

COMMENTS

The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights

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INTRODUCTION

In 2001, Leroy Miller took Ricky Fines onto his northern Indiana farm as a boarder.¹ Due to Miller and Fines's mutual interest in guns, the pair began purchasing, refurbishing, and selling firearms as business associates. After three years of uneventful gun refurbishment, federal agents executed a search warrant at the farm in April 2004. The agents discovered and seized three weapons in Miller's home and thirty-one located in a nearby shed, all purportedly belonging to Miller. Absent any aggravating circumstances, Miller's constructive possession of these thirty-four firearms would have been completely legal and unsuspecting. Unfortunately for Miller, Fines was a convicted felon, and Miller knew it.

Under federal law, it is a felony offense for convicted felons to possess firearms,² and for others—such as Miller—to knowingly aid and abet felons in firearm possession.³ Both Fines and Miller were convicted of federal felonies, and Miller's new status as a felon prospectively subjected him to the same firearm possession ban that precipitated his predicament.⁴ Although the law prohibits only the possession of firearms and not their ownership,⁵ the government had the statutory right to completely extinguish Miller's firearm-ownership rights by instituting forfeiture

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¹ *Miller v United States*, 2010 WL 1506546, *1 (ND Ind).

² See 18 USC § 922(g)(1).

³ 18 USC § 2(a).

⁴ See *United States v Miller*, 547 F3d 718, 719 (7th Cir 2008).

⁵ See 18 USC § 922(g)(1). Property ownership is distinct from property possession. For example, in a bailment relationship, a bailee possesses property owned by a bailor. See *Bailments*, 8 Corpus Juris Secundum § 1 at 365–67 (West 2005).

proceedings within 120 days of the seizure.⁶ However, the government failed to timely commence such proceedings against Miller, thereby nullifying the forfeiture authority granted by Congress.⁷

When congressionally granted forfeiture authority is not exercised, the default rule is that “seized property, other than contraband, should be returned to its rightful owner.”⁸ Because returning the seized firearms would violate the federal possession ban, the government refused to relinquish Miller’s guns upon his request.⁹ Thus, the government’s failure to properly pursue forfeiture proceedings against Miller consigned his thirty-four firearms to judicial limbo: Miller’s firearm property rights had not been extinguished by forfeiture proceedings, but the firearms could not be returned to Miller due to his “firearm disability.”¹⁰

This Comment addresses the contradiction in federal law that produces this seemingly irreconcilable predicament. How can courts resolve the statutory inconsistencies that generate a “firearm-disability dilemma”? More specifically, does the felon firearm possession ban effectively extinguish all firearm property rights, and if not, what are the contours of any residual property rights? Part I explores the statutory background that generates this legal quandary. This background includes an inquiry into antecedent legal issues that provide context and guidance for understanding the firearm-disability dilemma, including in-depth analyses of the meaning of possession, the differences between derivative and per se contraband, and the potential for a Fifth Amendment taking claim. Part II outlines the firearm-disability dilemma case law, describing the ways in which courts have previously resolved this problem. The courts are divided between recognizing a residual right and refusing to do so.

In Part III, the Comment presents three different judicial tools that courts historically employ when forced to conceptualize and adjudicate uncertain property rights: substantive, formalistic, and moralistic conceptions of property. Part IV applies these judicial tools to the firearm-disability dilemma. It observes that all of the courts to confront the firearm-disability dilemma

⁶ See 18 USC § 924(d)(1).

⁷ *United States v Miller*, 588 F3d 418, 418–19 (7th Cir 2009).

⁸ *United States v LaFatch*, 565 F2d 81, 83 (6th Cir 1977).

⁹ *Miller*, 588 F3d at 419 (summarizing the arguments in Miller’s postconviction lawsuit to regain possession of his firearms).

¹⁰ See note 15 and accompanying text.

have implicitly employed at least one of these conceptions of property, and that the particular conception embraced by a given court largely determines the type of remedy ultimately fashioned. Part IV then proposes a constructive trust and power of appointment remedy that attempts to utilize the advantages of each property conceptualization, while avoiding their inherent drawbacks. The Comment concludes that courts faced with a firearm-disability dilemma will have an easier time reconciling the inconsistent treatment of uncertain property rights if they are aware of the varying property conceptualizations behind the rulings.

I. STATUTORY FRAMEWORK AND LEGAL BACKGROUND

The firearm-disability dilemma is the product of a confluence of statutes and legal doctrines that contradict one another under certain circumstances. This Part seeks to illuminate the issue by first exploring the conflicting statutory framework, and then addressing three antecedent legal issues that provide a foundation for understanding the dilemma.

A. Statutory Ambiguity at the Intersection of 18 USC §§ 922 and 924

In 1968, Congress sought to remedy the “high incidence of crime in the United States” by passing the Omnibus Crime Control and Safe Streets Act of 1968¹¹ (“Crime Control Act”). In order to achieve its stated goal of “strengthening and improving law enforcement at every level,”¹² the Crime Control Act included provisions that regulate the possession of firearms by convicted felons.¹³ As currently amended, these provisions stipulate: “It shall be unlawful for any person [] who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport . . . or possess . . . any firearm or ammunition.”¹⁴ Courts describe this provision as a

¹¹ Pub L No 90-351, 82 Stat 197.

¹² Crime Control Act, 82 Stat at 198.

¹³ Crime Control Act Title IV, 82 Stat at 225–35.

¹⁴ 18 USC § 922(g). Note that all crimes punishable by a term exceeding one year are classified as felonies. See 18 USC § 3559(a). It is also important to note that, in addition to convicted felons, the statute subjects several other classes of individuals to firearms disabilities, including fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective, illegal aliens, aliens admitted to the United States under nonimmigrant visas, persons dishonorably discharged from the Armed Forces, individuals who have renounced US citizenship, certain persons subject

“firearm disability” that attaches to felons upon conviction.¹⁵ Individuals may receive relief from the firearm disability by petition,¹⁶ pardon,¹⁷ acquittal, or dismissal of the charges,¹⁸ but absent these rare exceptions, the disability is extinguished only by the felon’s death.¹⁹

In conjunction with prohibiting felon firearm possession, Congress also addressed the disposition of firearms found in the possession of convicted felons. Under the original Crime Control Act, the legislature stated: “Any firearm or ammunition involved in, or used or intended to be used in, any violation of the provisions of this chapter . . . shall be subject to seizure and forfeiture.”²⁰ A felony conviction thus imposes a lifetime ban on firearm possession in addition to the possibility that significant investments in firearm property will be forfeited.

Several years after the Crime Control Act’s implementation, members of Congress became concerned about the manner in which the possession ban was being enforced. Congress was uneasy with Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) practices of enticing gun collectors to violate firearm regulations and subsequently seizing valuable gun collections.²¹ Accordingly, it enacted the Firearm Owners’ Protection Act²² (FOPA) in an attempt to “reaffirm [that] the intent of the Congress” in passing the Gun Control Act of 1968²³ 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.”²⁴ Particularly germane to the firearm-disability

to restraining orders, and individuals who have been convicted of misdemeanor crimes of domestic violence. 18 USC § 922(g)(2)–(9).

¹⁵ See, for example, *Johnson v United States*, 130 S Ct 1265, 1273 (2010).

¹⁶ See 18 USC § 925(c).

¹⁷ See 18 USC § 921(a)(20); *United States v Miller*, 588 F3d 418, 420 (7th Cir 2009) (stating that a pardon will end a firearm disability).

¹⁸ See 18 USC § 924(d)(1).

¹⁹ See Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 Fordham Urban L J 1759, 1768–75 (2003) (exploring the disability relief provision and describing public outcry against expenditures for enforcing the provision, which ultimately resulted in Congress’s refusal to fund relief investigations).

²⁰ Crime Control Act § 924(c), ch 44, 82 Stat at 233.

²¹ See S 49, 99th Cong, 1st Sess (Jan 3, 1985), in 131 Cong Rec 18155 (July 9, 1985) (describing the ATF practice of prosecuting individuals and subjecting their gun collections to § 924 forfeiture after first encouraging them to act as unlicensed firearm dealers).

²² Pub L No 99-308, 100 Stat 449 (1986).

²³ Pub L No 90-618, 82 Stat 1213.

²⁴ FOPA § 1(b)(2), 100 Stat at 449.

dilemma is the added provision that “[a]ny action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.”²⁵ The legislative history surrounding this limitations period clearly indicates that it was intended to be strictly construed, such that “[b]eyond this point the statutory power to forfeit is lost.”²⁶

In combination, these two provisions prohibit convicted felons from possessing firearms, while simultaneously precluding the government from instituting forfeiture proceedings against seized weaponry after the 120-day limitations period. The legal ambiguity that arises from this construction is readily apparent: What should a judge do when the government fails to timely institute 18 USC § 924 forfeiture proceedings against a convicted felon that is subject to 18 USC § 922’s firearm disability?

B. Antecedent Legal Issues

In order to understand the firearm-disability dilemma, it is important to address three antecedent legal issues. First, an examination of how courts interpret “possession” helps determine the extent to which a firearm disability inhibits felons vis-à-vis firearm property. This issue also informs a court’s conceptualization of the fuzzy property rights at issue in the firearm-disability dilemma context, as will be explored in Part IV. Second, an understanding of the distinction courts draw between derivative and per se contraband is critical to determining when felon firearm possession implicates the firearm-disability dilemma. Finally, an assessment of whether the firearm-disability dilemma constitutes a Fifth Amendment taking is also warranted because at least two courts have considered the question. The potential for a takings claim also influences the remedies explored and proposed in Part IV and must thus be investigated prior to a discussion of residual property rights.

1. What is “possession”?

If possession constitutes nine-tenths of the law, then what constitutes possession, and what remains of an otherwise complete property right if possession is proscribed? In order to understand how a firearm disability affects a felon’s residual

²⁵ FOPA § 104, 100 Stat at 457, codified at 18 USC § 924(d)(1).

²⁶ See David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 Cumb L Rev 585, 660 & n 407 (1987).

property rights, it is critical to understand how courts interpret the term “possession” within the context of § 922.²⁷ Although this question generates a great deal of attention in property law,²⁸ criminal law avoids resorting to theoretical explications on the meaning of possession. Instead, courts simply describe possession as either physical or constructive, with relatively clear definitions for each.

