear arms.⁹⁴ The New Hampshire court upheld the state felon firearm possession statute on the grounds that it is narrowly tailored to serve "a significant governmental interest in protecting the general public"⁹⁵ The court focused on the fact that the statute prohibits only "persons likely to be dangerous from possessing dangerous weapons."⁹⁶ New Hampshire's statute is indeed more narrowly tailored than the North Carolina statute. The New Hampshire statute only prohibits the possession of firearms for those who have committed a felony against the person or property of another, or who have committed a drug-related felony—in essence, only prohibiting "dangerous" felons from possessing firearms.⁹⁷

While the New Hampshire statute is less restrictive than North Carolina's statute, Mr. Britt committed a drug-related felony, and therefore, if he were a New Hampshire resident he would still be prohibited from firearm possession.⁹⁸

Kentucky's felon possession statute has also survived scrutiny by the state supreme court.⁹⁹ Perhaps because the statute was challenged by arguably the least sympathetic plaintiff of the three cases,¹⁰⁰ the plaintiff in *Posey* tried a notably different argument. The plaintiff did not dispute that the "regulation of firearms among convicted felons is supported by substantial and rational concerns."¹⁰¹ Instead, he argued that the statute violated the state constitution because the "constitution expressly protects the convicted felon's right to bear arms *in spite* of these substantial risks to

charged with possessing a firearm while driving under the influence of intoxicants. *Hirsch*, 114 P.3d at 1106.

⁹³ 571 A.2d 279, 280 (N.H. 1990).

⁹⁴ "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. pt. 1, art. 2-a.

⁹⁵ *Smith*, 571 A.2d at 281.

⁹⁶ *Id.*

⁹⁷ N.H. REV. STAT. ANN. § 159:3 (LEXIS through 2009 Sess.); *see also Smith*, 571 A.2d at 281.

⁹⁸ *Britt v. State*, 681 S.E.2d 320, 321 (N.C. 2009).

⁹⁹ *Posey v. Commonwealth*, 185 S.W.3d 170, 172 (Ky. 2006).

¹⁰⁰ The plaintiff in *Posey* was arrested after officers searching for a different suspect found and seized shotgun shells, individually wrapped packets of marijuana, and a firearm in plain view in plaintiff's home. *Id.*

¹⁰¹ *Id.* at 176.

public welfare and safety.”¹⁰² Nevertheless, the Kentucky court was not convinced.¹⁰³

Kentucky Revised Statute § 527.040 prohibits the “possession of a firearm by a convicted felon . . . when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted.”¹⁰⁴ The Kentucky Constitution, on the other hand, provides that:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned The 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.¹⁰⁵

The Kentucky Supreme Court used the single footnote in *Emerson*¹⁰⁶ to find that, historically, felons were not permitted to possess firearms.¹⁰⁷ The court also found, as the Oregon court did, that the “defense” language in the state constitution illustrated that the right to bear arms was not absolute.¹⁰⁸ Taken together, the court determined that the statute is “reasonable legislation in the interest of public safety’ [and] since nothing in the constitution, either express or implied, undermines or prohibits such legislation, [the statute is] constitutional.”¹⁰⁹

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* at 177.

¹⁰⁴ KY. REV. STAT. ANN. § 527.040(1) (2010). The statute, however, only applies to persons convicted after January 1, 1975 with respect to handguns, and only applies to persons convicted before July 15, 1994 with respect to other firearms. *Id.* § 527.040(4). If Mr. Britt were a Kentucky resident, he would not have been prevented from possessing the rifles, since his felony conviction occurred prior to the statute.

¹⁰⁵ KY. CONST. § 1.

¹⁰⁶ *United States v. Emerson*, 270 F.3d 203, 226 n.21 (5th Cir. 2001) (citing scholarship that claims that at America’s founding, ex-felons were not considered to be citizens). *See supra* note 22.

¹⁰⁷ *Posey*, 185 S.W.3d at 178. The dissent vehemently disputed this historical analysis. *See id.* at 198–200 (Scott, J., dissenting).

