THE FIREARM OWNERS' PROTECTION ACT AND THE RESTORATION OF FELONS' RIGHT TO POSSESS FIREARMS: CONGRESSIONAL INTENT VERSUS NOTICE

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Many federal and state statutes affect individuals' right to "keep and bear arms" as guaranteed by the Second Amendment of the United States Constitution. In particular, the Firearm Owners Protection Act ("FOPA") prohibits felons from possessing, receiving, shipping, or transporting firearms or ammunition in interstate or foreign commerce. FOPA does not apply, however, to individuals who have received pardons or a restoration of their civil rights. It also exempts felons whose convictions have been expunged or set aside. These exceptions apply as long as such pardon, expungement, or restoration of civil rights fails to expressly provide that the individual may not ship, possess, or receive firearms or ammunition.

Although commentators do not significantly dispute FOPA's broad restriction on felons' Second Amendment right to "keep and bear arms," FOPA's other provisions have given rise to a federal circuit court split regarding whether a pardon, expungement, or restoration reinstates the entirety of a former felon's civil rights when an applicable state law provides that felons may not possess firearms or ammunition. The author begins by outlining the background of the Second Amendment, FOPA's statutory precursors, and FOPA's basic framework for restoring a former felon's firearm privileges. Next, the author uses these concepts to analyze two inconsistencies in circuit courts' application of FOPA: (1) the effect of a state's reinstatement of a former felon's civil rights by certificate or other document when the state otherwise forbids the felon from possessing firearms (the "active restoration" split), and (2) the implications of a state's provision for automatic reinstatement of a former felon's civil rights when the state also prohibits felons from possessing firearms (the "passive restoration" split). The author then scrutinizes whether and at what point courts should invoke the rule of lenity used in statutory construction to resolve these issues. After concluding that a singular em-

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phasis on either due process notice concerns or legislative intent would prove an inadequate mechanism for protecting state autonomy and felons' due process rights, the author recommends that states be required to proactively inform felons of their rights before releasing them into society. Specifically, the author suggests that states conduct informational meetings in which law enforcement officials inform probationers of gun possession laws and how prosecutors charge felons who possess firearms. This solution would fulfill the dual objectives of providing felons with notice of their rights and permitting states to determine whether a felon is fit to possess firearms.

I. INTRODUCTION

"The great object is, that every man be armed. . . . Every one Who [sic] is able may have a gun."[1] Although Patrick Henry's words are over 200 years old, they remain relevant in the ongoing debate concerning who "may have a gun." Most Americans know that the right to "keep and bear arms" is memorialized in the Second Amendment of the United States Constitution,[2] but many fail to realize that this right is not absolute. In fact, the first restriction on firearm possession surfaced just forty-five years after the ratification of the Bill of Rights in 1791, and such regulations were commonplace by the early twentieth century.[3]

One such regulation, and the one most relevant to this note, is the Firearm Owners' Protection Act ("FOPA").[4] FOPA prohibits any person who "has been convicted . . . of a crime punishable for a term exceeding one year" from possessing, receiving, shipping, or transporting any firearm or ammunition which has affected or touched interstate or foreign commerce.[5] The statute, however, exempts those who have been pardoned or had their civil rights restored, along with those who have had their conviction expunged or set aside.[6] The exception applies "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, possess, or receive firearms."[7]

This note strives to resolve the split among various federal circuit courts concerning whether a former felon, as defined by the statute, is exempted if his pardon, expungement, or restoration reinstates all of his civil rights, without exception, when a separate law in that state expressly

1. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (Jonathan Elliot ed., 2d ed. 1836), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed00351)) (quoting Patrick Henry on the importance of an armed militia).

2. U.S. CONST. amend. II.

3. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 589 (1987).

4. Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended in scattered sections of 18 U.S.C.).

5. 18 U.S.C. § 922(g)(1) (2000).

6. *Id.* § 921(a)(20).

7. *Id.*

provides that felons may not possess firearms. Problems often arise when a convicted felon, recently released from prison with his civil rights "completely restored," purchases a firearm for a lawful purpose such as hunting. That person could potentially face more prison time because, although he received a certificate restoring his rights, a separate state statute expressly prohibits him from possessing firearms due to his previous conviction. Although some circuits would deem this a due process violation for lack of notice, others interpret the statute as requiring such a result. Part II begins with a brief discussion of the Second Amendment and continues with an analysis of the case law and statutory construction of the Gun Control Act of 1968, the defect-ridden predecessor to FOPA. Part II goes on to explore the background, judicial interpretations, and pertinent provisions of FOPA. Part III begins with an assessment of the arguments in support of and against looking to the whole of a state's statutory law to determine whether a felon is prohibited from possessing firearms despite what his pardon, expungement, or restoration may indicate. This section continues by discussing the applicability of the rule of lenity and how each side of the circuit split views the rule and its proper place in constructing statutes such as FOPA. Finally, Part IV proposes a resolution to the circuit split that seeks to protect the defendant's rights without unduly burdening Congress's intent to keep firearms out of dangerous hands.

II. BACKGROUND

Before analyzing the circuit split regarding the restoration of a felon's firearm privileges, the reader must understand the laws and judicial decisions that gave rise to the current dispute. Because most people immediately think of the Second Amendment when faced with the issue of firearm rights, this Part begins with an exploration of the Amendment's history and purpose and continues with a discussion of the various interpretations of its meaning.[8] It then discusses the Gun Control Act of 1968, the precursor to FOPA. This brief analysis of the act's history, some of its provisions relevant to this note, and the various discrepancies, defects, and abuses which led to the passage of FOPA allows the reader to better grasp the intricacies behind the present day circuit split. Finally, this Part provides vital background concerning FOPA's provisions and how the act's ambiguities contribute to the ongoing debate over the restoration of a former felon's firearm privileges.

8. This note will not focus on the Second Amendment, its interpretations, or the case law surrounding it. However, it remains important to briefly discuss the background of the amendment and its interpretations to better understand what restrictions on the right to keep and bear arms are permitted by the Second Amendment.

A. The Second Amendment

"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."[9] Some scholars believe that including the Second Amendment in the Bill of Rights was the key to securing the ratification of the Constitution.[10] The states placed such a high value on the Second Amendment in part because the country was young enough to remember the success of the militia in defeating the English during the Revolutionary War. In fact, the Anti-Federalists, those opposed to the ratification of the Constitution, feared that the national government would use its standing army as a "trump card in any contest between local and national power."[11] Those fearing the national government's expansive powers, and its potential for abuse, viewed the militia as a significant counterweight to the national army.[12] Therefore, the drafters of the Bill of Rights created the Second Amendment and, with it, the ongoing debate as to the proper interpretation of those twenty-seven words.

Despite the disagreement over its proper meaning and scope, the United States Supreme Court has yet to offer any definitive interpretation of the Second Amendment. Surprisingly, the Supreme Court has only ruled on one Second Amendment challenge to a federal statute.[13] In *United States v. Miller*, the defendants argued that the National Firearms Act inhibited their right to "keep and bear arms" under the Second Amendment.[14] The Court disagreed, holding that the Second Amendment only guarantees the right to keep and bear such instruments that have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[15] The Court refused to find that a twelve gauge shotgun with a barrel less than eighteen inches in length could constitute "any part of the ordinary military equipment or that its use could contribute to the common defense."[16] Although *Miller* may have reinforced the government's ability to regulate the use and possession of firearms, it

9. U.S. CONST. amend. II.

10. John-Peter Lund, Note, *Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?*, 10 TEX. REV. L. & POL. 469, 476–78 (2006) (noting the Anti-Federalists' insistence on the adoption of the Bill of Rights, particularly the Second Amendment).

11. *Id.* at 478.