Physical possession is a straightforward concept. Physical possession of property consists of “actual physical control” of the item in question.²⁹ For example, in *United States v White*,³⁰ the court ruled that a defendant was in physical possession of a firearm when police found him sitting on a bed and “holding a sawed-off shotgun by the trigger area with his right hand while he loaded a round into the magazine tube with his left.”³¹ Such firearm possession is clearly anticipated and prohibited by § 922’s possession ban.

Constructive possession, while more nuanced than physical possession, is still relatively easy to define. The Seventh Circuit ruled that “[c]onstructive possession exists when a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others.”³² In *United States v Caldwell*,³³ the court determined that owning and residing in a home that contains firearms

²⁷ See 18 USC § 922(g).

²⁸ See Carol M. Rose, *Possession as the Origin of Property*, 52 U Chi L Rev 73, 74–75 (1985) (exploring the scope and nature of the right of possession in property law with a focus on the common law maxim that “first possession is the root of title”); Richard A. Epstein, *Possession as the Root of Title*, 13 Ga L Rev 1221, 1221–22 (1979) (using the principle of possession in an attempt to clarify the contours of “ownership rights”). See also Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U Colo L Rev 283, 283 (2006) (utilizing traditional notions of possession in the conservation context).

²⁹ *State v Fries*, 185 P3d 453, 456 (Or 2008).

³⁰ 552 F3d 240 (2d Cir 2009).

³¹ *Id.* at 243.

³² *United States v Caldwell*, 423 F3d 754, 758 (7th Cir 2005). See also *United States v Thomas*, 321 F3d 627, 636 (7th Cir 2003) (“[D]efendants are in constructive possession if they have ‘the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.’”); *United States v Payton*, 159 F3d 49, 56 (2d Cir 1998) (“Constructive possession exists when a person has the power and intention to exercise dominion and control over an object.”); *United States v Woodall*, 938 F2d 834, 838 (8th Cir 1991) (“An individual is said to have constructive possession over contraband if he [or she] had ‘ownership, dominion or control over the contraband itself, or dominion over the premises in which the contraband is concealed.’”) (alterations in original). See also Weapons, 94 Corpus Juris Secundum § 10 at 580–82 (West 2001) (explaining constructive possession of weapons).

³³ 423 F3d 754 (7th Cir 2005).

amounts to constructive possession of the firearms.³⁴ Similarly, a district court in Iowa held that the act of making a “complete gift” of firearms to another constituted constructive possession of the weapons, since the defendant’s designation of “his sister as the recipient of the Firearms would require him to exercise ‘dominion’ or ‘control’ over the Firearms because he would be deciding where they ought to go and who ought to possess them.”³⁵ Though several courts disagree with the Northern District of Iowa’s conclusion that making a complete gift amounts to constructive possession,³⁶ the cases nevertheless demonstrate that constructive possession usually implicates a degree of control or dominion over property.

These definitions establish what actions § 922 prohibits, and are therefore useful in determining which, if any, residual property rights persist after the right of possession is excised from an otherwise complete title to chattel property.³⁷ For now, it is important to note that § 922 prohibits both (1) physical possession of firearms and (2) control of firearms that rises to the level of constructive possession.

2. Are firearms derivative or per se contraband?

In the absence of forfeiture proceedings such as § 924, “[t]he general rule is that seized property, other than contraband, should be returned to its rightful owner” after termination of the criminal proceedings associated with the seizure.³⁸ Under this rule, courts must classify contraband as either “derivative” or “per se.” Derivative contraband is generally returned to the defendant, while per se contraband is not. In other words, this rule preserves derivative contraband property rights, while effecting the complete termination of property rights in per se contraband. This distinction merits an assessment of each type of contraband to determine the scope of the firearm-disability dilemma. The dilemma, after all, does not arise when contraband is classified as per se: there can be no question of residual property

³⁴ Id at 758.

³⁵ *United States v Oleson*, 2008 WL 2945458, *2 (ND Iowa).

³⁶ See *Miller*, 588 F3d at 419–20 (suggesting that making a gift of firearms would resolve the firearm-disability dilemma); *United States v Parsons*, 472 F Supp 2d 1169, 1176–77 (ND Iowa 2007). See also *United States v Rodriguez*, 2011 WL 5854369, *7 (WD Tex) (considering the propriety of allowing the defendant to gift his firearms).

³⁷ For a detailed examination of this issue, see Part IV.

³⁸ *United States v LaFatch*, 565 F2d 81, 83 (6th Cir 1977).

rights in per se contraband because there are no legitimate property rights in chattels so categorized.

Per se contraband is chattel property that subjects possessors to criminal liability regardless of how it is used.³⁹ *United States v Jeffers*,⁴⁰ in which the defendant claimed a property interest in seized illegal narcotics, demonstrates this principle.⁴¹ In light of Congress's express declaration that "no property rights shall exist" in narcotics contraband, the Supreme Court refused to recognize a property right in banned narcotics that would require their return to the defendant.⁴² Similarly, the Court refused to remit illegal alcoholic goods and distilling equipment to the defendants in *Trupiano v United States*,⁴³ reasoning that, "since this property was contraband, they have no right to have it returned to them."⁴⁴ Both of these cases "concerned objects the possession of which, without more, constitutes a crime."⁴⁵

Conversely, derivative contraband is not inherently unlawful, but may become so if put to an unlawful use as an instrumentality of crime.⁴⁶ For example, in *One 1958 Plymouth Sedan v Pennsylvania*,⁴⁷ the Supreme Court held that an automobile used to transport liquor without state tax seals was derivative contraband due to the illegal use to which the vehicle was put.⁴⁸ On the question of forfeiture, the DC Circuit in *United States v Farrell*⁴⁹ stated that there was "no precedent for confiscation without statutory authority . . . of derivative contraband merely

³⁹ See *Black's Law Dictionary* 365 (West 9th ed 2009).

⁴⁰ 342 US 48 (1951).

⁴¹ *Id.* at 54.

⁴² *Id.* at 52–54 (holding that "the respondent was not entitled to have [per se contraband] returned to him," but also recognizing a limited property right solely "for the purposes of the exclusionary rule" under the Fourth Amendment, such that illegally seized contraband evidence should be suppressed at trial).

⁴³ 334 US 699 (1948).

⁴⁴ *Id.* at 710.

⁴⁵ *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 699 (1965) (explaining that "[t]he return of [per se] contraband would clearly have frustrated the express public policy against the possession of such objects"). See also *Cooper v City of Greenwood, Mississippi*, 904 F2d 302, 305 (5th Cir 1990) ("Courts will not entertain a claim contesting the confiscation of contraband per se because one cannot have a property right in that which is not subject to legal possession.").

⁴⁶ *Cooper*, 904 F2d at 305. See also *United States v Farrell*, 606 F2d 1341, 1344 (DC Cir 1979).

⁴⁷ 380 US 693 (1965).

⁴⁸ *Id.* at 699 (deeming an automobile derivative contraband when it was used to illegally transport liquor without state tax seals).

⁴⁹ 606 F2d 1341 (DC Cir 1979).

because it is derivative contraband.”⁵⁰ Therefore, derivative contraband that falls outside the scope of congressional forfeiture provisions is subject to the default rule and should be returned to its rightful owner after the termination of criminal proceedings.⁵¹

Courts apply the contraband framework in two ways to firearms implicated by a § 922 disability. Some courts hold strictly to the notion that contraband qualifies as *per se* only when mere possession is actionable.⁵² For these courts, the requirement of a felony conviction prior to the attachment of a firearm disability moves firearm property outside the scope of *per se* contraband. In other words, mere possession is not sufficient for liability to attach, but must be coupled with the aggravating circumstance of a felony conviction.⁵³ Under this view, firearms that are not prohibited outright are always considered derivative contraband.⁵⁴

Other courts place no special emphasis on the requirement that a person must first be convicted of a felony before the mere possession of firearms is prohibited. For these courts, the timing of the felon’s conviction will determine whether disputed firearm property is *per se* or derivative contraband.⁵⁵ Because § 922 precludes mere possession of firearms by felons, these courts reason that firearms acquired by someone *after* a felony conviction fall into the category of *per se* contraband, while those obtained *before* a felony conviction are properly characterized as derivative contraband, provided their initial possession was legal. Put differently, a felony conviction prospectively renders all otherwise legal weapons later acquired by felons *per se* contraband.⁵⁶

⁵⁰ *Id.* at 1344.

⁵¹ *LaFatch*, 565 F2d at 83.

⁵² See *Cooper*, 904 F2d at 304–05 (asking whether “a firearm in the possession of a felon [is] more akin to [illegal narcotics] or to an automobile used in a bank robbery,” and holding that the required ancillary condition of felony status moves firearms into the automobile category). See also *1958 Plymouth Sedan*, 380 US at 699; *Farrell*, 606 F2d at 1344.

⁵³ See *Cooper*, 904 F2d at 305 (“In *Cooper*’s case, the ‘something more’ is *Cooper*’s membership in a category of persons prohibited from possessing firearms.”).

⁵⁴ See *id.* See also *Rodriguez*, 2011 WL 5854369 at *6 (“[A] firearm not of the type [explicitly] proscribed . . . is not contraband *per se*, and [felons have] a constitutionally protected property interest—limited to ownership interest and stripped of any possessory interest—in such a firearm.”).

⁵⁵ See *United States v Felici*, 208 F3d 667, 670 (8th Cir 2000) (strictly construing the possession ban, but noting that this construction is “[b]ased upon *Felici*’s status as a convicted felon”); *Parsons*, 472 F Supp 2d at 1174 (noting that had the defendant been a felon when law enforcement confiscated his firearms, his motion for a return of seized property would have been denied).

⁵⁶ These courts reason that ruling otherwise would “clearly [] frustrate[] the express public policy against the possession of such objects.” *Farrell*, 606 F2d at 1344.

Consequently, the scope of the firearm-disability dilemma is dependent upon a court's construction of the *per se* and derivative contraband question, as only derivative contraband—which but for § 922 would be subject to the default rule requiring its return—triggers the issue. In jurisdictions where the first approach is adopted, the dilemma encompasses all firearm property not subject to an absolute ban.⁵⁷ For courts accepting the second approach, the firearm-disability dilemma is limited to firearms legally owned by felons prior to their convictions. Both approaches require the expiration of a 120-day limitations period under § 924's forfeiture proceedings for the dilemma to arise. Accordingly, while a court's construction of the contraband issue determines the scope of the firearm-disability dilemma, it ultimately does not resolve the question.