¹⁰⁸ *Id.* at 180. It is interesting that the court focused on the self-defense language to show that the right to bear arms is not absolute, instead of focusing on the language explicitly permitting the legislature to “enact laws to prevent persons from carrying concealed weapons.” It is also curious that the constitutional provision explicitly provides for prohibitions against concealed weapons, but not against felon firearm possession. KY. CONST. § 1(7). Several other states have similar provisions regarding concealed weapons in their state constitutions. *See, e.g.*, COLO. CONST. art. II, § 13; LA. CONST. art. I, § 11; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30. However, none of these constitutions say anything regarding felon possession. Only Idaho’s constitution specifically permits laws against felon possession. IDAHO CONST. art. I, § 11.

¹⁰⁹ *Posey*, 185 S.W.3d at 181 (internal citations omitted).

If the North Carolina court dealt with the same facts and law at issue in *Posey*, it would likely still have found the statute unconstitutional as applied to Mr. Britt, but not as applied to Mr. Posey. The major difference between the two cases is the dangerousness, or at least lawlessness, of the two plaintiffs. Mr. Posey was found possessing a firearm while engaging in other illegal acts,¹¹⁰ whereas Mr. Britt had been a law-abiding member of the community for thirty years.¹¹¹ According to the North Carolina appellate court's five-factor test, the type of felony conviction is heavily considered in a determination of whether the statute is constitutionally applied.¹¹²

Not every state court will follow North Carolina's lead and poke holes in its state's felon firearm possession statutes, but there is certainly the potential for finding that many of these statutory schemes are unconstitutional, at least as applied to particular plaintiffs. This possibility is strengthened when considering the ever-growing class of ex-felons who were convicted of nonviolent felonies.¹¹³

C. IMPACT ON FEDERAL LAW

While North Carolina's ruling has no direct effect on federal law, the state's decision may foreshadow the direction future federal decisions could take, especially given the recent federal court decisions on Second Amendment jurisprudence.¹¹⁴

In *District of Columbia v. Heller*, the Court interpreted the Second Amendment as an individual right to bear arms.¹¹⁵ The majority in *Heller* declared that its decision did not impact the validity of felon firearm possession restrictions.¹¹⁶ The Court noted the prohibitions on the possession of firearms by felons were "longstanding" and "presumptively lawful," but did not cite any supporting authorities.¹¹⁷ The Court made this

¹¹⁰ *Id.* at 172.

¹¹¹ *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009).

¹¹² *State v. Whitaker*, 689 S.E.2d 395, 404 (N.C. Ct. App. 2009) (citing *Britt*, 681 S.E.2d at 322).

¹¹³ Every year, state courts convict about 800,000 additional nonviolent felons. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf>.

¹¹⁴ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

¹¹⁵ *Heller*, 128 S. Ct. at 2797. Coincidentally, the Court specifically notes that North Carolina's constitutional provision providing for the right to bear arms is very similar to the Second Amendment. *Id.* at 2802.

¹¹⁶ *Id.* at 2816–17. The Court repeated this assertion in *McDonald*, 130 S. Ct. at 3047.

¹¹⁷ *Heller*, 128 S. Ct. at 2816–17.

assertion despite its lengthy review of the drafting history of the Second Amendment, and subsequent conclusion that the right to bear arms was considered a fundamental, individual right related to the right of self-defense.¹¹⁸ The Court even quoted eighteenth century scholars such as William Rawle to suggest that, at founding, it was believed that the government had no “power to disarm” the people whatsoever.¹¹⁹

The lack of supporting authorities for the Court’s assertion that restrictions on a felon’s possession of firearms are “presumptively lawful” is disconcerting. Considering the Court’s holding that the Second Amendment secures an individual right to bear arms, federal prohibitions against felon firearm possession may not be as secure as the Court initially presumed. This is especially true in light of the majority’s assault on the idea that courts should conduct an “interest-balancing” approach to determine whether statutory burdens on a protected interest are proportional to the effects upon other governmental interests.¹²⁰ Indeed, if an interest-balancing test is conducted, some courts may find, as the New Hampshire Supreme Court found, that the burdens on ex-felons are proportional and reasonable to protect the governmental interest of protecting the safety and welfare of the public.¹²¹ The majority in *Heller*, however, scoffed at the idea of conducting an interest-balancing analysis, and noted that there is “no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”¹²² The majority went even further to refute the idea that a rational-basis scrutiny test should be the standard to evaluate regulations on constitutional guarantees:

[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to bear

¹¹⁸ *Id.* at 2790–2806.