12. *Id.*

13. *See* United States v. Miller, 307 U.S. 174 (1939). On November 20, 2007, the Supreme Court granted cert to hear the appeal in *Parker v. District of Columbia*. The Court will determine whether the District of Columbia's law banning private handgun ownership and requiring that rifles and shotguns kept in private homes be unloaded and disassembled or locked violates the Second Amendment. Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *cert granted in part*, District of Columbia v. Heller, 128 S. Ct. 645 (2007). Although this case does not reflect a Second Amendment challenge to a federal statute as in *Miller*, the ruling will clarify the Court's position on whether the Second Amendment guarantees apply only to those involved in militias or more expansively to all individuals regardless of their involvement in the state militia. *See infra* notes 17–30 and accompanying text.

14. *Miller*, 307 U.S. at 176.

15. *Id.* at 178.

16. *Id.*

did little to clear up the ambiguity concerning the appropriate interpretation of the Second Amendment.

Even after *Miller*, lower courts, scholars, lobbying groups, and others hotly debate whether the Second Amendment provides the right to keep and bear arms to individuals or rather, more generally, only to those involved in the militias. Proponents of the collective rights approach, those believing that the amendment only safeguards the rights of states to create militias, point to the language at the beginning of the amendment, in addition to the holding of *Miller*, to support their view.[17] They argue that the language of the phrase "a well regulated militia, being necessary to the security of a free state"[18] supports the proposition that the Second Amendment only protects the rights of states to arm their militias.[19] Many courts have adopted this reading of *Miller*, adding to the potency of the collective rights proponents' argument.[20]

Individual rights theorists disagree. They point to the latter half of the amendment that states "the right of the people to keep and bear arms shall not be infringed."[21] Those supporting the individual rights theory respond to their critics' textual argument by noting that the reference to the "militia" in the amendment is simply a justification for the individual's right to keep and bear arms.[22] Moreover, individual rights theorists argue that *Miller* is too often interpreted as supporting the collective rights argument.[23] Rather, they argue, *Miller* "is better read as stating that . . . ownership and carry of weapons which are suitable for militia use is [sic] protected by the Second Amendment."[24] Individual rights theory supporters also point to numerous court decisions[25] as well as a U.S. Department of Justice memorandum[26] endorsing the individual rights interpretation. Although nine circuit courts support the collective rights approach, the individual rights movement is beginning to gather

17. Michael T. O'Donnell, Note, *The Second Amendment: A Study of Recent Trends*, 25 U. RICH. L. REV. 501, 504–05 (1991).

18. U.S. CONST. amend. II.

19. O'Donnell, *supra* note 17, at 505.

20. *See, e.g.*, United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) ("[T]he Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'" (quoting United States v. Miller, 307 U.S. 174, 174 (1939))).

21. U.S. CONST. amend. II; *see* O'Donnell, *supra* note 17, at 503.

22. O'Donnell, *supra* note 17, at 503.

23. Lund, *supra* note 10, at 490.

24. *Id.*

25. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 229 (5th Cir. 2001) (holding that it is "clear that 'the people,' as used in the Constitution, including the Second Amendment, refers to individual Americans").

26. Memorandum Opinion, U.S. Dep't of Justice Office of Legal Counsel, Whether the Second Amendment Secures an Individual Right (Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf.

momentum.[27] In fact, on March 9, 2007, the U.S Court of Appeals for the District of Columbia Circuit became the most recent federal circuit court to hold that "the Second Amendment protects an individual right to keep and bear arms" and that "an individual's enjoyment of th[at] right [is not] contingent upon his or her continued intermittent enrollment in the militia."[28]

While the debate between individual rights and collective rights theories continues, a third group of scholars has suggested a compromise in the form of a "qualified individual right."[29] The advocates of this theory interpret *Miller* as "recogniz[ing] the right of individuals to possess firearms, but creat[ing] the limitation that the firearms must serve the collective purpose" of the militia.[30] However, until the Supreme Court clarifies the issue of the appropriate construction of the Second Amendment, the courts remain divided on the proper theory to apply when defining its scope.

Although the individual rights approach certainly would benefit the argument that a firearm regulation such as FOPA is unconstitutional, those opposing the regulation of the right to keep and bear firearms have other barriers to overcome. Indeed, "[i]t has been a longstanding position of courts throughout the United States that the Second Amendment is not a bar to congressional regulation of the use and possession of firearms."[31] Those convicted of a felony face an even greater hurdle in their efforts to challenge the constitutionality of firearm regulations because the Supreme Court has repeatedly recognized that Congress may constitutionally prohibit a convicted felon from possessing firearms.[32] Thus, it becomes evident that no matter what interpretation of the Second Amendment is employed, courts may refuse to invalidate laws seeking to regulate felons' possession of firearms on Second Amendment grounds.

B. The Gun Control Act of 1968

Before studying and analyzing the relevant provisions and interpretations of FOPA, it is necessary to first understand its predecessor, the Gun Control Act of 1968 ("Gun Control Act").[33] The Gun Control Act was passed in the wake of a number of highly publicized and violent gun

27. Adam Liptak, *A Liberal Case for Gun Rights Helps Sway Judiciary*, N.Y. TIMES, May 7, 2007, at A18 (noting that over the last twenty years, several leading liberal law professors "have come to embrace the view that the Second Amendment protects and individual right to own guns").

28. Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007), *cert granted in part*, District of Columbia v. Heller, 128 S. Ct. 645 (2007).

29. Lund, *supra* note 10, at 505.

30. O'Donnell, *supra* note 17, at 509.

31. Stephen S. Cook, *Selected Constitutional Questions Regarding Federal Offender Supervision*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 5 (1997).

32. *See* Lewis v. United States, 445 U.S. 55, 66 (1980); *see also* Rice v. United States, 68 F.3d 702, 710 (3d Cir. 1995) (noting that the "Supreme Court has held that the right to possess a firearm after a disabling conviction is a privilege, not a right").

33. Gun Control Act of 1968, 18 U.S.C. §§ 921–998 (2000).

crimes, including the assassinations of President John F. Kennedy, Robert F. Kennedy, Dr. Martin Luther King, Jr., and Medgar Evers.[34] To add to this disturbing fact, reports show that prior to the act's creation, firearms were used in fifty-eight percent of robberies, thirty percent of homicides, and twenty percent of assaults each year.[35] In response to these alarming events and statistics, President Johnson called upon Congress to adopt stricter gun control laws during his 1968 State of the Union Address.[36] Congress responded by passing the Gun Control Act of 1968, a law designed to "provid[e] support to Federal, State, and local law enforcement officials in their fight against crime and violence."[37]

1. Relevant Provisions

Today, the Gun Control Act refers to Title IV[38] and Title VII[39] of the Omnibus Crime Control and Safe Streets Act. Both provisions dealt with a wide range of issues concerning firearm regulation. For the purposes of this note, this section will only provide background on those provisions relevant to the possession, receipt, shipment, and transportation of firearms by persons convicted of felonies. Although there is much overlap and many similarities between the coverage of the two titles, it remains important to understand their differences in order to understand the faults in the Gun Control Act that led to the creation of FOPA.

a. Title IV: State Firearms Control Assistance

Although much of Title IV focused on creating a more comprehensive and effective licensing system for firearms, the provision also sought to prohibit the possession of firearms by those who Congress deemed dangerous to society.[40] Title IV prohibited "any person who is under indictment or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, or who is a fugitive from

34. Hardy, *supra* note 3, at 601–02; Lynn Murtha & Suzanne L. Smith, "*An Ounce of Prevention . . .": Restriction Versus Proaction In American Gun Violence Policies*, 10 ST. JOHN'S J. LEGAL COMMENT. 205, 210–11 (1994).