3. The firearm-disability dilemma as an unconstitutional taking?

Although the Supreme Court ruled that the Second Amendment secures to individuals the right to keep and bear arms, it also acknowledged the right's limits, asserting that their decision should not cast doubt on the constitutionality of the felony firearm disability.⁵⁸ The Court has also held that the firearm disability does not violate the equal protection component of the Fifth Amendment.⁵⁹ However, the Court has not entertained a challenge to the firearm-disability dilemma under the Fifth Amendment's Takings Clause. Two other courts have considered whether the dilemma works an uncompensated taking. The attention this question has attracted in the case law merits a brief overview of the takings issue to ensure that any broad constitutional concerns the dilemma raises are addressed prior to a focused assessment of residual property rights. Additionally, the possibility that some remedies to the firearm-disability dilemma may constitute uncompensated takings is a pertinent consideration for courts fashioning their rulings. Part IV further discusses the relevance of this takings inquiry to potential solutions to the disability dilemma.

⁵⁷ For example, machine guns constitute *per se* contraband under either approach, as they are completely prohibited by 18 USC § 922(o).

⁵⁸ *District of Columbia v Heller*, 128 S Ct 2783, 2816–17 (2008) (emphasizing that the Court's opinion should not be construed to cast doubt on “prohibitions on the possession of firearms by felons and the mentally ill”).

⁵⁹ *Lewis v United States*, 445 US 55, 65–66 (1980).

In *United States v Zaleski*,⁶⁰ the United States District Court for the District of Connecticut held that the firearm-disability dilemma does not implicate the Takings Clause.⁶¹ The court stated that the “Takings Clause is designed to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶² The court concluded that the dilemma does not violate this policy because convicted felons must bear these deprivations alone due to their criminal mischief.⁶³ In contrast, Judge Frank Easterbrook of the Seventh Circuit has implied that the failure to recognize any residual property right in the firearm-disability dilemma does constitute a Fifth Amendment taking.⁶⁴ The divergence between these two views demonstrates the ambiguous nature of Fifth Amendment takings jurisprudence in the context of the firearm-disability dilemma.

The firearm-disability dilemma might be characterized as a taking by application of the per se rule that “permanent physical occupation[s]” are always takings.⁶⁵ The DC Circuit first applied this per se rule to chattel property in *Nixon v United States*.⁶⁶ A statute that extinguished rights of possession and control, established uncertain rights of access, limited the right to exclude, and abolished the ability to dispose of regulated property was held to be a per se Fifth Amendment taking of former President Richard Nixon’s presidential papers.⁶⁷ The court noted that the relevant inquiries for importing the per se test into the chattel property context include (1) whether the residual rights “preserve for the former owner the essential economic use of the surrendered property” and (2) whether the right to exclude others from using the property has been completely extinguished.⁶⁸

⁶⁰ 2011 WL 1559238 (D Conn), vacd and remd on other grounds by *United States v Zaleski*, 686 F3d 90 (2d Cir 2012).

⁶¹ *Zaleski*, 2011 WL 1559238 at *3.

⁶² *Id* (quotation marks omitted).

⁶³ *Id*.

⁶⁴ *Miller*, 588 F3d at 419 (implying that the government’s failure to remedy this situation would result in an extra round of Tucker Act takings litigation to determine the value of the firearms if they were destroyed by the government).

⁶⁵ *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 426 (1982).

⁶⁶ 978 F2d 1269 (DC Cir 1992).

⁶⁷ *Id* at 1287.

⁶⁸ *Id* at 1285–87. It is worth noting that the subsidiary questions posed in *Nixon* for the *Loretto* framework bear a strong resemblance to the per se test the Court adopted five months earlier in *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 (1992). In *Lucas*, the critical takings inquiry was whether all economically beneficial uses of a parcel of real property had been proscribed by the challenged regulation. See *id*.

Thus, the application of this narrowly construed per se test to a firearm-disability dilemma depends upon a factual assessment of the remedy a court prescribes.⁶⁹ Court rulings that completely reject any claim to residual property rights in firearm property appear to trigger this per se test because they do not preserve the economic value of firearms or any rights of exclusion for felons. Contrarily, holdings that preserve certain rights—such as the right to determine who ultimately receives the property and the right to the property’s economic value—seem to mitigate the two inquiries undertaken in *Nixon*. It is also notable that the ability to relieve the disability by pardon, petition, acquittal, or dismissal of the charges may also remove the possession ban from the narrow scope of this per se test, since it is arguably not a “permanent” deprivation of property if it can be terminated.⁷⁰

If not subject to per se takings jurisprudence, remedies to the firearm-disability dilemma may still be deemed takings pursuant to an “in-depth factual inquiry to determine whether one’s economic interests have been sufficiently damaged as to warrant compensation.”⁷¹ The Supreme Court first applied the “ad hoc, factual inquir[y]”⁷² developed in *Penn Central Transportation Co v New York City*⁷³ to chattel property in *Andrus v Allard*.⁷⁴ There, the Court held that a federal statute prohibiting the commercial sale of eagle feathers did not constitute a Fifth Amendment taking.⁷⁵ Noting that the Takings Clause “preserves governmental power to regulate, subject only to the dictates of justice and fairness,”⁷⁶ the Court denied the takings claim by relying upon the fact that, out of the full bundle of property rights,⁷⁷ the legislation extinguished only the right of property alienation.⁷⁸

This rule is not easily applied outside of the real property context. However, the *Nixon* court’s contemporaneous concern with economic use does suggest that per se takings jurisprudence evolved in 1992 to place a greater emphasis on economic use generally.

⁶⁹ See *Nixon*, 978 F2d at 1284 (noting that “the holding of *Loretto* is a narrow one”).

⁷⁰ See notes 16–18 and accompanying text. See also *Arkansas Game and Fish Commission v United States*, 133 S Ct 511, 521 (2012) (reaffirming the narrow scope of *Loretto*, which excludes nonpermanent invasions of property).

⁷¹ *Nixon*, 978 F2d at 1284.

⁷² *Penn Central Transportation Co v New York City*, 438 US 104, 124 (1978).

⁷³ 438 US 104 (1978).

⁷⁴ 444 US 51, 65 (1979).

⁷⁵ *Id* at 67–68.

⁷⁶ *Id* at 65 (quotation marks omitted), quoting *Penn Central*, 438 US at 124.

⁷⁷ Legal realists conceptualize property as a “very complex [bundle] of rights, privileges, powers and immunities.” Walter W. Cook, *Introduction: Hohfeld’s Contributions to the Science of Law*, in Walter Wheeler Cook, ed, *Wesley Newcomb Hohfeld, Fundamental*

In many ways, a court recognizing residual property rights in the firearm-disability dilemma is faced with a situation similar to that presented in *Allard*. The Crime Control Act removes possession rights from the full bundle of property rights owners normally have in their firearms, while the statute in *Allard* terminated the right to derive economic value from the sale of eagle feathers. To be sure, the right to possess and the right to economic value are distinct.⁷⁹ But, as the Court observed, “At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”⁸⁰ This language suggests that judicial recognition of residual firearm property rights should weaken the persuasiveness of takings challenges to the firearm-disability dilemma.

Two final doctrines that may remove the firearm possession ban from Fifth Amendment takings jurisprudence are the per se nuisance abatement and forfeiture exceptions. When property is used “in the commission of a crime or a public nuisance,” government regulations that abate such usage—thereby promoting the “health, morals, or safety of the community”⁸¹—are exempted from the requirement to pay just compensation for appropriated property.⁸² This is because the police power, which justifies both the nuisance abatement and forfeiture exceptions,⁸³ “cannot be [] burdened with the condition that the state must compensate such individual owners . . . by reason of their not being permitted . . . to inflict injury upon the community.”⁸⁴ In light of Congress’s stated goals of limiting “the ease with which any person can acquire firearms” in order to decrease “the prevalence of lawlessness and violent crime in the United States,”⁸⁵ the

Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 3, 14 (1923). For a more extended discussion on the “bundles” theory of property, see Part III.A.

⁷⁸ *Allard*, 444 US at 65–66.

⁷⁹ *Id.* at 66 (noting that it was critical that the statute left intact the right of possession).

⁸⁰ *Id.* at 65–66.

⁸¹ *Mugler v Kansas*, 123 US 623, 668–69 (1887).

⁸² David A. Dana and Thomas W. Merrill, *Property: Takings* 110–16 (Foundation Press 2002).

⁸³ See *id.* at 110 (noting that the Court has created several categorical exceptions where compensation is never required due to the justification of being “pure police power regulation”).

⁸⁴ *Mugler*, 123 US at 669.

⁸⁵ Crime Control Act § 901, 82 Stat at 225–26 (citing causal relationships between firearm accessibility, youthful criminality, and general lawlessness as further justification for the legislation). Additionally, Congress’s purpose in passing the Crime Control

possession ban would seem fully within the scope of the police power exception. However, the Court has also held that the “police power” is reserved exclusively to the states, which is problematic because the firearm-disability dilemma stems from federal statutes.⁸⁶ Additionally, the forfeiture exemption requires statutory authority for the expropriation of property, which is absent when the government exceeds § 924’s 120-day limitations period.⁸⁷ It is thus unclear in the firearm-disability context whether these police power exceptions would save from the Takings Clause a remedy that failed to recognize any residual property rights.⁸⁸

Regardless of the police power exceptions’ applicability, the character of the government action in the dilemma context—which is geared towards preserving community safety—would undoubtedly support a more favorable result to the government under the *Penn Central* balancing inquiry utilized in *Allard*.⁸⁹ This is because government actions that seek to “promote the common good” are less likely to be considered takings.⁹⁰ Note, however, that a court must protect some residual firearm property rights to get past the per se analysis, which otherwise may moot this point by precluding a *Penn Central* balancing inquiry altogether.

In summary, remedies to the firearm-disability dilemma that do not recognize residual property rights are probably per se takings, since no rights to economic value or exclusion remain,

Act was to “prevent crime and to insure the greater safety of the people.” Crime Control Act, 82 Stat at 197.

⁸⁶ *United States v Morrison*, 529 US 598, 618 (2000). See also D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U Miami L Rev 471, 495 n 126 (2004) (exploring the concept of “police power” and asserting that the federal government does not enjoy a police power).