¹¹⁹ *Id.* at 2806.

¹²⁰ *Id.* at 2821.

¹²¹ *Smith v. State*, 571 A.2d 279, 281 (N.H. 1990). The New Hampshire court upheld the state felon firearm possession statute on the grounds that it is narrowly tailored to serve “a significant governmental interest in protecting the general public.” *Id.*

¹²² *Heller*, 128 S. Ct. at 2821. The Court continues: “The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Id.*

arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.¹²³

It is difficult to see how the Court can so calmly promise that felon firearm possession prohibitions will be upheld when it so eagerly disposes of a balancing approach to determine the validity of firearm regulatory schemes in light of the “fundamental” rights guaranteed by the Second Amendment.

The Federal Firearms Act created a very broad prohibition against the possession of firearms by anyone convicted of a federal felony.¹²⁴ The prohibition is not narrowly tailored to prevent only violent felons from firearm possession like New Hampshire’s provision,¹²⁵ nor does the restriction depend upon the time elapsed since the completion of the sentence as is the case in Oregon.¹²⁶ The federal statute prohibits a person convicted of perjury from owning a gun, for example, even if the person has not been charged again for fifty years.¹²⁷ Considering the Court’s position in *Heller* and the broad nature of the federal regulation,¹²⁸ one can see how a plaintiff with a record similar to Mr. Britt’s could successfully challenge the federal law as overly restrictive of the individual constitutional right to bear arms.

V. RESTORATION OF RIGHTS UPON REENTRY

In order to adequately consider solutions that will prevent felon firearm possession statutes from being invalidated, it is important first to consider whether the right to bear arms should, in fact, be restored upon an ex-felon’s reentry into the community.

The right to firearm possession is one of relatively few rights that ex-felons are prohibited from exercising upon the completion of their sentences, on both the federal and the state level. The United States Supreme Court has, however, “recognized . . . that a legislature

¹²³ *Id.* at 2817 n.27 (citations omitted).

¹²⁴ 18 U.S.C. § 922 (2006).

¹²⁵ N.H. REV. STAT. ANN. § 159:3 (LEXIS through 2009 Sess.) (prohibiting ex-felons convicted of violent felonies from possessing firearms).

¹²⁶ OR. REV. STAT. § 166.270 (2007) (prohibiting ex-felons convicted of nonviolent felonies from possessing firearms for fifteen years after the completion of their sentence).

¹²⁷ *See, e.g.*, N.C. GEN. STAT. § 14-209 (2009) (classifying perjury as a felony offense).

¹²⁸ The Federal Firearms Act “has a strikingly large scope—a scope that might be arguably called into question by a fair reading of *Heller*’s rationale” *United States v. Abner*, Civil Action No. 3:08cr51-MHT, 2009 WL 103172, *1 (M.D. Ala., Jan. 14, 2009). The Court did not find a constitutional violation in this case, since plaintiff had a “serious history of violent crime of the highest magnitude, including state convictions for kidnapping and attempted murder.” *Id.*

constitutionally may prohibit a convicted felon from engaging in activities [other] than the possession of a firearm.”¹²⁹ In North Carolina and many other jurisdictions, all rights other than the right to possess a firearm are automatically restored upon the completion of the felon’s sentence.¹³⁰ Various specific crimes may result in specific burdens after the completion of the offender’s sentence, such as sex offender registry requirements, but no government-imposed burdens fall on such a broad group of ex-offenders as does the prohibition against firearm possession.¹³¹