35. H.R. Rep. No. 90-1577, at 19 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 4410, 4425. "Statistics indicate that 50 lives are destroyed by firearms each day. In the 13 months ending in September 1967 guns were involved in more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500 aggravated assaults, and 50,000 robberies." *Id.* at 7, *as reprinted in* 1968 U.S.C.C.A.N. at 4413.

36. Hardy, *supra* note 3, at 597 n.69.

37. Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213 (1968) (prior to 1986 amendment).

38. 18 U.S.C. §§ 921–927, *amended by* Firearm Owner's Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

39. 18 U.S.C. app. § 1202 (1982), *repealed by* Firearm Owner's Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

40. United States v. Lewis, 445 U.S. 55, 67 (1980) (noting "Congress' [sic] judgment that a convicted felon . . . is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness").

justice" from shipping, transporting in, or receiving "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[41] The statute stipulated a fine of no more than five thousand dollars or a prison term of no more than five years for violators of its provisions.[42]

The prohibitions found in Title IV are not absolute. Title IV allowed "a person convicted of a crime punishable by imprisonment for a term exceeding one year . . . [to apply] to the Secretary [of the United States Treasury] for relief from the disabilities . . . incurred by reason of such conviction."[43] The Secretary would grant relief from disability upon a showing that the applicant would not use the firearm in "an unlawful manner, and that the granting of relief would not be contrary to the public interest."[44] Thus, Title IV required a person previously convicted of a crime punishable by a prison term of more than one year to proactively seek and receive permission from the Secretary of the Treasury before once again shipping, transporting, or receiving a firearm.

b. Title VII: Unlawful Possession or Receipt of Firearms

Unlike Title IV, Title VII was more narrow and specific in its coverage and in the class of individuals it prohibited from receiving, possessing, or transporting firearms. In Title VII, Congress proscribed "the receipt, *possession*, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship."[45] Title VII also differed from Title IV in the applicable penalty, imposing a fine of no more than ten thousand dollars or a prison term not more than two years for a violation.[46]

In addition to the differences in coverage and penalty provisions, Title VII disability exemptions differed from Title IV counterparts. Firearm disabilities only became eradicated upon "*pardon*[] by the President of the United States or the chief executive of a State *and*" an express authorization by the President of the United States or the state chief executive to once again receive, possess, or transport a firearm in commerce.[47] Therefore, not only must the felon receive a pardon from either the President or the governor of his state, but that pardon must expressly indicate that the firearms restrictions are to be removed.

41. 18 U.S.C. § 922(e)–(f) (1968) (amended 1986).
42. *Id.* § 924(a)(1).
43. *Id.* § 925(c).
44. *Id.*
45. 18 U.S.C. app. §§ 1201–1202 (1982) (repealed 1986) (emphasis added).
46. *Id.* § 1202(a).
47. *Id.* § 1203(2) (emphases added).

2. *Discrepancies and Defects in the Law*

After analyzing the two titles, the ambiguities and discrepancies between them become increasingly clear.[48] Not only did the specific prohibited acts vary between titles,[49] but the classes prohibited from committing those acts also differed depending on which title the courts applied. In addition, as previously mentioned, the two titles diverged on the procedures whereby a person could have his firearm rights restored.

These inconsistencies are relevant given the fact that when both titles were applied, the government could invoke either at its option.[50] Consider what happens when a person, formally convicted of a crime punishable for more than one year, successfully applies for and receives relief from the Secretary of the Treasury for the firearm disabilities he incurred because of the former conviction. Pursuant to Title IV, this person may now ship, transport, and receive firearms in interstate or foreign commerce.[51] Nevertheless, in light of the ruling in *Ball v. United States*, the government could prosecute the same person for possession of a firearm under Title VII since they failed to obtain a pardon by the President or a governor with express authorization to "possess" a firearm.[52]

3. *Abuses*

Due to its many structural imperfections, the Gun Control Act was susceptible to abusive enforcement. During the time prior to its enactment, the Bureau of Alcohol, Tobacco and Firearms ("BATF") had quickly grown into a powerful and successful enforcement agency with a strong focus on regulating alcohol.[53] Accordingly, upon ratification of the Gun Control Act, Congress delegated its enforcement responsibilities to BATF.[54] By the early 1970s, however, the enforcement of alcohol taxes was no longer as great a concern.[55]

48. *Cf.* Scarborough v. United States, 431 U.S. 563, 569–70 (noting that Title VII "is not the product of model legislative deliberation or draftsmanship" but, instead, "a last-minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings").

49. *Compare* 18 U.S.C. § 922(e)–(f) (1968) (amended 1986) (prohibiting the shipment, transport, or receipt of firearms that have affected commerce), *with* 18 U.S.C. app. § 1202(a) (1982) (repealed 1986) (proscribing the receipt, possession, or transportation in commerce of firearms).

50. Ball v. United States, 470 U.S. 856, 859 (1985) (noting that a "convicted felon may be prosecuted simultaneously for violations of [Title IV and Title VII] involving the same firearm").

51. *See* 18 U.S.C. § 925(c) (1968) (amended 1986).

52. *See supra* note 50 and accompanying text. The inverse of this question was asked of the Seventh Circuit in *Thrall v. Wolfe.* The court held that, although the gubernatorial pardon rendered Title VII inapplicable, such pardon did not remove the disabilities imposed under Title IV. Thrall v. Wolfe, 503 F.2d 313, 316 (7th Cir. 1974). As will be discussed below, FOPA sought to remedy these confusing inconsistencies.

53. DAVID T. HARDY, THE BATF'S WAR ON CIVIL LIBERTIES: THE ASSAULT ON GUN OWNERS 7 (1979).

54. *Id.*

55. Hardy, *supra* note 3, at 604–05 n.108 (discussing how the substantially increased price of sugar in the 1970s made the illegal manufacture of alcohol ("moonshine") virtually unprofitable).

To fill the vacuum left by the fact that "[a]lmost forty percent of BATF's manpower was directed at a law enforcement problem that had all but vanished," BATF began to focus heavily on enforcing the Gun Control Act.[56] The agency's eagerness to prove itself led to "pressure for results [which, when] coupled with extremely loose control, led to stringent enforcement of the Gun Control Act's provisions."[57] In fact, testimony in the Senate Judiciary Committee prior to FOPA's enactment revealed that "enforcement of the act's restrictions ha[d] resulted in infringements of basic individual liberties, such as abusive search and seizure practices and unwarranted prosecutions for mere technical violations of the law."[58] The Senate Judiciary Committee also heard testimony indicating that "the enforcement tactics made possible by the current firearms laws [were] constitutionally, legally, and practically reprehensible."[59] Despite these abuses and ambiguously drafted provisions, Congress did not act to change the Gun Control Act, and BATF continued to enforce its provisions.

4. Dickerson v. New Banner Institute

Although the poor draftsmanship and enforcement abuses did not provoke Congress to act, the holding handed down in *Dickerson v. New Banner Institute, Inc.*[60] may have been the final straw necessary to motivate Congress to action. In 1974, David Kennison, the director and chairman of the board of New Banner Institute, pled guilty to carrying a concealed handgun in the state of Iowa, a crime punishable by imprisonment of no more than five years.[61] The state deferred Kennison's sentence pursuant to an Iowa state statute and, upon completion of his probation term in 1976, his record was expunged.[62] When Kennison's company applied for a firearms and ammunition dealer's license later that year, the agency refused to issue a license upon learning of Kennison's past weapons charge and guilty plea.[63]

56. *Id.* at 604–05.

57. *Id.* at 605.