⁸⁷ See *Bennis v Michigan*, 516 US 442, 452–53 (1996) (asserting that because the “State [] sought to deter illegal activity that contributes to . . . unsafe streets,” the forfeiture statute was valid, and compliance with its requirements did not work an uncompensated taking). See also Dana and Merrill, *Takings* at 115 (cited in note 82) (“The Court has held that as long as the forfeiture proceeding satisfies statutory and due process requirements, it does not raise any question under the Takings Clause.”).

⁸⁸ Regarding the question of whether the federal government enjoys a police power similar to that possessed by the states, compare Barros, 58 U Miami L Rev at 495–96 (cited in note 86) (stating that there is no federal police power), with Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 107–08 (Harvard 1985) (noting that the Constitution should be construed to allow “both the federal and state governments the minimum capacity to maintain peace and good order” because “the police power remains an inherent attribute of sovereignty at all levels of government”).

⁸⁹ See *Allard*, 444 US at 65–67.

⁹⁰ *Penn Central*, 438 US at 124.

as required under *Nixon*.⁹¹ This is likely what led Judge Easterbrook to suggest that the failure to protect a residual property interest would provide grounds for a subsequent takings challenge.⁹² Holdings that extinguish all firearm property rights are questionable even under the *Allard* balancing inquiry, which also turned on the retention of certain rights. Therefore, at least in light of the Fifth Amendment, the most pragmatic resolutions of the firearm-disability dilemma recognize a residual property right in some form, thereby significantly obviating takings concerns.⁹³

II. EARLY ATTEMPTS TO RESOLVE THE FIREARM-DISABILITY DILEMMA

The statutory contradictions that generate the firearm-disability dilemma do not lend themselves to easy solutions and have consequently generated a significant amount of litigation. This predicament produced a circuit split, with some courts recognizing a residual property right in firearms for those subjected to the firearm-disability dilemma and others refusing to do so. This Part details both sides of the circuit split, categorizing courts that preserve residual firearm property rights as “formalistic” or “realist,” while also exploring the “moralistic” approach employed by courts rejecting felons’ claims.

A. Formalistic and Realist Approaches Recognizing Residual Property Rights

Courts recognizing residual property rights at the intersection of §§ 922 and 924 are divided into two camps. The first of these can be characterized as “formalistic courts,” which employ preexisting forms of property when fashioning their ultimate remedies. In contrast, “realist courts” do not invoke property forms when fashioning remedies to the dilemma.

In *United States v Zaleski*,⁹⁴ the Second Circuit ruled on a Federal Rules of Criminal Procedure (FRCrP) 41(g) motion

⁹¹ *Nixon*, 978 F2d at 1286. See also *Loretto*, 458 US at 441 (affirming the traditional rule that “a permanent physical occupation of property is a taking”).

⁹² See *Miller*, 588 F3d at 419.

⁹³ See Part IV. For further discussion of firearm control laws and their takings implications, see Roland Docal, Comment, *The Second, Fifth, and Ninth Amendments—the Precarious Protectors of the American Gun Collector*, 23 Fla St U L Rev 1101, 1127–35 (1996).

⁹⁴ 686 F3d 90 (2d Cir 2012).

brought by the defendant for the return of his confiscated firearms.⁹⁵ After executing a search warrant on the defendant's home, police discovered "a large cache" of firearms that included several per se illegal weapons in addition to many legally possessed weapons.⁹⁶ Instead of instituting forfeiture proceedings, the government petitioned to retain and destroy the firearms under the All Writs Act,⁹⁷ perhaps because the limitations period had expired.⁹⁸ The court's remedy allowed Zaleski to transfer his weapons to a third-party gun dealer who would, acting as a trustee, sell the weapons and disburse the proceeds to Zaleski. This arrangement was subject to several conditions: that it "would *in fact* strip Zaleski of any power to exercise dominion and control over [the firearms], [that the third-party gun dealer] is a suitable custodian and not subject to Zaleski's control, and [that] the arrangement is otherwise equitable."⁹⁹ The court also provided that additional safeguards and qualifications—such as sale deadlines, accounting procedures, and specific instructions for the "trustee"—may be put into place to ensure that the defendant's powers over the weapons would never amount to the level of control prohibited by the federal ban on constructive possession.¹⁰⁰

The Seventh Circuit also resorted to preexisting property rules in an attempt to make sense of the firearm-disability dilemma in *United States v Miller*.¹⁰¹ The court suggested that reliance on trusts to resolve the firearm-disability dilemma would be appropriate. Additionally, the court proposed three other solutions to the dilemma, which included (1) allowing defendants to make gifts of firearms to friends or relatives, as long as recipients could not return the firearms to the defendants or honor their instructions; (2) having the government liquidate the firearms and disburse the proceeds to the felons; and (3) instructing the government to retain and store the firearms while the

⁹⁵ Id at 91.

⁹⁶ See id.

⁹⁷ Act of Mar 3, 1911, §§ 234, 261, 262, ch 231, 36 Stat 1087, 1156, 1162, codified as amended at 28 USC §1651.

⁹⁸ See *Zaleski*, 686 F3d at 91–92. See also 28 USC § 1651(a) (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

⁹⁹ *Zaleski*, 686 F3d at 93.

¹⁰⁰ See id at 93–94. See also *United States v Rodriguez*, 2011 WL 5854369, *18–19 (WD Tex) (approving a firearm transfer to a nonrelative of the defendant in trust to either hold the firearms or sell them for the defendant).

¹⁰¹ 588 F3d 418 (7th Cir 2009). See also notes 1–7 and accompanying text.

defendants' disabilities continued.¹⁰² The court's gift proposal is another traditional property remedy that other courts have also considered.¹⁰³

In contrast with the formalistic solutions, the Seventh Circuit's other suggestions—that the government either sell the firearms on behalf of defendants or retain and store them for the benefit of defendants—are not concerned with fitting the firearm-disability dilemma into a preexisting property category. This approach instead focuses solely on the statutory dilemma, and may thus be characterized as “realist” due to its direct approach to property rights.¹⁰⁴

The Seventh Circuit is not the only court to pursue a realist approach to the firearm-disability dilemma. The Fifth Circuit used a similar method in *Cooper v City of Greenwood, Mississippi*,¹⁰⁵ when a search warrant of an animal hospital led to the discovery of firearms on the premises.¹⁰⁶ As a convicted felon, Earl Roy Cooper was charged with violating § 922 for constructively possessing the firearms, but because the court characterized the firearms as derivative contraband, it held that Cooper retained a residual property interest that was “limited to an ownership interest.”¹⁰⁷ Therefore, the court held that his § 1983 suit—which allowed him to bring a claim against the local government for deprivation of his due process rights—had merit in light of the city's failure to conduct § 924 forfeiture proceedings before auctioning off the firearms.¹⁰⁸ The court suggested that compelling the City of Greenwood to sell the firearms for the account of the defendant was an appropriate remedy to the firearm-disability dilemma.¹⁰⁹ This liquidation-and-disbursement remedy parallels

¹⁰² *Miller*, 588 F3d at 419–20.

¹⁰³ See, for example, *Rodriguez*, 2011 WL 5854369 at *7 (suggesting that a complete gift to the felon's brother would be inappropriate); *United States v Parsons*, 472 F Supp 2d 1169, 1175 (ND Iowa 2007).

¹⁰⁴ See Part IV.C.

¹⁰⁵ 904 F2d 302 (5th Cir 1990).

¹⁰⁶ *Id* at 304.

¹⁰⁷ *Id* at 305.

¹⁰⁸ *Id* at 306.

¹⁰⁹ The court's proposed remedy to the firearm-disability dilemma was inspired by 27 CFR § 72.39(a)(2), a provision of the ATF guidelines that dictates the sale of firearms seized by the ATF for the account of petitioners who successfully petition for exception from § 924 forfeiture proceedings. See *Cooper*, 904 F2d at 306.

the Seventh Circuit's realist solutions, as it makes no mention of traditional property institutions.¹¹⁰

B. Moralistic Approaches Denying Residual Property Rights

In contrast to courts that recognize convicted felons' firearm property rights, some courts refuse to recognize any residual rights in the firearm-disability dilemma context. While one of these courts may have relied on a per se characterization of firearm contraband found in a convicted felon's possession,¹¹¹ most courts ruling on this issue arguably rely primarily on moralistic or public policy grounds when strictly construing the possession ban.

In *United States v Howell*,¹¹² the defendant sought the return of his firearms under FRCrP 41(g).¹¹³ The Eleventh Circuit refused Howell's claim without any discussion of the requisite § 924 forfeiture proceedings, asserting that § 922 was "specifically designed to serve public policy and prevent convicted felons from having either constructive or actual possession of firearms," adding that "[o]bviously, the courts cannot participate in a criminal offense by returning firearms to a convicted felon."¹¹⁴

The Eighth Circuit also relied upon principle and policy in *United States v Bagley*¹¹⁵ when rejecting an FRCrP 41(g) motion, observing "that to allow [the defendant] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law."¹¹⁶

Although these courts explicitly rely upon strict constructions of § 922's firearm possession ban, the language they employ suggests that their nullification of both § 924's forfeiture provisions and the default rule mandating the return of seized

¹¹⁰ See *Cooper*, 904 F2d at 306. See also *United States v Approximately 627 Firearms, More or Less*, 589 F Supp 2d 1129, 1140 (SD Iowa 2008) (ordering the liquidation and disbursement of the defendant's personal firearms so as to "restore [the defendant], as closely as possible under the circumstances, to the same position he would have been in had the Government not seized his personal firearms to begin with"); *Watts v United States*, 2002 WL 999320, *3 (ND Tex) (recommending that the government pay fair market value for the felon's seized firearms in a firearm-disability dilemma).

¹¹¹ *United States v Felici*, 208 F3d 667, 670 (8th Cir 2000) (strictly construing the possession ban but noting that this construction is "[b]ased upon Felici's status as a convicted felon").

¹¹² 425 F3d 971 (11th Cir 2005).

¹¹³ *Id* at 972.

¹¹⁴ *Id* at 977.

¹¹⁵ 899 F2d 707 (8th Cir 1990).