The only civil right that is denied to the whole class of ex-felons with some frequency is the right to vote. Only two states, however, Virginia and Kentucky, permanently disenfranchise persons with felony convictions.¹³² Maine and Vermont allow felons to vote even while serving their sentence.¹³³ Most states fall somewhere in between the two, permitting some, but not all, ex-felons to vote, or establishing a process by which voting rights can be restored.¹³⁴ Despite the higher public tolerance for ex-felon enfranchisement than for ex-felon firearm possession, the Supreme Court has expressly ruled that there is a constitutionally valid basis for preventing ex-felons from voting in federal elections.¹³⁵

¹²⁹ *Lewis v. United States*, 445 U.S. 55, 66 (1980) (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)) (disenfranchisement); *De Veau v. Braisted*, 363 U.S. 144 (1960) (proscription against holding office in a waterfront labor organization); *Hawker v. New York*, 170 U.S. 189 (1898) (prohibition against the practice of medicine).

¹³⁰ North Carolina automatically restores the rights of a convicted person upon (1) “discharge . . . by the State Department of Correction . . . or of a parolee by the Department of Correction;” (2) “[t]he unconditional pardon of the offender;” or (3) [t]he satisfaction by the offender of all conditions of a conditional pardon.” N.C. GEN. STAT. § 13-1 (2009). The statute provides similar conditions for ex-felons convicted by the federal government or convicted by other states. *Id.* at § 13-1(4)–(5). Ex-felons must re-register to vote, but they are permitted to do so freely once their sentence is served. *Id.* at § 163-55.

¹³¹ *See, e.g.*, Sex Offender and Public Protection Registration Programs, N.C. GEN. STAT. §§ 14-208.5, *et. seq.* (2009).

¹³² *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2009), *available at* http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMarch2010.pdf.

¹³³ *See id.*

¹³⁴ *See id.* Many states simply require ex-felons to re-register to vote upon the completion of their sentence.

¹³⁵ In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the Court found that a California law disenfranchising convicted felons who had completed their sentences does not violate the Equal Protection Clause. The Court relied primarily on legislative history to conclude that the Equal Protection Clause in Section 1 of the Fourteenth Amendment was not meant to override the express exemption permitting felon disenfranchisement in Section 2. *Id.* at 55–56. The Court held that the language in Section 2 prohibiting the abridgement of the right to vote “except for participation in rebellion, or other crime” expressly permits states to disenfranchise felons. *Id.* Senator Feingold and Congressman Conyers have introduced

Research illustrates that ex-felons are most likely to become active, lawful participants in the community if they are given the same rights and opportunities as other community members upon release.¹³⁶ Civil disabilities affect the ability for ex-felons to integrate fully into society upon release. In interviews with ex-offenders, for example, researchers have “found evidence that disenfranchisement ‘carried a sting,’ was like ‘salt in the wound,’ and ‘part of a larger package of restrictions that confounded efforts to become normal citizens.’”¹³⁷

While there are obvious emotional and politically expedient reasons to prohibit firearm possession by convicted felons, any limitations on rights after the completion of a felon’s sentence should be carefully evaluated. In 2004, the most recent year for which data is available, 1,078,920 people were convicted of a felony in state courts.¹³⁸ Eighty-two percent of these felonies were categorized as “nonviolent” felonies by the Department of Justice.¹³⁹ Is a person convicted of a nonviolent felony actually any more likely to commit a violent act with a firearm than someone who does not have a prior felony conviction? Department of Justice studies show that sixty-seven percent of felons released in 1994 were convicted of a subsequent felony or serious misdemeanor, but there is little research regarding the prevalence of nonviolent ex-felons who commit subsequent violent felonies.¹⁴⁰

Certainly, our initial impulse may be to believe that convicted felons are more dangerous than ordinary citizens, regardless of the nonviolent nature of their first conviction. The dissent in *Britt*, for example, determined that the prohibition was reasonable because “[o]ne who has committed a felony has displayed a degree of lawlessness that makes it

legislation to ensure ex-felons’ right to vote is restored in federal elections after the successful completion of their sentence. See Democracy Restoration Act of 2009, H.R.3335, 111st Cong. (1st Sess. 2009); Democracy Restoration Act of 2009, S.1516, 111st Cong. (1st Sess. 2009).