58. 131 CONG. REC. 13, 18167 (1985) (statement of Sen. Laxalt); *see also* United States v. Biswell, 406 U.S. 311, 316 (1972) (finding that "if the [Gun Control Act] is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment" and that "if inspection is to be effective . . . unannounced, even frequent, inspections are essential").

59. S. SUBCOMM. ON THE CONSTITUTION, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS 20 (Comm. Print 1982).

60. 460 U.S. 103 (1983).

61. *Id.* at 103.

62. *Id.* at 107–08.

63. *Id.* at 108–09. Title IV prohibits a corporation from transporting, shipping, or receiving firearms or ammunition if "any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation" is under the prohibitions imposed by § 922(f), (g). 18 U.S.C. § 923(d)(1)(B)(2000).

On appeal, the Fourth Circuit reversed the district court's verdict in favor of the government.[64] The circuit court found that, although Kennison's guilty plea in 1974 constituted a "crime punishable by imprisonment for a term exceeding one year,"[65] the plea could not serve as a predicate offense for the Gun Control Act.[66] The Fourth Circuit held that the expungement of Kennison's record effectively removed his firearm disabilities.[67]

On appeal, the Supreme Court began its analysis by deciding whether Kennison was "convicted" as defined by Title IV.[68] The Court focused on the language of the statute and concluded that the fact that Kennison did not actually serve a prison sentence was irrelevant.[69] Since the Iowa state court could not have placed Kennison on probation without deeming him guilty of a crime, and since that crime was "*punishable* by imprisonment for a term exceeding one year,"[70] the Court easily found that Kennison's 1974 offense constituted a disabling conviction.[71]

The Supreme Court next decided whether the state expunction of Kennison's 1974 offense nevertheless served to nullify the conviction for purposes of the Gun Control Act. Citing the need for "national uniformity unaffected by varying state laws [and] procedures,"[72] the Court held that, unlike the procedure outlined in § 925(c), "expunction under state law does not alter the historical fact of the conviction"[73] and would not act to remove federal firearm disabilities. The Court believed that giving effect to state expunctions would impair the application of the Gun Control Act and thus impede Congress's intent to keep guns away from those who had proven that they could not be trusted with them.[74] Thus, after *Dickerson*, once a state conviction triggered firearm disabilities under the Gun Control Act, the state's postconviction expunction would fall short of removing the firearm disabilities incurred from the original state conviction.[75]

64. New Banner Inst., Inc. v. Dickerson, 649 F.2d 216, 217 (4th Cir. 1981).

65. 18 U.S.C. § 922(e) (1968) (amended 1986).

66. *Dickerson*, 649 F.2d at 221.

67. *Id.*

68. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 111 (1983).

69. *Id.* at 113.

70. 18 U.S.C. § 922(e) (1968) (amended 1986) (emphasis added).

71. *Dickerson*, 460 U.S. at 113–14 (citing United States v. Woods, 696 F.2d 556, 570 (8th Cir. 1982) ("[O]nce guilt has been established whether by plea or by verdict and nothing remains to be done except pass the sentence, the defendant has been convicted within the intendment of Congress.")).

72. *Id.* at 112. The Court noted that "Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms." *Id.* at 120.

73. *Id.* at 115.

74. *Id.* at 112, 120. The Court noted that "a state expunction typically does not focus upon the question with which Title IV is concerned, namely, whether the convicted person is fit to . . . possess a firearm." *Id.* at 119.

75. *Id.* at 120.

C. The Firearm Owners' Protection Act

On May 19, 1986, the first thorough redraft of the federal firearms law since the Gun Control Act of 1968 was signed into law.[76] As its name suggests, the Firearm Owner's Protection Act was considered a victory by those who had perceived national firearms laws as lacking fairness and clarity.[77] In enacting FOPA, Congress found that "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution . . . require[d] additional legislation to correct existing firearms statutes and enforcement policies."[78] Congress also sought to reaffirm that its objective was not to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . [or] to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."[79] Consequently, as evidenced by the relevant congressional findings, Congress enacted FOPA to correct the inequities and inconsistencies that stemmed from the poor drafting of the Gun Control Act.

1. Relevant Provisions

Congress removed many of the disparities between the prohibited classes in Title IV and Title VII by repealing Title VII and incorporating its prohibited person categories into Title IV.[80] As a result, FOPA demands that any person "who has been convicted . . . [of] a crime punishable by imprisonment for a term exceeding one year" shall not "ship or transport in interstate or foreign commerce, or possess . . . any firearm or ammunition" or "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[81] FOPA essentially becomes a hybrid of Title IV and Title VII in its penalty provision, indicating that a knowing violation of the above section results in a fine or prison sentence of no more than ten years.[82]

FOPA also amended the way in which one may remove the firearm disabilities incurred by reason of a prior conviction. In addition to applying for and receiving permission from the Secretary of the Treasury,[83] FOPA also permits state expunctions, pardons, or other civil rights resto-

76. Hardy, s*upra* note 3, at 585.
77. *Id.*
78. Pub. L. No. 99-308, § 1(b)(1), 100 Stat. 449, 449 (1986).
79. *Id.* § 1(b)(2).
80. *Id.* §§ 102(6)–(7), 104(b).
81. 18 U.S.C. § 922(g)(1) (2000 & Supp. IV 2004).
82. *Id.* § 924(a)(2).
83. *Id.* § 923(c). The Secretary of the Treasury has now delegated his authority under § 925(c) to the director of the Bureau of Alcohol, Tobacco and Firearms. *See* 27 C.F.R. § 178.144 (2002).

rations to remove the disabling effects of a prior conviction unless they expressly provide otherwise.[84]

2. *FOPA's Effects*

In addition to reestablishing uniformity and clarity regarding the Gun Control Act's prohibitions, covered classes, exceptions, and penalties, FOPA also ran counter to six Supreme Court precedents, including *Dickerson*.[85] Congress's express provision allowing state expunctions to cure firearm disabilities illustrates its intent to "eliminate the disabling effect of a felony conviction when the state of conviction has made certain determinations, embodied in state law, regarding a released felon's civil rights and firearms privileges."[86] FOPA also corrected other injustices and defects prevalent in the enforcement of the prior version of the Gun Control Act. For example, FOPA seeks to curb the abusive warrantless searches held valid under *United States v. Biswell*[87] by requiring reasonable cause accompanied by a warrant for such searches.[88] Despite Congress's notable efforts to cure the Gun Control Act of its shortcomings and what many viewed as unjust judicial interpretations, FOPA contains imperfections of its own, leading to some inconsistent interpretations among the circuit courts.

III. ANALYSIS

Congress passed FOPA in an effort to cure some of the ambiguities and shortcomings prevalent in previous gun laws. Unfortunately, however, several more defects were instantly produced, one of which concerns the restoration of a felon's right to posses and bear arms pursuant to § 921(a)(20). Currently, there are two ongoing disagreements among the federal circuit courts regarding this provision. The first split concerns the procedure whereby the state sends the former felon a certificate or other document restoring his civil rights, but elsewhere, typically in one

84. 18 U.S.C. § 921(a)(20). The statutory language 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.

85. *See* Hardy, *supra* note 3, at 641.

86. United States v. Cassidy, 899 F.2d 543, 546 (6th Cir. 1990). *But see* Beecham v. United States, 511 U.S. 368, 471 (1994) (holding that a state's restoration of a convicted felon's civil rights does not remove firearm disabilities imposed as a result of a federal conviction). Many lower courts continue to give Dickerson precedential value with regard to matters not covered by FOPA. These courts hold that in the absence of a statute providing otherwise, federal authorities are not bound by state expungement orders. James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 100–01 (1992).

87. 406 U.S. 311 (1972); *see supra* note 58 and accompanying text.