¹¹⁶ *Id* at 708 (citation omitted and second brackets in original).

property¹¹⁷ is primarily grounded in public policy and moral intuitions.¹¹⁸

III. JUDICIAL CONCEPTUALIZATIONS OF PROPERTY RIGHTS

Intuitively, it seems that felons subject to the firearm-disability dilemma should retain some kind of residual property right, as ruling otherwise would render the § 924 forfeiture provisions a nullity in contravention of a court's duty to give effect to "every clause and word of a statute."¹¹⁹ This Comment proposes that one way to give meaning to both § 922's firearm disability and § 924's forfeiture requirements is to look for and recognize any residual rights that persist beyond a ban on firearm possession. As will be shown, courts determining whether property rights exist regularly rely upon conceptualizations of property to reach their decisions. And as Professor Hanoch Dagan observes, there are competing views as to the best way to conceptualize property rights, because "[p]roperty is torn between form and substance."¹²⁰ While these conceptualizations of property are by no means mutually exclusive, this insight suggests that a judge's predisposition to either substantive or formalistic views of property may influence the remedies he or she prescribes. Additionally, some judges also appear to employ moral conceptualizations of property rights, a judicial construction that is especially pertinent in the firearm-disability dilemma context. Accordingly, this Part analyzes judicial conceptualizations of property rights through formal, substantive, and moral lenses in order to provide a broader context for understanding the interests at stake in the firearm-disability dilemma.

A. Substance of Property: Bundles of Rights

The debate over the proper conceptualization of property is rigorous. However, the historic view of property as rights in

¹¹⁷ *United States v LaFatch*, 565 F2d 81, 83 (6th Cir 1977).

¹¹⁸ See *United States v Roberts*, 322 Fed Appx 175, 176–77 (3d Cir 2009) (relying summarily upon the *Howell* decision and its reasoning). See also *United States v Headley*, 50 Fed Appx 266, 267 (6th Cir 2002) (construing the possession ban strictly without discussion of § 924); *United States v Oleson*, 2008 WL 2945458, *2–3 (ND Iowa) (rejecting the defendant's request to allow the firearms to be gifted to his sister based upon a strict construction of the § 922 possession ban).

¹¹⁹ *United States v Menasche*, 348 US 528, 538–39 (1955). This provision of § 924 would be rendered inoperative if courts failed to require the government to provide process within 120 days.

¹²⁰ Hanoch Dagan, *The Craft of Property*, 91 Cal L Rev 1517, 1519 (2003).

specified objects¹²¹ has largely been replaced with the legal realist notion of the “bundle of rights” property owners hold with respect to others, a view first summarized by Professor Wesley Hohfeld.¹²² While this view of property is not without its detractors,¹²³ courts continue to utilize this conceptual device in determining the nature of novel property rights. Three examples of the employment of this judicial tool—*In re Marriage of Graham*,¹²⁴ *Moore v Regents of the University of California*,¹²⁵ and *United States v Craft*¹²⁶—suffice to demonstrate its utility.

In re Marriage of Graham posed the question of whether an MBA degree constitutes property subject to Colorado’s marital property division legislation.¹²⁷ In determining the scope of the term “property,” the Supreme Court of Colorado held that property includes “everything that has an exchangeable value or which goes to make up wealth or estate.”¹²⁸ The court also noted other characteristics of property, including “whether [something] can be assigned, sold, transferred, conveyed, or pledged, or

¹²¹ See Thomas C. Grey, *The Disintegration of Property*, in J. Roland Pennock and John W. Chapman, eds, *Property: Nomos XXII* 69, 73 (NYU 1980) (“The conception of property held by the legal and political theorists of classical liberalism coincided precisely with the present popular idea, the notion of thing-ownership.”).

¹²² See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L J 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L J 16 (1913). See also Cook, *Hohfeld’s Contributions* at 14 (cited in note 77) (positing that Hohfeld’s scholarship demonstrates that “what the owner of property has is a very complex aggregate of rights, privileges, powers and immunities”).

¹²³ See, for example, Dagan, 91 Cal L Rev at 1570 (cited in note 120) (arguing for a conceptualization of property that combines both the bundles-of-rights theory and forms of property, a union he describes as “property institutions”); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 Ariz L Rev 371, 376 (2003) (promoting a conceptualization of property that embraces the right to exclude in addition to rights of acquisition, use, and disposal, such that the aggregate of these rights gives “full meaning to the concept of property”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb L Rev 730, 730 (1998):

[T]he right to exclude others is more than just “one of the most essential” constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.

J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L Rev 711, 714 (1996) (“‘Property is a bundle of rights’ is little more than a slogan. . . . There is no real ‘theory’ that property is a bundle of rights.”).

¹²⁴ 574 P2d 75 (Colo 1979).

¹²⁵ 793 P2d 479 (Cal 1990).

¹²⁶ 535 US 274 (2002).

¹²⁷ *Graham*, 574 P2d at 75.

¹²⁸ *Id* at 77.

whether it terminates on the death of the owner.”¹²⁹ With this conception of property in mind, the court concluded that a graduate degree does not constitute property, asserting that “[i]t does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged.”¹³⁰ Thus, after first defining the bundle of rights that comprises a full property right, the court determined that the failure of a degree to embody any of these individual rights compelled a ruling that educational degrees do not constitute property.¹³¹

The Supreme Court of California was faced with a similarly difficult question in *Moore v Regents of the University of California*, where it was required to assess the limits of an individual’s property rights in the cellular structure and genetic materials contained in his surgically removed spleen.¹³² The UCLA Medical Center used John Moore’s spleen to isolate a unique cellular structure from which a commercially valuable blood product was derived. Moore brought a claim for tortious conversion of his genetic material.¹³³ The court noted that in order to substantiate his claim, Moore needed to “establish an actual interference with his *ownership* or *right of possession*.”¹³⁴ In addition to these two sticks of a full property-right bundle, the court also discussed the right of control, equating control with “so many of the rights ordinarily attached to property.”¹³⁵ After assessing these three elements—ownership, possession, and control—of a full property right, the court concluded that there was no evidence that Moore had retained any of these rights in sufficient quantity to merit a claim for conversion.¹³⁶

The bundle-of-rights conceptualization of property is not the exclusive domain of state supreme courts, as the Supreme Court also uses this analytical tool to flesh out uncertain property rights. In *United States v Craft*, the Court was required to determine “whether a tenant by the entirety possesses ‘property’ or

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Graham*, 574 P2d at 77.

¹³² *Moore*, 793 P2d at 487–89.

¹³³ *Id.* at 480–82.

¹³⁴ *Id.* at 488.

¹³⁵ *Id.* at 492 (discussing California statutory restrictions on the control of excised cells, and exploring whether the right of control persists despite the restrictions).

¹³⁶ *Moore*, 793 P2d at 496.

‘rights to property’ to which a federal tax lien may attach.”¹³⁷ Eight years of tax delinquency prompted the IRS to attach a tax lien to real property located in Grand Rapids, Michigan, where Mr. and Mrs. Craft owned the land as tenants by the entirety. In Michigan, tenants by the entirety have “no separate interest” in jointly held property, such that it was not clear whether a tax lien specific to Mr. Craft could attach to the land.¹³⁸ In order to ascertain whether Mr. Craft did have an independent property interest, the Court compared the rights Mr. Craft held to the rights it deemed essential to a complete property bundle. Mr. Craft’s rights included the right to exclude others from property, the right to use property, the right to receive income produced or derived therefrom, the right of control, the right to alienate or otherwise encumber property with the consent of the other spouse, and the right of survivorship.¹³⁹ The Court found that the only significant “stick” from a full property right “bundle” that Mr. Craft did not possess was the right to unilaterally alienate the property.¹⁴⁰ After conceptualizing the property rights at stake in this manner, the Court found that Mr. Craft’s property rights were sufficient to accommodate tax lien attachment.¹⁴¹

While these cases address disparate asserted property rights, they uniformly utilize the bundle-of-rights conception of property in determining what constitutes property. This substantive perception of property thus serves as a judicial tool for discerning the contours of uncertain property rights.

B. Forms of Property: Classification, Induction, and Deduction

Formal conceptions of property have a long tradition of being used by the judiciary to resolve property conflicts arising between individuals. A formalistic conceptualization of property presumes that existing legal institutions embody

a scientific system of rules and institutions that [are] *complete* in that the system made right answers available in all

¹³⁷ *Craft*, 535 US at 276.

¹³⁸ *Id.* at 277. See also text accompanying note 149.

¹³⁹ *Craft*, 535 US at 283–85.

¹⁴⁰ *Id.* at 284.

¹⁴¹ *Id.* at 288. For an excellent summary of the *Craft* Court’s “bundle of rights” analysis, see Dagan, 91 Cal L Rev at 1518–26, 1532–35 (cited in note 120) (“To shift from labels to substance, Justice O’Connor invoked the Hohfeldian conception of property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”) (quotation marks omitted).

cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; . . .¹⁴²

Courts employing a formal conception of property rights are tasked with the “classification, induction, and deduction” of asserted property rights into preexisting forms of property.¹⁴³ After determining what form of property best approximates the asserted rights, courts then fashion their rulings by applying the preexisting rules associated with the identified property form, as demonstrated in the following two examples.

In *People v Minch*,¹⁴⁴ the Michigan Supreme Court recently demonstrated the formalistic approach in the context of their state counterpart to the federal firearm-disability dilemma. After examining the state’s firearm-disability statute—which terminates the disability after five years if certain conditions are met—the court concluded that the legislation created a “constructive bailment . . . between defendant and the police department.”¹⁴⁵ This was because “nothing in the statute severs a felon’s ownership interest in his or her firearms,” but it instead simply prohibits physical and constructive possession.¹⁴⁶ Accordingly, the court directed the police department and any successor bailees to conform to bailment requirements, as this was the legal relationship most closely approximated by the state’s firearm disability.¹⁴⁷

Justices Antonin Scalia’s and Clarence Thomas’s dissents in *Craft* present another excellent example of the application of formalistic property theory. As outlined above, the Court had to determine the nature of tenancy-by-the-entirety property rights for the purposes of IRS tax liens.¹⁴⁸ Justice Thomas explained that under Michigan and English common law, “property held as a tenancy by the entirety does not belong to either spouse, but to

¹⁴² Richard H. Pildes, *Forms of Formalism*, 66 U Chi L Rev 607, 608–09 (1999).

¹⁴³ Dagan, 91 Cal L Rev at 1527 (cited in note 120).

¹⁴⁴ 825 NW2d 560 (Mich 2012).

¹⁴⁵ Id at 563.

¹⁴⁶ Id at 562–63.

¹⁴⁷ Id at 563–64. It is important to note that, while bailments generally do not create formal fiduciary duties between the bailee and bailor, they usually include an understanding that a bailee will “safeguard the personal property of [the bailor] and exercise[] complete dominion at all times over the property.” Bailments, 8 Corpus Juris Secundum § 1 at 366–67 (cited in note 5).