¹³⁶ See, e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105–39 (2003).

¹³⁷ *Id.* at 133.

¹³⁸ Bureau of Justice Statistics, U.S. Dep’t of Justice, State Court Sentencing of Convicted Felons—Statistical Tables: Felony Sentences in State Court, <http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04110tab.cfm> (last updated Sep. 9, 2010). In the same year, the federal system convicted 66,518 adult felons. *Id.*

¹³⁹ *Id.*

¹⁴⁰ Bureau of Justice Statistics, U.S. Dep’t of Justice, Recidivism of Prisoners Released in 1994, Summary Findings, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited Mar. 9, 2010).

entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person.”¹⁴¹

Despite *Heller*'s promises to the contrary, the Supreme Court's determination that the right to bear arms is an individual right and its disapproval of the interest-balancing test for firearm regulations¹⁴² beg the question of whether the state's interest in a slightly safer public is strong enough to trump the individual's right to bear arms. Certainly, in situations similar to Mr. Britt's, where there is no evidence of dangerousness and thus no obvious benefit to the state, it will be difficult for the government to show that the law, as applied, furthers any sort of legitimate state interest.

This is particularly true given *Heller*'s focus on the historical tie between the right to bear arms and the right to self-defense.¹⁴³ If this historical analysis is taken as true, why would an ex-felon have less of a right to self-defense than a person with no felony convictions? Taken one step further, does a person who lives in a home with an ex-felon have less of a right to self-defense than does a person who does not live with an ex-felon? Since *Heller* has determined that the language of the Second Amendment guarantees an individual right to use firearms for self-defense,¹⁴⁴ firearm regulations will need to be reformed to respect the rights of ex-offenders, especially in cases where there is no evidence that the ex-offender is particularly dangerous.

VI. LEGISLATIVE SOLUTIONS TO ENSURE THE VALIDITY OF FELON POSSESSION STATUTES

If courts continue to hold that the right to bear arms is a fundamental individual right and dispose of interest-balancing tests for determining the validity of firearm regulations, there are several options for states with schemes similar to North Carolina's to protect the ability to legislate classes of citizens who may not possess firearms. If, however, the American public and state legislatures determine, as some courts have, that the right to bear arms is truly a fundamental right and that the government has no power to

¹⁴¹ Britt v. State, 681 S.E.2d 320, 324 (N.C. 2009) (Timmons-Goodson, J., dissenting). An additional question is whether felon firearm statutes have any success in deterring and preventing ex-felons from obtaining firearms, considering that they have shown this tendency for "lawlessness" in the past. See Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, Two-Thirds of Former State Prisoners Rearrested for Serious New Crimes (June 2, 2002), available at <http://bjs.ojp.usdoj.gov/content/pub/press/rpr94pr.cfm> ("Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime in the following three years.").

¹⁴² District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).

¹⁴³ *Id.* at 2817–18.

¹⁴⁴ *Id.* at 2797.

disarm, then firearm possession statutes will soon go by the wayside. If the public really believes the right to bear arms is a basic fundamental right,¹⁴⁵ then the right should indeed be restored upon the completion of an ex-felon's sentence, just as other rights that are deemed fundamental are restored in most jurisdictions.¹⁴⁶ The success of many of these strategies will depend largely upon the direction that Second Amendment jurisprudence takes in the wake of *McDonald*.¹⁴⁷

A. THE CONSTITUTIONAL DIMENSION

The surest route that states can take is to amend their state constitutions. Currently, only Idaho's constitution specifically permits laws against felon possession.¹⁴⁸ It is certainly interesting to note that Idaho, which revised its constitution in the late 1970s, thought to include this provision, but other states have not followed suit.