88. 18 U.S.C. § 923(g)(1)(A).

of the state statutes, forbids the felon from possessing firearms. The second, less remarkable, split pertains to the circumstances in which a state restores a former felon's rights automatically pursuant to state law, but also forbids that felon from possessing weapons in another provision of state law.

This Part begins with an analysis of the first circuit split, the main foundation cases, and the arguments that each side of the debate offers in support of their view. Subsequently, this note analyzes the "passive restoration" circuit split and the different positions taken by the Seventh and Fifth Circuits. Finally, this note discusses the statutory construction rule of lenity and scrutinizes its application to the ongoing dispute regarding § 921(a)(20).

A. The Active and Passive Restoration Circuit Splits

By making "convicted felon" status dependent upon state law and thus expressly overruling the Supreme Court's holding in *Dickerson*, Congress created provisions in FOPA which became susceptible to varying interpretations by the federal circuit courts.[89] One such provision relates to the definition of a "crime punishable by imprisonment for a term exceeding one year":

> What 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.[90]

Some circuits differ in their construction of the last half of the provision beginning with "unless" ("the unless clause"). Problems arise when a felon convicted of a crime punishable by imprisonment for a term exceeding one year is restored his civil rights in one respect, but the convicting state nevertheless prohibits that felon from possessing firearms.

States employ a wide range of practices for restoring felons' civil rights; some restore by statute ("passive restoration"), others issue certificates of restoration to felons after a specified period of time ("active restoration"), and other states restore rights by a combination of statutes or by certificate and statute.[91] With regard to active restoration of felons' civil rights, the circuits disagree as to whether a court must only look to the restoration document for an express limitation of firearm privileges, or whether the court may also consider limitations found in separate

89. United States v. Kolter, 849 F.2d 541, 543 (11th Cir. 1988); S. REP. NO. 98-583, at 7 (1984).
90. 18 U.S.C. § 921(a)(20) (emphasis added).
91. *See* United States v. Bost, 87 F.3d 1333, 1335 (D.C. Cir. 1996).

state statutes. Similarly, with regard to passive restoration, some circuits require any law limiting a felon's firearm rights to be in the same statutory provision as the law seeking to restore the felon's other rights. Other circuits allow the laws to be in completely different parts of the statutory compilations. This section analyzes the various arguments in favor of and opposed to each side of these circuit splits, beginning with the more pervasive split regarding active restoration and proceeding to the debate over passive restoration.

1. Active Restoration by Expunction, Pardon, or Certificate

Federal circuits are currently split as to "whether Congress intended that a court look *only* to the document, if any, tendered to a felon upon release, to determine whether his civil rights have been restored and whether there is an express limitation upon his firearm privileges."[92] The Fourth[93], Sixth,[94] and Tenth[95] Circuits have answered this question in the negative, holding that the express restriction on firearms privileges does not need to be contained in the same statutory provision or in the certificate that restores civil rights. On the contrary, the Fifth,[96] Seventh,[97] Ninth,[98] and District of Columbia[99] Circuits contend that a court may not look beyond the document purporting to restore the felon's civil rights when determining if his firearm privileges are still intact.

a. Looking Beyond the Restoration Document to the Whole of State Law

Those circuits finding that state law provisions banning the possession of firearms by felons operates to trigger the unless clause of § 921(a)(20), despite language to the contrary in the restoration docu-

92. United States v. Cassidy, 899 F.2d 543, 546 (6th Cir. 1990) (emphasis added).

93. United States v. McLean, 904 F.2d 216, 218 (4th Cir. 1990) (indicating that "[r]ather than focusing solely on the language of the certificate," the whole of North Carolina law is to be considered in determining whether a former felon's possession of a firearm violated 18 U.S.C. § 922(g)(1)).

94. *Cassidy*, 899 F.2d at 546.

95. United States v. Burns, 934 F.2d 1157, 1160–61 (10th Cir. 1991) ("Looking to the whole of state law, we conclude defendant was still subject to the firearms disability . . . at the time of his current conviction despite the language in the Certificate of Discharge.").

96. United States v. Chenowith, 459 F.3d 635, 640 (5th Cir. 2006) ("Because the certificate is the source of Chenowith's civil-rights restoration, and because it does *not expressly prohibit* his possessing firearms, the district court erred in denying his motion to dismiss the indictment.").

97. United States v. Glaser, 14 F.3d 1213, 1218 (7th Cir. 1994) ("When the state gives the person a formal notice of the restoration of civil rights, however, the final sentence of § 921(a)(20) instructs us to look, not at the contents of the state's statute books but at the contents of the document.").

98. United States v. Herron, 45 F.3d 340, 342 (9th Cir. 1995) ("One must 'look to the whole of state law' to determine if the restoration is substantial, only where the restoration is by operation of law rather than by certificate or order." (citation omitted)) .

99. United States v. Bost, 87 F.3d 1333, 1336 (D.C. Cir. 1996) ("[I]n order to determine whether a convicted felon falls within the exception described in section 921(a)(20), a court may look no further than the source of the restoration of his civil rights to see whether his gun-related rights have been restored.").

ment, make several convincing arguments based on the intent and purpose of FOPA. This section will begin by analyzing those arguments, especially those made in *United States v. Cassidy*,[100] one of the more seminal cases concerning this dispute. Next, this section will compare these arguments and those made in a recent Supreme Court decision regarding another FOPA circuit split.

i. *United States v. Cassidy* and Its Progeny

Without Calvin Cassidy, it is very likely that this circuit split would not have come to fruition. After being convicted in the state of Ohio on a drug trafficking charge and completing of a prison term in excess of one year, the state provided Cassidy with a "Restoration to Civil Rights" certificate that purported to restore "the rights and privileges forfeited by his conviction."[101] A few years later, Cassidy was indicted for knowingly possessing a firearm despite his previous felony conviction, in violation of 18 U.S.C. § 922(g)(1).[102] Cassidy argued, and the district court agreed, that since the restoration certificate did not expressly limit his firearm privileges, Cassidy did not fall within the statutory definition of a "convicted felon," despite the Ohio statutory provision that prohibits felons from possessing firearms.[103]

The Sixth Circuit Court of Appeals, disagreed.[104] Together with the other courts that agree with its interpretation of § 921(a)(20), the Sixth Circuit justifies its holding by looking beyond the language of the statute to the legislative history and congressional intent behind FOPA.[105] These circuits agree that "a primary concern of Congress was that 'convicted felon' status be determined with reference to state law."[106] In other words, by expressly overruling *Dickerson*, Congress intended that the states determine whether felons should be trusted to possess firearms. If state officials deem the felon capable of possessing a firearm without constituting a danger to others, the federal government would not consider the former convict a "convicted felon" as defined by the statute. If the state did not believe the felon could possess a firearm without presenting a danger to the public at large, then the state could make such a belief known and, thus, make the felon susceptible to federal charges under FOPA if caught in possession of firearms.

100. United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990).
101. *Id.* at 544.
102. *Id.*
103. *Id.* at 545 (OHIO REV. CODE ANN. § 2923.13 (LexisNexis 2006)).
104. *Id.* at 545–46.
105. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.").
106. *Cassidy*, 899 F.2d at 548; *see also* S. Rep. No. 98-583, at 7 (1984) ("Since the federal prohibition is keyed to the state's conviction, state law should govern in these matters.").