¹⁴⁸ See notes 137–41 and accompanying text.

a single entity composed of the married persons. . . . Neither spouse has any separate interest in such an estate.”¹⁴⁹ Justice Scalia suggested that the purpose of this *form* of property ownership was to “benefit [] the stay-at-home spouse or mother” by (1) providing her with the right of survivorship, and (2) shielding her from any indebtedness that her husband may incur.¹⁵⁰ By conceptualizing the property right as a preexisting form of property, the dissenters in *Craft* relied on the ready-made legal institution of tenancy by the entirety to dictate the resolution of an otherwise complicated substantive “sticks” inquiry.

As demonstrated by these cases, the task of a court formalistically conceptualizing property is straightforward. Instead of reciting and analyzing a list of undertheorized rights that are deemed essential to a full property bundle, formalistic courts find the preexisting form of property that is most analogous to the situation at hand and apply established rules to resolve the dispute. While this approach benefits from building upon established legal rules, it is subject to the legal realist critique that it promotes form while obscuring substance.¹⁵¹ Nonetheless, it is an effective tool that courts can employ when ascertaining the boundaries of uncertain property rights.

C. Policy of Property: Normative Assessments of Rights

In addition to substantive and formalistic views of property, courts also employ moralistic conceptualizations of property when reconciling conflicting and uncertain property interests. Indeed, “morality has been a strong force in American public life,” such that when wrongful possession is implicated—as it is in the context of a firearm disability—“[c]ourts regularly have examined the legitimacy of possession of chattels, and have refused to accord possessory rights when they have found . . . misconduct on the part of the [potential] possessor.”¹⁵² Thus, while a default property rule may require granting special property rights to unsavory characters, some courts refuse to recognize these rights when a state’s public policy deems the potential recipient a wrongful actor.

¹⁴⁹ *Craft*, 535 US at 292 (Thomas dissenting) (quotation marks omitted).

¹⁵⁰ *Id.* at 289–90 (Scalia dissenting).

¹⁵¹ See Dagan, 91 Cal L Rev at 1527 (cited in note 120).

¹⁵² R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw U L Rev 1221, 1222–24 (1986).

For example, in *Jones v Metcalf*,¹⁵³ the Supreme Court of Vermont applied a moralistic interpretation of property rights to invalidate a trapper's claim of conversion. The plaintiff had set a bear trap that did not comport with statutory requirements, and the defendant—a local game warden—discovered the illegal construction of the trap and seized it and the bear it had killed.¹⁵⁴ The plaintiff sued to recover the value of the bear's spoiled meat, the hide, and the time he lost searching for the confiscated trap. The trapper based his claim on the common law rule that reducing wild animals to possession creates property rights in formerly *ferae naturae*.¹⁵⁵ Regarding both the game and trap, the court found that the law “will not enforce claims made in contravention of its mandates,” and that “courts of justice will not sustain actions in regards to . . . property, which have for their object the violation of law.”¹⁵⁶ As the trapper's method of hunting was deemed illegal, he received no protection of his otherwise-valid property rights because “the act of reducing a wild animal to possession, as affecting the question of ownership, must not be wrongful.”¹⁵⁷

*Dorrell v Clark*¹⁵⁸ provides another example of a moralistic interpretation of property rights. Elmer Dorrell installed two slot machines in his billiard parlor in violation of state law. After the local sheriff discovered and confiscated the slot machines, Dorrell commenced an action alleging that he was entitled to the money in the slot machines.¹⁵⁹ The court held that ownership of the money was originally vested in the individuals who placed the money into the slot machine, and that even after a limitations period extinguished their claim, the owner of the slot machine should still be precluded from obtaining ownership over the property.¹⁶⁰ This was because “the power of our courts, either at law or in equity, cannot be invoked in aid of one showing a violation of the law.”¹⁶¹ The court deemed this outcome “in conformity with the public policy of the state and of good mor-

¹⁵³ 119 A 430 (Vt 1923).

¹⁵⁴ Id at 431.

¹⁵⁵ Id at 432.

¹⁵⁶ Id.

¹⁵⁷ *Jones*, 119 A at 432. See also *Dapson v Daly*, 153 NE 454, 454 (Mass 1926) (granting special import to the fact that the plaintiff was not a licensed hunter, and therefore “was not entitled to the rights of a huntsman”).

¹⁵⁸ 4 P2d 712 (Mont 1931).

¹⁵⁹ Id at 712–13.

¹⁶⁰ Id at 714.

¹⁶¹ Id.

als,” despite the lack of on-point forfeiture legislation.¹⁶² The New York Court of Appeals reached an identical outcome in a case involving illegal gambling winnings.¹⁶³

In all of these cases, courts applied a legal presumption that property rights stemming from wrongdoing do not deserve judicial recognition, despite common law default rules that would otherwise vest title in the wrongdoer. This view is based on the “public policy of the state and of good morals,”¹⁶⁴ and amounts to a judicial determination that, under certain circumstances, default property rules may be ignored in favor of normative assessments of public policy. Accordingly, this conceptualization of property serves as yet another judicial tool for ascertaining the scope of uncertain property rights. When taken in conjunction with substantive and formalistic conceptions of property rights, courts are equipped with three means by which they can comprehend and recognize otherwise ambiguous property rights.

IV. RESOLVING THE FIREARM-DISABILITY DILEMMA

The judicial tools of substantive, formalistic, and moralistic conceptualizations of property explored in Part III are well suited for resolving the firearm-disability dilemma. The basic problem presented by the inconsistency of §§ 922 and 924 is the determination of what should follow the termination of physical and constructive possession rights from an otherwise-complete title to firearm property. The statutory ambiguity can be interpreted either as fashioning new property rights or as extinguishing old title. This Part first shows that courts choosing to completely invalidate a felon’s firearm property rights are employing moralistic conceptualizations of property rights that generate “clean hands” remedies. Conversely, courts recognizing a residual property right in felon firearm property often approach the dilemma either substantively or formalistically. Substantive conceptualizations generate realist solutions specially tailored to the firearm-disability dilemma. Formalistic conceptualizations generate formal solutions that are similarly well suited to the problem, while also benefitting from applicable preexisting rules

¹⁶² *Dorrell*, 4 P2d at 714.

¹⁶³ See *Hofferman v Simmons*, 49 NE2d 523, 526 (NY 1943) (“To say that a professional gambler . . . can invoke the aid of the courts to get back from the police monies [obtained] in defiance of the law, is to say that the courts will . . . give their sanction to titles and possessory rights founded only on lawbreaking.”).

¹⁶⁴ See text accompanying note 162.

that courts have long experience applying in different contexts. This Part examines the advantages and disadvantages of each of these conceptualizations and resulting remedies in the context of the firearm-disability dilemma, and concludes by proposing a constructive trust and power-of-appointment solution that draws on the strengths of each approach.

A. Moralistic Solution: Clean Hands

A moralistic conceptualization of property rights provides a simple solution to the firearm-disability dilemma.¹⁶⁵ Viewed through such a lens, a court is free to reject the residual property rights asserted by convicted felons if such a solution is supported by public policy. As discussed above, in passing the Crime Control Act, Congress explicitly expressed a public policy against allowing felons to possess firearms.¹⁶⁶ Because the moralistic view of property provides courts with precedent supporting rulings that completely extinguish the property rights of wrongdoers (a label that criminal conviction inevitably affixes upon felons),¹⁶⁷ it is a useful judicial tool for courts seeking to resolve the firearm-disability dilemma in favor of the government. It also allows a court to avoid expending judicial resources determining which remedy best recognizes asserted residual rights. Finally, under this solution, courts can avoid politically unsavory remedies that recognize property rights in wrongdoers.¹⁶⁸

This is precisely what the Third, Sixth, Eighth, and Eleventh Circuits did—albeit without explicitly invoking a moralistic conception of property rights—when they refused to recognize felons’ residual rights in seized firearms.¹⁶⁹ Some of these courts justified their rulings in part by reference to the doctrine of unclean hands, which “is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.”¹⁷⁰ The courts also observed that recognizing firearm property rights in felons would be repugnant to

¹⁶⁵ See Part III.C.

¹⁶⁶ See note 14 and accompanying text.

¹⁶⁷ Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453, 457–58 (1997) (discussing the condemnation that the criminal law affixes to convicts).

¹⁶⁸ See note 152 and accompanying text.

¹⁶⁹ See notes 111–18 and accompanying text.

¹⁷⁰ *United States v Felici*, 208 F3d 667, 670–71 (8th Cir 2000) (noting that FRCrP 41(g) motions are brought in equity). See also *Howell*, 425 F3d at 974 (“The defendant in the instant case has come into court with extremely ‘unclean hands.’ One engaged in this type of criminal conduct is hardly entitled to equitable relief.”).

public policy.¹⁷¹ By focusing on public policy and the unclean hands of convicted felons, the courts in essence concluded that “whatever may or may not be done with the [property] in the custody of the [government], the power of our courts, either at law or in equity, cannot be invoked in aid of one showing a violation of the law.”¹⁷²

While the moralistic conception of property rights provides a straightforward solution to the problem, it is subject to at least three serious weaknesses. First, a strict construction of § 922’s possession ban that completely extinguishes a felon’s property rights renders § 924’s forfeiture provision a nullity. If Congress intended to extinguish all of felons’ property rights in their firearms when enacting the Crime Control Act, then why did it include the § 924 forfeiture provisions and subsequently strengthen them with the addition of a 120-day limitations period? A court would be hard pressed to reconcile these provisions with its refusal to recognize residual property rights in the firearms. Courts reaching this result effectively read the provisions out of the statute, thereby violating the canon of statutory construction that imposes a duty upon courts to “give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.”¹⁷³

Another problem with the public policy approach is that it fails to recognize that it is the *government’s* failure to timely institute § 924 forfeiture proceedings that generates the firearm-disability dilemma, through no fault of the convicted felons. Analogy to the doctrine of laches is appropriate, which was “developed and designed to protect . . . against those who have slept upon their rights, with knowledge and ample opportunity to assert them.”¹⁷⁴ Laches is “an equitable doctrine that may be asserted to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom relief is sought.”¹⁷⁵ Under the terms of this analogy, a felon may be

¹⁷¹ *Howell*, 425 F3d at 977 (asserting that § 922 was “specifically designed to serve public policy and prevent convicted felons from having either constructive or actual possession of firearms”); *Bagley*, 899 F2d at 708 (“[T]o allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law.”) (second and third alterations in original). See also notes 111–18 and accompanying text.