Some states have revised their constitutions to give the legislature a more explicit power to regulate the use of firearms, even if felon possession is not specifically mentioned.¹⁴⁹ The Florida constitution, revised in 1968, provides an example. The constitution provides that "the right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law.*"¹⁵⁰ Unfortunately, revising a state's constitutional provision regarding the highly contentious right to bear arms will not be an easy task and may simply not be feasible in many states. Further, under *McDonald*, even if state regulations are valid under the state constitution they will need to pass muster under the Second Amendment.¹⁵¹ Luckily, there is a variety of more accessible options for state legislatures to protect regulations against the possession of firearms by felons.

B. STATUTORY SOLUTIONS

First, state legislatures would be wise to consider whether it is necessary to prohibit all convicted felons from firearm possession or whether only violent ex-offenders should be restricted. Some states, such as New Hampshire, implemented statutes that prohibit the possession of

¹⁴⁵ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

¹⁴⁶ *See, e.g.*, N.C. GEN. STAT. § 13-1 (2009).

¹⁴⁷ *McDonald*, 130 S. Ct. at 3036.

¹⁴⁸ IDAHO CONST. art. I, § 11.

¹⁴⁹ In the wake of *McDonald*, constitutional revisions may be invalidated by the federal Second Amendment. *McDonald*, 130 S. Ct. at 3036.

¹⁵⁰ FLA. CONST. § 8(a) (emphasis added).

¹⁵¹ *McDonald*, 130 S. Ct. at 3036.

firearms only for those who have committed a felony against the person or property of another, or who have committed a drug-related felony—in essence, only prohibiting “dangerous” felons from possessing firearms.¹⁵² Of course, as discussed earlier, it is difficult to measure whether or not persons convicted of previous felonies are more likely to commit future crimes with firearms.¹⁵³

Another option would be to permit nonviolent offenders to possess firearms, but to restrict the type of firearm they may possess. This is the current proposal in the North Carolina state legislature, where legislators have proposed a bill to permit nonviolent offenders certain “hunting” rights.¹⁵⁴ These statutes rely on the fact that most crimes conducted with firearms are conducted with handguns rather than sporting rifles,¹⁵⁵ but do not explicitly evaluate the dangerousness of the ex-felon. If ex-felons convicted of nonviolent felonies are indeed statistically more dangerous, however, permitting even limited gun rights may be a questionable practice.

Several states have struck an interesting balance between the right to bear arms and the public safety concern that results from ex-felon firearm possession. One avenue some jurisdictions have explored is the establishment of a restoration date.¹⁵⁶ This scheme permits the restoration of the right to possess firearms a certain number of years after time served and often permits automatic restoration for nonviolent, first-time offenders.¹⁵⁷ Statutes with restoration date provisions permit ex-felons,

¹⁵² N.H. REV. STAT. ANN. § 159:3 (2009); *see also* State v. Smith, 571 A.2d 279, 281 (1990).

¹⁵³ Department of Justice studies show that sixty-seven percent of felons released in 1994 were convicted of a subsequent felony or serious misdemeanor, but there is little research regarding the prevalence of nonviolent ex-felons who commit subsequent violent felonies. *See* Press Release, Bureau of Justice Statistics, *supra* note 141.

¹⁵⁴ H.B. 1444, 2009 Gen. Assem., 2009 Sess. (N.C. 2009).

¹⁵⁵ Approximately seventy-five percent of gun-related homicides in 2005 were committed with a handgun. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 137, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf>.

¹⁵⁶ *See, e.g.*, OR. REV. STAT. § 166.270(4)(a) (2007).

¹⁵⁷ In Oregon, for example, ex-felons are prohibited from firearm possession except for persons:

[c]onvicted of only one felony under the law of this state or any other state, or who has been convicted of only one felony under the laws of the United States, which felony did not involve criminal homicide, as defined in ORS 163.005, or the possession or use of a firearm or a weapon having a blade that projects or swings into position by force of a spring or by centrifugal force, and who has been discharged from imprisonment, parole or probation for said offense for a period of 15 years prior to the date of alleged violation of subsection (1) of this section.

OR. REV. STAT. § 166.270 (4)(a).

such as Mr. Britt, who have shown themselves to be law-abiding members of the community, to regain the ability to possess certain firearms. These statutes essentially allow ex-felons a “second chance” to prove they are law-abiding, despite their previous convictions.