Another piece of legislative history that tends to support this reading of the unless clause is a statement by U.S Senator David Durenberger urging Congress to postpone the effective date of FOPA.[107] Senator Durenberger hoped to allow states more time to reconsider their laws regarding felons' ability to possess firearms.[108] While addressing the Senate, he noted that "[t]he ironic, *unintended* side effect of this 'glitch in the gun law' is to turn a law intended to crack down on crime into a law that could abet crime unless [states] change [their] laws regarding civil rights of felons."[109] Thus, Durenberger's statement acknowledges that FOPA interprets state statutes that seek to restrict felons' ability to possess firearms as superseding any restoration document that may have been sent to the felon after the completion of his prison sentence. The Senator's statement recognizes these statutes as examples of how a state may "expressly provide that the person may not ship, transport, possess, or receive firearms."[110] If this were not the case, Senator Durenberger's words would be meaningless because any last minute change in a state's laws would not affect the certificate handed to the felon.

Based on their reading of legislative history, floor debates, and other aspects of FOPA's congressional record, the courts in accord with Senator Durenberger's view reason:

> It would frustrate the intent of Congress to focus solely upon the document transferred to the convict upon release. The intent of Congress, was to give effect to state reforms with respect to the status of an ex-convict. A narrow interpretation requiring that we look only to the document, if any, evidencing a restoration of rights, would frustrate the intent of Congress that we look to the whole of state law, including state law concerning a felon's firearms privileges.[111]

Under this reasoning, whether the state chose to declare its judgment regarding felons' firearms privileges by statutory provision or by certificate upon release from prison would be insignificant. The very fact that the state has made the determination that the felon is too dangerous to possess a weapon is enough to trigger the unless clause of § 921(a)(20).[112]

ii. The All or Nothing Rule

The Supreme Court's recent resolution of another circuit split regarding interpretation of the unless clause found in § 921(a)(20) may lend support to proponents of the *Cassidy* rule of thought. In *Caron v.*

107. 132 CONG. REC. S. 14943 (daily ed. Oct. 3, 1986).
108. *Id.*
109. *Id.* (emphasis added).
110. 18 U.S.C. § 921(a)(20)(2000).
111. *Cassidy*, 899 F.2d at 548.
112. *But see* United States v. Bost, 87 F.3d at 1333, 1337 (D.C. Cir. 1996) (arguing that states' judgments about felons' ability to possess firearms can still be enforced because the state is still "free to arrest, convict, and jail the defendant any time he is found in possession of a firearm in Ohio").

United States,[113] the Supreme Court sought to determine whether a felon's firearms privileges have been effectively restored when the restoring state forbids possession of handguns but permits rifles and shotguns.[114] From its reading of the unless clause, the Court determined that the state could not ban certain weapons while permitting others since "[t]he unless clause looks to the terms of the past restorations alone and does not refer to the weapons at issue."[115] Consequently, according to the court, "[e]ither the restorations forbade possession of 'firearms' and the convictions count for all purposes, or they did not and the convictions count not at all."[116]

After weighing both parties' arguments, the Court found in favor of the government, relying heavily on many of the same arguments made in *Cassidy*. Citing the government's "interest in a single, national, protective policy,"[117] the Court found that once the state "singled out the offender as more dangerous than law-abiding citizens," it was then the federal government's responsibility to use such a "determination to impose its own broader" firearms prohibitions.[118] Accordingly, because the state determined that the felon was too dangerous to possess handguns, he must also be too dangerous to possess rifles and shotguns.

If the Supreme Court is willing to make this argument for the all or nothing rule, it may be safe to assume that it will apply the same reasoning should the current circuit split reach the Court's docket. If the Court was comfortable finding that a partial firearm restriction was enough to constitute a determination that a felon was still "dangerous," it seems that a clear state law forbidding felons from possessing firearms would constitute an even clearer assertion of dangerousness.

b. Looking Only to the Document Restoring Felon's Rights

The most recent addition to the circuit split, and the case that many view as *Cassidy's* counterpart, is *United States v. Chenowith*.[119] In 1974, Charles Chenowith pled guilty to a manslaughter conviction and was sentenced to twelve months and one day in prison.[120] Four years later, however, the state of Ohio issued Chenowith a certificate restoring the rights

113. Caron v. United States, 524 U.S. 308 (1998).

114. *Id.* at 313 ("The question presented is whether the handgun restriction activates the unless clause, making the convictions count under federal law.").

115. *Id.* at 314.

116. *Id.* ("The unless clause is activated if a restoration of civil rights 'expressly provides that the person may not possess . . . firearms . . . . So if the Massachusetts convictions count for some purposes, they count for all and bar possession of all guns."(citation omitted)).

117. *Id.* at 316.

118. *Id.* at 315. "In sum, Massachusetts treats petitioner as too dangerous to trust with handguns, though it accords this right to law abiding citizens. Federal law uses this state finding of dangerousness in forbidding petitioner to have any guns." *Id*. at 316–17.

119. United States v. Chenoweth, 459 F.3d 635 (5th Cir. 2006). Ironically, the government in both *Cassidy* and *Chenowith* claimed that the same Ohio law precluded both men from possessing firearms.

120. *Id.* at 636.

he had forfeited in light of his conviction.[121] In August of 2004, Chenowith was indicted for "knowingly and unlawfully possessing [a] revolver in and affecting interstate or foreign commerce, subsequent to being convicted of a crime punishable by imprisonment for a term exceeding one year."[122] Chenowith contended that his 1974 manslaughter plea could not constitute a felon in possession predicate offense because his civil rights had been unqualifiedly restored without qualification. The district court, noting the existence of an Ohio state law prohibiting felons from possessing firearms, followed the holding in *Cassidy* and ruled in favor of the government; the Fifth Circuit reversed.[123]

Unlike the other side of the circuit debate, circuits that refuse to look beyond the restoring document focus their attention on the express language of the statute.[124] These courts often cite the common rule of statutory construction that a resort to the legislative history is unwarranted when the plain meaning of the statute is clear and unambiguous.[125] Judges often criticize other circuits' use of legislative history in this context as "manufactur[ing] ambiguity in order to defeat [Congress's expressed] intent."[126] In dissecting and interpreting the literal, express language of the unless clause,[127] the Ninth Circuit found the language quite clear: "By [the word] 'such,' Congress tells us what to read in order to determine whether the felon's civil rights restoration made an exception for firearms. The words 'expressly provides' tell us what to look for."[128] In other words, Congress's express, chosen language instructs courts to look *only* at the "pardon, expungement, or restoration of civil rights" for any indication "that the person may not ship, transport, possess, or receive firearms."[129]

Another textual argument these courts often make is based on fairness to the felon. Courts believe that this literal interpretation is more equitable than the alternative approach because it requires the states to give the felon fair notice if his restoration of civil rights makes an excep-

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, *id.* at 639, 640 ("[W]e may look no further than the source of the restoration of civil rights to see whether gun-related rights have been restricted. . . . Because the certificate is the source of Chenowith's civil rights restoration and because it does not *expressly prohibit* his possessing firearms, the district court erred in denying his motion to dismiss his indictment." (emphasis in original) (citation omitted)).

125. *See* United States v. Gomez, 911 F.2d 219, 221 (9th Cir. 1990).

126. *Id*. (citing Bifulco v. United States, 447 U.S. 381, 387 (1980)).