¹⁷² *Dorrell*, 4 P2d at 714.

¹⁷³ *United States v Menasche*, 348 US 528, 538–39 (1955) (quotation marks omitted).

¹⁷⁴ *Ewert v Bluejacket*, 259 US 129, 138 (1922).

¹⁷⁵ *Robbins v People*, 107 P3d 384, 388 (Colo 2005).

considered a wrongdoer by virtue of his felony conviction, but a government entity that slept upon its firearm forfeiture rights must also be held accountable to the standards imposed by Congress. Although the doctrine of laches is inapplicable to the situation at hand,¹⁷⁶ it does demonstrate legal recognition of the public policy behind limitations periods. This policy of punishing those who sleep on their rights cuts against a normative approach to the firearm-disability dilemma that lays all liability at the feet of convicted felons without recognizing the government's wrongdoing.

A final drawback of the moralistic approach—as the only conceptualization that extinguishes all of a felon's property rights—is the concern that failure to recognize any residual property rights may constitute a Fifth Amendment taking. Judge Easterbrook confirmed the salience of this concern by implication, suggesting that a failure to recognize some of a defendant's rights in his firearms would result in unnecessary and inefficient expenditures of judicial resources as the parties litigated subsequent takings claims.¹⁷⁷

In summary, a moralistic approach catalyzed by the public policy conceptualization of property rights provides courts with an easy solution to the firearm-disability dilemma. The simplicity of this solution comes at the cost of nullifying § 924 forfeiture proceedings, creating perverse incentives for the government to sleep on its rights when instituting forfeiture proceedings, and possibly working an unconstitutional taking of the property.

B. Formalistic Solutions: Bailments, Trusts, and Powers of Appointment

A formalistic approach to the firearm-disability dilemma results in the categorization of a felon's residual property rights into a preexisting legal form of property ownership.¹⁷⁸ Courts employing this conceptualization of property have analogized

¹⁷⁶ The invocation of laches generally requires demonstration of (1) an unreasonable delay by one party in the assertion of his rights and (2) a resulting prejudice to the party raising the laches defense. *United States v Mandycz*, 447 F3d 951, 965 (6th Cir 2006). Congress has defined "unreasonable delay" as a 120-day delay in the commencement of § 924(d) forfeiture proceedings. But there is no danger of a felon suffering prejudice due to his reliance on firearm property rights in himself, because the guns are always in the government's possession.

¹⁷⁷ See *Miller*, 588 F3d at 419. For an extended treatment of the takings question, see Part I.B.3.

¹⁷⁸ See Part III.B.

the legal rights emerging from the intersection of §§ 922 and 924 to several previously recognized forms of property. Multiple courts have explicitly decided that trusts and bailments are the most appropriate resolutions of the firearm-disability dilemma, while others implicitly prescribe a power-of-appointment remedy to preserve residual property rights. The merits of each of these remedies deserve some attention.

The most prevalent formalistic method of resolving the firearm-disability dilemma is analogizing to trusts.¹⁷⁹ Originating from the English concept of “use” as enforced in equity,¹⁸⁰ the tool of trust severs legal and equitable title to property.¹⁸¹ Trustees hold legal title and owe beneficiaries a fiduciary duty to manage the property for their benefit.¹⁸² Correspondingly, beneficiaries hold equitable title to the property, such that they enjoy the net income generated by the trust arrangement.¹⁸³

As applied to the firearm-disability dilemma, courts seeking to recognize a residual property right can rely upon the “trust” form of property, whereby a felon-beneficiary retains equitable title and “ownership” of his firearms.¹⁸⁴ The formal trust allays concerns over physical possession and control via constructive possession, since “a trustee is not subject to the control of . . . the beneficiaries except to the extent the terms of the trust reserve or confer some such power over the trustee.”¹⁸⁵ If utilized, a trust remedy to the firearm-disability dilemma entails simple recognition of a felon’s retention of equitable title, which § 922 does not purport to extinguish. Several courts have employed trust analogies to decide the firearm-disability dilemma.¹⁸⁶

¹⁷⁹ See notes 94–103 and accompanying text.

¹⁸⁰ Herbert Thorndike Tiffany, 1 *The Law of Real Property* § 221 at 390–91 (Callaghan 3d ed 1939).

¹⁸¹ Robert J. Lynn and Grayson M.P. McCouch, *Introduction to Estate Planning* § 8.1 at 168–69 (West 5th ed 2004).

¹⁸² *Id.* at 168.

¹⁸³ *Id.* at 168–69.

¹⁸⁴ Restatement (Third) of Trusts § 2, comment d (2003) (“The term ‘owner’ is used in this Restatement to indicate a person by whom one or more interests are held for the person’s own benefit.”).

¹⁸⁵ *Id.* at § 5, comment e. See also *id.* (noting that “a trust may be created without the consent or even the knowledge of either the beneficiaries or the trustee,” and that “[a] trustee can maintain an action with respect to trust property, but ordinarily a beneficiary cannot”).

¹⁸⁶ See, for example, *Zaleski*, 686 F3d at 93 (2d Cir) (noting after exploring the rights associated with trusts that “[s]ole possession and exclusive control of the firearms by a third party may extinguish the felon’s possessory interest”); *Miller*, 588 F3d at 420 (7th Cir) (deeming trusts an appropriate remedy to the firearm-disability dilemma).

Another formalistic solution that courts have explicitly applied to the firearm-disability dilemma is analogizing to bailments. Under this construction, the government holds property as bailee, to whom the firearms are delivered for the purpose of safekeeping for the duration of the felon's (or bailor's) disability.¹⁸⁷ The difference between bailments and trusts is that the trustee has a fiduciary duty to manage the property for the felon's benefit, while a bailee has only a duty of safekeeping.¹⁸⁸ Two courts have proposed this approach.¹⁸⁹

A third formal solution to the dilemma is to allow a felon to exercise a power of appointment, subject to some limitations. Powers of appointment entail the power "to designate recipients of beneficial interests in property."¹⁹⁰ In other words, a felon with the power of appointment can determine to whom the government should confer the firearms. Judges may assuage their concerns that such a remedy amounts to constructive possession by fashioning a nongeneral exclusionary power of appointment, which would restrict the felon's ability to grant the property to certain enumerated individuals, perhaps including himself, close relatives, and friends.¹⁹¹ Thus, the power of appointment grants courts the flexibility to alleviate § 922 possession concerns while simultaneously giving import to § 924's forfeiture limitations. It also allows judges to recognize the residual ownership right of exclusion. Implicitly, this solution has been suggested by at least two courts.¹⁹²

¹⁸⁷ See Bailments, 8 Corpus Juris Secundum § 1 at 366 (cited in note 5) (defining bailments comprehensively as "a delivery of personalty for some particular purpose . . . [and] that after the purpose has been fulfilled it shall be redelivered to the person who delivered it").

¹⁸⁸ See note 147.

¹⁸⁹ See *Minch*, 825 NW2d at 563 (Mich) (holding that a state felon possession ban created a "constructive bailment" relationship); *Miller*, 588 F3d at 420 (7th Cir) (proposing "storage of the firearms by the United States while [the defendant's] firearms disability continues").

¹⁹⁰ Restatement (Second) of Property: Donative Transfers § 11.1 (1986).

¹⁹¹ See Restatement (Third) of Property: Wills & Other Donative Transfers § 17.3 (2011) (discussing nongeneral powers); *id* at § 17.5, comment h (describing exclusionary powers).

¹⁹² See *Miller*, 588 F3d at 420 (7th Cir) (suggesting that the power to make a complete gift to a friend or relative with certain restrictive conditions in place would resolve the conflict between §§ 922 and 924); *United States v Parsons*, 472 F Supp 2d 1169, 1175 (ND Iowa 2007) (stating that allowing the defendant to designate to whom the firearms should be given "does not rise to the level of constructive possession but is, instead, permitting [the defendant] to exercise only the merest indicia of ownership").

C. Realist Solution: Liquidation and Disbursement

The substantive view of property encourages judicial inquiry into the best means of recognizing the individual “sticks” of property rights to which a property owner is legally entitled. In the context of the firearm-disability dilemma, such an analysis would proceed by (1) exploring the nature of a full complement of property rights and (2) assessing which rights remain after the dilemma is triggered. The *Graham*, *Moore*, and *Craft* cases used to demonstrate the substantive conceptualization of property also provide important guidance in this context.¹⁹³

In *Graham*, the Supreme Court of Colorado suggested that exchangeable value and rights of alienability were key considerations in defining property.¹⁹⁴ As these are critical elements of property, it follows that a full property right must include the power to alienate and obtain value for property. In *Moore*, the California Supreme Court focused on the rights of ownership, possession, and control as the basis of complete property rights.¹⁹⁵ Finally, in *Craft*, the US Supreme Court enumerated many sticks in the property bundle, including exclusion, use, control, alienation, and receipt of income derived from the property.¹⁹⁶

If one were to subtract from these enumerations of critical property rights the right of possession as defined in Part I.B.1, which also encompasses a degree of control, it is readily apparent that the entire property bundle is not extinguished. In other words, these cases make it clear that residual property rights still persist in the absence of possession. In *Graham*, the right to obtain the value of property does not implicate possession or control.¹⁹⁷ Similarly, the *Moore* enumeration of property rights explicitly preserves ownership even if possession and control are lost. Finally, while the possession barred by § 922 is implicated to some degree by the *Craft* sticks of use, control, alienation, and exclusion, there is no such implication by the right to the receipt

¹⁹³ See Part III.A.

¹⁹⁴ See *Graham*, 574 P2d at 77 (quoting *Black's Law Dictionary* 1382 (West 4th ed 1968), for the proposition that property consists of “everything that has an exchangeable value or which goes to make up wealth or estate”).

¹⁹⁵ See *Moore*, 793 P2d at 488 (holding that for the tort of conversion, a plaintiff's property rights of possession and ownership must be violated, which will often implicate the right to control).

¹⁹⁶ *Craft*, 535 US at 279–83 (discussing the rights associated with a tenancy by the entirety and comparing these rights to “the most essential property rights”).