Other states allow ex-felons to request hearings to restore their gun rights after a certain number of years have passed since their sentence was completed.¹⁵⁸ These hearings give the opportunity for ex-felons to “prove” that they are now nonviolent and law-abiding citizens despite their previous convictions.¹⁵⁹ These statutes have an obvious safety advantage over statutes that automatically restore the right within a certain number of years because the hearings allow the opportunity for both the ex-felon and the state to present evidence regarding possible dangerous tendencies even if there have been no subsequent charges against the individual.¹⁶⁰ If properly executed, these hearings can ensure that dangerous persons are not permitted to possess firearms, regardless of how long ago they were convicted of a crime, instead of making broad generalization about the dangerousness of particular types of felons. Realistically, the procedural requirements for these hearings are not always a difficult obstacle in the path to firearm possession.¹⁶¹ Provided that the hearings are reasonably restrictive, hearings may be the best alternative to ensure dangerous felons are not able to possess weapons without unduly burdening the right to bear arms of all ex-felons regardless of dangerousness.

The question remains, however, whether these statutory solutions would rely too heavily on an interest-balancing test to be upheld—exactly the sort of test that *Heller* dismisses as inappropriate for individual rights.¹⁶²

¹⁵⁸ WASH. REV. CODE § 9.41.040 (West, Westlaw through all 2010 legislation).

¹⁵⁹ See Matthew R. Kite, *State v. Radan: Upsetting the Balance of Public Safety and the Right to Bear Arms*, 37 GONZ. L. REV. 201, 211 (2001).

¹⁶⁰ *Id.*

¹⁶¹ See *id.* The ex-felon in *State v. Radan* committed a felony in Montana and moved to Washington after release. The Court held that while Montana’s automatic restoration of plaintiff’s civil rights did not meet the hearing requirement under Washington statute, the “facts of a felon’s early discharge from parole, accompanied by an automatic restorations of rights, meets the statute’s meaning of an ‘other equivalent procedure,’ thus restoring a felon’s right to possess firearms in Washington, without actually going through the hearing process.” *Id.* at 202 (citing *State v. Radan*, 21 P.3d 255, 261 (2001)).

¹⁶² *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2009) (“[N]o other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).

Thus far, however, even the North Carolina courts have refused to entirely eliminate the interest-balancing test.¹⁶³

A final option would be to leave the statutes as they are, under an assumption that Mr. Britt's case is a rarity, and allow courts to deal with plaintiffs on a case-by-case basis. Yet such a decision ignores the likelihood that there are and will continue to be plaintiffs similar to Mr. Britt who cannot be shown to be dangerous. If the statutes are not revised and there are enough Britt-like plaintiffs, the statutes may be in danger of eventually being overturned.

VII. CONCLUSION

Whether or not more jurisdictions will continue to judicially eat away at felon firearm restrictions is yet to be seen, but *Britt v. State* shows that many current state firearm restrictions likely will no longer be considered constitutionally viable in the wake of *Heller* and *McDonald*.

Going forward, it will be important for state legislatures to continue to consider the implications of the Supreme Court's recent decision in *McDonald*.¹⁶⁴ Even if the Court continues to suggest felon firearm statutes are valid despite the incorporation of the Second Amendment against the states, it will be difficult to prevent additional states from finding as the *Britt* court did.

Unless the Court—and the country—retreat from the opinion that Americans have an individual right to bear arms, laws preventing felons from possessing firearms will be challenged and potentially stripped away. According to the majority in *Heller*, the right to bear arms cannot at once be inalienable and subject to restrictions.¹⁶⁵ Legislatures must act to ensure that firearm restrictions remain valid to keep firearms out of the hands of only those who are most likely to misuse them.

¹⁶³ *State v. Whitaker*, 689 S.E.2d 395 (N.C. Ct. App. 2009).

¹⁶⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

¹⁶⁵ *Heller*, 128 S. Ct. at 2821.