127. *See* 18 U.S.C. § 921(a)(20) (2000). The unless clause states "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.*

128. United States v. Herron, 45 F.3d 340, 343 (9th Cir. 1995).

129. 18 U.S.C. § 921(a)(20) (2000).

tion for firearm privileges.[130] The most cited expression of this argument is often entitled the "anti-mouse trapping rule"[131]:

> If the state sends the felon a piece of paper implying that he is no longer "convicted" and that all civil rights have been restored, a reservation in a corner of the state's penal code can not be the basis of a federal prosecution. A state must tell the felon point blank that weapons are not kosher. The final sentence of 921(a)(20) cannot logically mean that the state may dole out an apparently unconditional restoration of rights yet be silent so long as any musty statute withholds the right to carry guns.[132]

These circuits believe that any other reading of the statute would create due process concerns by effectively allowing the federal government to convict the felon on the basis that the state misinformed him.[133]

2. Passive Restoration by Statute

Although not as commonly discussed or debated among the circuits, the second branch of this circuit split concerns when a state automatically restores the felon's civil rights by statute but still prohibits that felon from possessing firearms by way of other state statutes. Though it may be obvious how courts like the *Cassidy* court would decide such an issue, one may be surprised to realize that circuits who staunchly oppose the *Cassidy* interpretation for active restoration tend to agree regarding the passive restoration branch of the debate.[134]

a. Restriction Anywhere in the State's Statute Books Sufficient to Exclude Felon from Possessing Firearms

The majority of courts in the federal system are of the opinion that when the state automatically restores a felon's civil rights by statute, a statute found anywhere in the state's statute books will constitute an "express" restriction on the felon's firearm rights and thus trigger the unless clause of § 921(a)(20).[135] The most significant rationale for this view is that because there is no potential for unfairness or violations of

130. *Herron*, 45 F.3d at 343.

131. United States v. Erwin, 902 F.2d 510, 512 (7th Cir. 1990).

132. *Id.* at 512–13.

133. *See Herron*, 45 F.3d at 342. Some courts counter this argument by noting that "the general rule has always been that persons are presumed to know the law applicable to their affairs, so that every document need not have a law school lecture in order to explain all the possible legal nuances." United States v. Swanson, 753 F. Supp. 338, 344 (N.D. Ala. 1990).

134. *See Erwin*, 902 F.2d at 512–13.

135. *See id.*

> The language is no less "express" when codified elsewhere. "Codification" in Illinois, as in most other states, is a misleading term. West Publishing Company rather than the state of Illinois arranges the session laws to form a "code." Whether an employee of West or an officer of the legislature decided that the text of [the statute] would appear where it does is unimportant in the end. The state's law is "express" notice of its contents.

Id. at 513.

due process, the "mouse-trapping"[136] problem is not implicated: "When the state sends no document granting pardon or restoring rights, there is no potential for deception and the question becomes whether the particular civil right to carry guns has been restored by law."[137] Thus, because the potential for unfairness only exists when states actively restore felons' civil rights, most courts seem much more lenient and pro-government when issues regarding passive restoration arise.[138]

b. Restriction Must Be Within the Same Statutory Provision as Restoration of Rights

A minority of courts disagree with the holding in *Erwin* that language restricting the felon's right to possess firearms is no less express when codified in a different part of the state's statutes than the restoration.[139] Even absent the due process concerns discussed earlier, these courts find *Erwin's* "expansive reasoning difficult to square with that unambiguous language of § 921(a)(20)," which requires the restriction to be "express."[140] Though perhaps their conclusion is questionable, these courts believe that they must follow the text of the statute as Congress wrote it, thus requiring states wishing to prohibit felons from possessing firearms to include such a statutory provision along side any provision restoring felons' civil rights.

B. The Rule of Lenity and Due Process Concerns

"A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*."[141] The rule of lenity requires strict construction of penal statutes when enforcing the meaning of the statute would not give reasonable notice and would constitute a denial of due process.[142] This rule of statutory construction originated in England during the sixteenth and seventeenth centuries as a result of the legislature's wide-ranging imposition of the death penalty for even the most minor of crimes.[143] Once integrated into the United States's common law, "the rule of lenity came to represent the principles that individuals should have fair warning of what

136. *Id.* at 512–13.
137. *Id.* at 513.
138. *Id.* at 512–13.
139. *See, e.g.*, United States v. Thomas, 991 F.2d 206, 213 (5th Cir. 1993).
140. *Id.*
141. Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L.L. REV. 197, 197 (1994) (quoting William Blackstone).
142. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990).
143. Newland, *supra* note 141, at 197. In the seventeenth century, crimes punishable solely by death included "pick-pocketing, wandering about as a soldier without a pass . . . and being in the company of gypsies.'" *Id*. at 200 (citation omitted).

constitutes criminal conduct and that courts should not extend the reach of a statute beyond what the legislature clearly enacted."[144]

Although it is clear that a statute must be ambiguous before a court will apply the rule of lenity, scholars debate at what point in the statutory interpretation process courts should invoke the rule.[145] A majority of courts, including the U.S. Supreme Court,[146] only reach the rule at the end of the interpretive process if ambiguity endures *after* reviewing legislative history and other nontextual materials.[147] Some scholars, most notably Supreme Court Justice Antonin Scalia, believe that courts should consider lenity throughout the interpretative process to resolve textual ambiguities before, if ever, resulting to legislative history.[148] Assuming, *arguendo*, that the court finds § 921(a)(20) of FOPA ambiguous, the point at which it chooses to apply the rule of lenity could constitute the deciding factor in how this circuit split is ultimately resolved.

1. Application of the Rule of Lenity After Reference to Legislative Materials

Those circuits holding that state law, no matter where it may be found, constitutes an express restriction of a felon's right to possess firearms would apply the rule of lenity only if ambiguity remains after an investigation into the statute's legislative history and congressional intent. A majority of courts, including the Supreme Court, follow this approach and view the rule of lenity "as a secondary rule of interpretation because it functions as a 'tie breaker' when traditional statutory construction has not produced a determinative result."[149]

The case that best represents the use of the rule of lenity as a "tie breaker" is *Moskal v. United States*.[150] Raymond Moskal was convicted pursuant to a statute prohibiting "the knowing transportation of falsely made, forged, altered or counterfeit securities in interstate commerce."[151] Moskal argued that because the statute was open to two different readings and because *some* courts have read the statute so as to impose no

144. *Id.* at 197.

145. *See id.* at 197, 228.

146. Because the Court's findings on when the rule of lenity should be invoked constitute dicta, the issue is technically not resolved and thus still open for debate among legal scholars.

147. Newland, *supra* note 141, at 198.

148. *See* United States v. R.L.C., 503 U.S. 291, 307–11 (1992) (Scalia, J., concurring); Newland, *supra* note 141, at 205–06.

149. Newland, *supra* note 141, at 214 n.85; *see* Liparota v. United States, 471 U.S. 419, 427 (1985) ("Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear."); United States v. Bass, 404 U.S. 336, 347–48 (1971) (finding that the rule of lenity is appropriate when the statute's context and the legislative history do not produce a determinative result); Ladner v. United States, 358 U.S. 169, 177–78 (1958) ("Neither the wording of the statute nor its legislative history points clearly to either of two possible meanings, the Court applies a policy of lenity and adopts the less harsh meaning.").

150. 498 U.S. 103 (1990).

151. *Id.* at 106–07 (quoting 18 U.S.C. § 2314 (2000)).

criminal liability for Moskal's actions, the statute's ambiguity should be resolved in his favor under the rule of lenity.[152] The Court rejected Moskal's "cramped reading of the statute's words as inconsistent with Congress' general purpose to combat interstate fraud."[153] The Justices reaffirmed their position that courts should apply the rule of lenity only to "those situations in which a reasonable doubt persists about a statute's scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute."[154]

Courts following the Sixth Circuit's reasoning in *Cassidy* would likely view *Moskal* as analogous to the dispute regarding the unless clause of § 921(a)(20). These courts might argue that, similar to *Moskal*, although "some courts" have found differently, looking to state statutes for firearms restrictions conforms to the general purpose of the statute: keeping firearms out of the hands of people the state has found to be too dangerous to possess them. Thus, these courts would find that the rule of lenity has no place in the analytical process because the legislative history clears up any ambiguity in the statute's text.