¹⁹⁷ See notes 128–29 and accompanying text.

of income derived from property—another stick the *Craft* Court deemed critical. Although these cases are not consistent in determining which rights are necessary to constitute a complete property right, they *are* consistent in their understanding that the right to receive value derived from property is an ownership right common to most property bundles.¹⁹⁸

Were a realist court to determine that the only meaningful property right that persists in the firearm-disability dilemma situation is ownership—defined as the right to receive value derived from property—then its remedy would seek to restore that value to the felon. One logical way to protect this right entails liquidation of the property by government agents and disbursement of the proceeds to the felon. This exact remedy has been suggested or employed by at least three courts faced with the firearm-disability dilemma.¹⁹⁹

The liquidation-and-disbursement remedy presents a clean solution to the firearm-disability dilemma by directly targeting the residual ownership interest retained by felons. In addition to recognizing felons' retained rights,²⁰⁰ it also removes the perverse incentive for the government to sleep on its rights and simultaneously furthers the public policy objective of keeping firearms out of the hands of felons.²⁰¹ Additionally, courts employing this approach are liberated from the task of finding the correct legal form with which to preserve residual firearm property rights, although they must instead engage in the work of exploring which substantive rights remain in the absence of possession and constructive control. One problem this remedy raises is whether courts have the authority to order government agencies to act as auctioneers for convicted felons. In *Cooper*, the

¹⁹⁸ See *Craft*, 535 US at 283 (noting the importance of the right to income derived from property); *Moore*, 793 P2d at 488, 491–92 (exploring ownership rights as distinct from possessory or control rights, and contemplating that such rights would include the right to value derived from excised cells); *Graham*, 574 P2d at 77 (citing the right to “exchangeable value” as a useful shorthand for property).

¹⁹⁹ See *Miller*, 588 F3d at 419 (7th Cir) (suggesting that the sale of the firearms and disbursement to the defendant would be a lawful remedy); *United States v Approximately 627 Firearms, More or Less*, 589 F Supp 2d 1129, 1140 (SD Iowa 2008) (ordering a liquidation and disbursement remedy, since “it would restore [the defendant], as closely as possible under the circumstances, to the same position he would have been in had the Government not seized his personal firearms to begin with”); *Cooper*, 904 F2d at 306 (5th Cir) (approving an ATF regulatory remedy that would allow the court to order the sale of firearms for the account of the claimant).

²⁰⁰ See note 177 and accompanying text.

²⁰¹ See note 85 and accompanying text.

court correctly suggests that such a remedy is not entirely novel, as relevant ATF regulations contemplate a similar approach.²⁰² Obliging the government to “act as a felon’s auctioneer”²⁰³ would likely seem objectionable to moralistic courts, but may be the best a realist court can do given that it was the government’s failure to adhere to § 924’s forfeiture requirements that precipitated the dilemma in the first place.

D. Constructive Trust and the Power of Appointment: A Formalistic Solution Informed by Realist and Moralistic Considerations

While the property conceptualizations outlined above provide resolutions to the firearm-disability dilemma, all are subject to certain shortcomings. Strictly moralistic approaches promote public policies at the expense of ignoring the forfeiture provisions, incentivizing governmental laziness in instituting forfeiture, and possibly working unconstitutional takings. Realist conceptualizations of felon firearm property rights are well suited to discerning which rights persist after possession is prohibited, but the liquidation-and-disbursement solution offends moralistic sensibilities by forcing the government to act as a felon’s auctioneer. Formalistic remedies benefit from the ready-made rules associated with various property forms. But as long as possession is precluded and some residual right is recognized, formalism offers little guidance as to which form of property best resolves the dilemma.

Consideration of each approach’s concomitant strengths and weaknesses does suggest, however, that the various conceptualizations may be used in combination to avoid their idiosyncratic pitfalls and arrive at a more deliberative resolution of the firearm-disability dilemma. Public policy dictates that felon firearm possession be strictly curtailed, and that government resources not be expended to preserve firearm value for felons.²⁰⁴ Substantive analysis suggests that courts, at a minimum, should recognize a residual ownership right that preserves the value of seized firearms for felons.²⁰⁵ With these guiding considerations,

²⁰² See note 109. See also *Approximately 627 Firearms, More or Less*, 589 F Supp 2d at 1140 (citing with approval *Cooper*’s suggestion that courts enjoy this authority).

²⁰³ *Miller*, 588 F3d at 419.

²⁰⁴ See notes 166–68 and accompanying text.

²⁰⁵ See notes 194–98 and accompanying text.

courts can fashion formalistic remedies that benefit from previously established property rules.²⁰⁶

One formalistic solution that comports with these principles is a constructive trust with a power of appointment in the felon-beneficiary. Courts are empowered in equity to impose constructive trusts when a delinquent party has acquired property by “unjust, unconscionable, or unlawful means.”²⁰⁷ In the firearm-disability–dilemma context, the government’s continued possession may be characterized as “unjust” or “unlawful,” since the government holds the guns in violation of a defendant’s right to have his property returned under the seized property default rule.²⁰⁸ If a constructive trust is imposed, equitable title immediately vests in the defendant beneficiary, and the “rights and duties of the parties [] are the same as if an express trust had been created.”²⁰⁹

Because constructive trusts are judicial creations, courts can adapt the trust relationship to the firearm-disability dilemma.²¹⁰ To avoid forcing the government into a trustee position, the court may remove trustee status due to “unfitness.”²¹¹ A court may also preserve a defendant’s rights of exclusion and alienability by vesting a nongeneral exclusionary power of appointment in the defendant,²¹² which would allow him to choose the

²⁰⁶ See Part III.B.

²⁰⁷ Caryl A. Yzenbaard, George Gleason Bogert, and George Taylor Bogert, *The Law of Trusts and Trustees* § 471 at 2 (West 3d ed 2009).

²⁰⁸ See note 38 and accompanying text. It is also important to remember that it is the government’s failure to timely institute forfeiture that initiates the dilemma. See text accompanying notes 174–76.

²⁰⁹ Yzenbaard, Bogert, and Bogert, *Trusts and Trustees* § 471 at 13 (cited in note 207).

²¹⁰ See id § 472 at 58–61 (exploring several judicial decrees that typically accompany constructive trusts, including ordering the sale of property and delivery of proceeds to plaintiffs).

²¹¹ Restatement (Second) of Trusts § 107, comment b (1959) (suggesting merely that some kind of “cause” is required for unfitness removal). Courts broadly construe the grounds for removal of a trustee, such that either the underlying wrongful retention of the firearms past § 924’s 120-day limitations period or a court’s simple reluctance to force the government into a trustee relationship with a felon-beneficiary could justify designating a different trustee in equity. See George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* § 527 at 48–98 (West rev 2d ed 1993) (observing that “[t]he number of possible situations which may make it desirable to remove a trustee is very large,” and that a “personal interest” adverse to the beneficiary or an inappropriate appropriation of property—two situations that are analogous to the firearm-disability dilemma—are sufficient to displace a trustee).

²¹² See notes 190–92 and accompanying text.

subsequent trustee.²¹³ Finally, the court could stipulate that the successor trustee's fiduciary duties were limited to liquidation of the firearms and disbursement of the proceeds to the defendant.²¹⁴ This would recognize a felon's ownership right in the firearms' value.²¹⁵

As long as the pool of potential trustees is sufficiently narrow and the court strictly limits the trustee's duties to liquidation and disbursement, the power of appointment would not amount to constructive possession.²¹⁶ The constructive trust and power-of-appointment arrangement grants the defendant "dominion or control" over the firearms' monetary value, but completely removes physical control over both the firearms themselves and their lethal power. Since Congress was concerned about this latter value when it created the firearm disability,²¹⁷ a power of appointment in this context does not implicate the concerns motivating Congress when it outlawed constructive possession. Furthermore, limiting potential trustees in this manner fails to rise to the level of constructive possession altogether, as long as the recipient refuses to accept a felon's instructions concerning the firearms' disposition.²¹⁸

In summary, a constructive trust and appurtenant power of appointment functionally give defendants the power to choose a "trustee" to liquidate their firearm property and a right to the proceeds derived from the firearms. This remedy avoids burdening the government with maintenance of a felon's firearm interests, thus satisfying some moralistic concerns. Its flexibility accommodates the preservation of residual ownership rights, thereby benefitting from substantive analysis and mitigating potential takings claims. Finally, it benefits from the ready-made property rules associated with long-recognized legal forms, thus drawing on the advantages of the formalistic approach. Accordingly, the constructive-trust and power-of-appointment arrangement synthesizes into a comprehensive remedy the property

²¹³ See Restatement (Second) of Trusts § 108, comment i (1959) (noting that trust instruments may grant beneficiaries the power to select trustees); Bogert and Bogert, *Trusts and Trustees* § 532 at 121–22 (cited in note 211) (same).

²¹⁴ See note 210.

²¹⁵ See Part IV.C.

²¹⁶ See Part I.B.1.

²¹⁷ See note 14 and accompanying text.

²¹⁸ See *Miller*, 588 F3d at 419–20 (concluding that trustees who will not heed a felon's instructions vis-à-vis his firearms have effectively removed the weapons from a defendant's "constructive possession").

insights all courts have imbued into the firearm-disability dilemma.²¹⁹

CONCLUSION

Although no court has explicitly invoked a particular conception of property when ruling on the firearm-disability dilemma, the remedies handed down appear driven by substantive, formalistic, and moralistic conceptualizations of property rights. Substantive and formal conceptions of property encourage remedies that recognize residual firearm property rights. Moralistic approaches, on the other hand, provide justifications for the complete extinguishment of a felon's firearm property rights. An assessment of the advantages and disadvantages of each method does not demonstrate an unambiguously preferred conceptualization of property in the context of the firearm-disability dilemma. But courts that utilize all three are in a position to benefit from the advantages that each view has to offer. This Comment proposes that such an analysis may lead courts to employ the constructive trust and power-of-appointment remedy.

Recognition of the differing conceptualizations of property that often motivate disparate remedies in property rights cases is one tool courts and litigants can use to sort through precedential inconsistencies. As applied to the statutory contradiction found at the intersection of §§ 922 and 924, these insights provide a considered approach to a novel property rights quandary, thereby illuminating possible resolutions to the firearm-disability dilemma.

²¹⁹ The Western District of Texas proposed a remedy similar to the constructive trust and power-of-appointment solution in *United States v Rodriguez*, 2011 WL 5854369 (WD Tex). In that case, the court proposed designating a nonrelative of the defendant to either hold the firearms in trust until the disability was removed or sell them for his account, which functionally approximates this Comment's solution. *Id.* at *15.