2. The Rule of Lenity as a Background Principle in Statutory Interpretation

Courts that interpret FOPA to require that any express firearm restriction be included on the restoration document would first argue that the statute was unambiguous. In the alternative, however, such courts would apply the rule of lenity early in the construction process as an "interpretive lens,"[155] despite what the legislative history may imply. Scholars who maintain this position typically rely on two different arguments in support of their position: the need for a separation of powers between the judiciary and the legislature and the due process concerns that arise when a statute fails to provide adequate notice of its prohibitions.[156]

Some commentators argue that avoiding legislative history and strictly construing any statutory ambiguities in favor of the criminal defendant maintains the judicial-legislative balance while protecting the defendant's rights.[157] These scholars contend that "[w]hen the legislature fails to speak clearly, considerations of lenity avoid the dilemma of how to derive a legitimate interpretation without 'legislating' by choosing a priori the stance the court will take."[158] Thus, by refraining from "legis-

152. *Id.* at 107.
153. *Id.* at 113.
154. *Id.* at 108
155. Newland, *supra* note 141, at 205–09.
156. *Id.*; *see also* United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department.").
157. *See* Newland, *supra* note 141, at 206–07.
158. *Id.* at 206.

lating" and instead reading the statute strictly, the court will provide proper notice because, "although the defendant is presumed to know the statute and perhaps the decisions of the court, the defendant should not be presumed to know the statute's legislative history."[159] Accordingly, circuits supporting the rationale of *Chenowith* will continue to use similar arguments and contend that ambiguities in § 921(a)(20) should be construed against the government. Applying the rule of lenity as an interpretive lens would require any limitation on the felon's firearm privileges to be expressly provided in either the same restoring document or the same statutory provision.

IV. RESOLUTION

Based on analysis of both the active and passive restoration circuit splits, three positions emerge that fall on a continuum ranging from the broad interpretation given by *Cassidy*[160] to the strict textual reading offered by *Thomas*.[161] While one side of the split wishes to give priority to the legislative history and purpose of the statute, the other side places due process concerns of notice above all else. Ironically, the rule of lenity does not offer much guidance because the debate concerning the point at which courts should apply the doctrine also diverges along similar lines of legislative intent versus notice. Accordingly, any resolution to this dispute must take into account both the need to defer to the state's judgment regarding whether a felon retains the necessary responsibility to possess a weapon and the constitutional mandate that penal statutes provide accurate notice of their prohibitions.

Proponents of the position that the courts may only look to the restoration document for restrictions on felons' firearms privileges often point out that although the state statute may not apply for FOPA charges, the state is still "free to arrest, convict, and jail . . . [the defendant] any time he is found in possession of a firearm."[162] Although this argument may come close to resolving the issue of congressional intent by allowing the states to determine the trustworthiness of a former felon, the notice concerns remain prevalent. If the state gives the felon a restoration certificate purporting to restore all civil rights forfeited by conviction but a state statute forbids that felon from possessing firearms, the "mouse trapping"[163] concerns are no less significant because the felon is convicted pursuant to state law rather than federal law.

159. *Id.* at 217.

160. United States v. Cassidy, 899 F.3d 543, 545–56 (6th Cir. 1990); *see supra* notes 100–06 and accompanying text.

161. United States v. Thomas, 991 F.2d 206, 213 (5th Cir. 1993); *see supra* notes 139–40 and accompanying text.

162. United States v. Bost, 87 F.3d 1333, 1337 (D.C. Cir. 1996).

163. United States v. Erwin, 902 F.2d at 512–13 (7th Cir. 1990).

Another potential resolution is to amend FOPA to mirror the provisions in Title IV of the Gun Control Act of 1968 and only restore firearm possession rights after the former felon successfully petitions the state for relief from the disabilities incurred because of the former conviction.[164] Thus, this solution, unlike the current FOPA statute, would involve a presumption that felons do *not* regain their firearm privileges after serving their sentence unless they convince the state that they are once again worthy of those rights. Although this may also solve the problem regarding Congress's intention to have the states determine felons' fitness to possess firearms, it leaves many other problems unanswered. First, this purported resolution may create even greater bureaucracy in the form of paperwork and red tape and impose a much more serious burden on the state than if it simply acted more carefully to include all firearm restrictions on the same document as the restoration certificate. In addition, notice issues may still persist unless the felon is somehow explicitly informed that he must proactively seek permission from the state to regain his firearm privileges.

Because it appears that, in order to achieve the proper balance between these two concerns, there must be some explicit act on the part of the state to inform the felon, the most common sense resolution may be just that simple. As between the state and the felon, the state appears to be in the best position to rectify this problem by informing felons whether the convicting state's statutory law prohibits them from possessing weapons upon release. Upon release from custody, the state could inform the felon of what the law requires. This small expenditure of time and money would provide notice to released felons of their position in society and what is expected of them while allowing the state to make the determination as to whether the felon is fit to possess a firearm.

One state has followed this apparently simple approach and has achieved great success. Beginning in January 2003, the U.S. Attorney's Office for the Northern District of Illinois and other Illinois state officials[165] began conducting "gun-alert meetings."[166] During these meetings law enforcement officials meet with probationers to discuss gun possession laws and how prosecutors charge felons who are found in possession of firearms.[167] These informational meetings met with enormous success as only three percent of felons who participated have been arrested for

164. *See* 18 U.S.C. § 922(e)–(f) (1968) (amended 1986); *see also supra* notes 43–44 and accompanying text.

165. The list of state officials involved includes the Illinois Department of Corrections, the Cook County Adult Probation office, the Chicago Police Department, and the Cook County Prosecutor. *Gun Possession Warning to Felons Slashes Recidivism in Chicago*, CRIME CONTROL DIG., Apr. 29, 2005, *available at* http://www.findarticles.com/p/articles/mi_ qa4440/is_200504/ai_n16065128.

166. *Id.*

167. *Id.*

new offenses compared to twenty-two percent of felons who did not attend the meetings.[168]

Given the success of the informational meetings in Illinois and the ease with which states can inform felons of their civil rights status upon release from prison, it is a wonder why this circuit split has yet to be resolved nationwide. Implementing a policy that requires states to proactively inform felons of their rights before they reenter society, eliminates the constitutional due process concerns of notice and "mouse trapping."[169] In addition, these prerelease meetings allow the state to make case-by-case determinations as to the ability of each felon to regain his or her right to possess firearms, thus satisfying the congressional intent concerns raised by *Cassidy* and its followers.

V. CONCLUSION

"There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril."[170] Although this may be true, such a society cannot lose sight of other important concerns in the process of regulating the shipment, transport, or possession of firearms. One such concern is the constitutional due process requirement of proper notice; people must understand what a statute, especially a penal statute, prohibits. Another is the purpose behind the creation of the statute. In view of the current circuit split, these two concerns cannot coexist. On one side, courts focus on the need for notice and thus only look at the restoration document for restrictions. Other courts place more emphasis on legislative intent, viewing any indication that the state believes the felon is unfit as an "express" restriction on the felon's firearm privileges.

To properly balance these two competing concerns, state statutes should qualify as express firearms restrictions within the meaning of FOPA, but in addition the state should require penal and law enforcement officials to inform felons of such restrictions before they are released into the general population. Although this solution would impose additional burdens on the state, such a burden pales in comparison to the one imposed on a felon who is sent back to prison despite his best efforts to stay within the bounds of the law and the terms of his release from prison.

168. *Id.* In addition, "the homicide rate dropped 40 percent in the gun-alert communities since the forums began in January 2003—the largest decline for any high-crime district in Chicago." *Id.*

169. United States v. Erwin, 902 F.2d 510, 512–13 (7th Cir. 1990).

170. United States v. Warin, 530 F.2d 103, 108 (6th Cir. 1976).