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THE "SCOURGE" OF ARMED CHECK FRAUD: A CONSTITUTIONAL FRAMEWORK FOR PROHIBITED POSSESSOR LAWS

Jeffrey Giancana*

Abstract

Prohibited possessor statutes have been a part of American law for decades. Put simply, these laws prohibit any person who has been convicted of a felony from possessing a firearm, a prohibition that lasts for the felon's entire life. The Supreme Court's modern Second Amendment jurisprudence has held that the right to possess a firearm is a fundamental individual right. In light of this new paradigm, the constitutionality of such broad prohibitions must be called into question—despite the eagerness of courts across the country to dismiss such challenges by pointing to a single line in Heller. *This Note challenges the constitutionality of modern prohibited possessor laws and asserts that these laws are unconstitutionally overbroad. It then proposes a constitutional framework for analyzing laws that ban firearm possession by felons.*

Introduction

Prohibited possessor laws have existed in the United States for decades. Many of these laws, which exist at both the federal and state level, originally applied only to violent felons. Over time, however, these laws broadened in scope; today, virtually every person convicted of a felony is automatically banned from possessing a firearm. In 2008, the Supreme Court decided *District of Columbia v. Heller*, holding for the first time that the Second Amendment protects an individual right to keep and bear arms.[1] In *McDonald v. City of Chicago*, the Court incorporated this right against the states, counting "the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[2]

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1. District of Columbia v. Heller, 554 U.S. 570 (2008).
2. McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

One might expect the holdings in *Heller* and *McDonald* to have had a dramatic impact on prohibited possessor laws. After all, prohibited possessor laws bar a group of people from exercising a fundamental right for their entire lives. Yet, challenges to prohibited possessor laws have largely been unsuccessful. How can this be? Part of the answer lies in *Heller* itself. In a brief and passing remark, the *Heller* Court noted that the right to keep and bear arms is not absolute: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[3] Courts have relied on this language to dismiss challenges to prohibited possessor laws.

Despite *Heller's* language, current prohibited possessor laws do not make sense in light of the Court's modern Second Amendment jurisprudence. Second Amendment restrictions must satisfy some form of heightened scrutiny, and these laws are too broad to do so. They cover a wide variety of offenses that have nothing to do with firearms, and they cover an extensive range of offenders who cannot be considered any more dangerous than the average person.

This Note provides a framework for analyzing the constitutionality of prohibited possessor statutes. It recognizes a clear public purpose served by keeping firearms away from those who pose a danger to society while also recognizing that current laws are incredibly overbroad, creating irrational lifetime bans on firearm possession by people who pose little danger to public safety. This Note creates a framework that addresses both concerns; it adopts a workable and easy-to-apply distinction between violent and non-violent felons, it makes room for laws that actually serve to keep society safe, and it allows individuals to bring as-applied challenges to laws that are irrational when applied to them.

Part I explains the background behind prohibited possessor laws and the Court's modern Second Amendment jurisprudence. Part II explores the current state of the law and how courts across the country have handled challenges to prohibited possessor statutes. Part III lays out the reform—a framework for addressing the constitutionality of prohibited possessor laws—and addresses counterarguments.

3. *Heller*, 554 U.S. at 626.

I. BACKGROUND TO PROBIBITED POSSESSOR LAWS AND THE SECOND AMENDMENT

Part I of this Note addresses the background of both Second Amendment jurisprudence and prohibited possessor laws. It begins with a brief description of these laws. Next, it gives an overview of the Second Amendment, detailing how it came to protect an individual right to bear arms and how that right was incorporated against the states. Next, this Note discusses why the classification of the Second Amendment right as "fundamental" implies the need to analyze restrictions on the exercise of that right under heightened scrutiny. It then provides a discussion of how the Supreme Court has explicitly endorsed certain restrictions on the Second Amendment right. This Note examines these restrictions and addresses the challenges to the Supreme Court's assertion that bans on felons possessing firearms are "longstanding." Part I concludes by discussing the problems created by attempting to apply strict scrutiny to prohibited possessor laws as they currently exist.

A. *Prohibited Possessor Laws*

Prohibited possessor laws exist at both the federal and state level.[4] For the sake of simplicity, this Note focuses primarily on the federal prohibition found in 18 U.S.C. § 922(g), which makes it 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 in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[5]

References to state statutes may also be used throughout for illustration or to provide further examples. Because states are not burdened by the need to justify their legislation as an exercise of the commerce power, their prohibited possessor statutes can cover all firearms. For example, Arizona law makes it a crime for "any person . . . [w]ho has been convicted within or without this state of

4. 18 U.S.C. § 922(g) (2012); s*ee, e.g.*, 720 ILL. COMP. STAT. 5/24-1.1 (2017); GA. CODE ANN. § 16-11-131 (2011 & Supp. 2017); ARIZ. REV. STAT. ANN. § 13-3101, 02 (2010 & Supp. 2016); CAL. PENAL CODE § 29800(a)(1) (West 2012).

5. 18 U.S.C. § 922(g).

a felony or who has been adjudicated delinquent for a felony and whose civil right to possess or carry a gun or firearm has not been restored"[6] to possess a deadly weapon.[7] Ultimately, the federal and state prohibited possessor statutes tend to be very similar, and while some states do have narrower prohibitions,[8] the likelihood that any given firearm has been shipped in interstate commerce means that even felons in these more lenient states are likely to violate the federal prohibited possessor law.[9]

B. *The Second Amendment Revolution*

In 2008, the Supreme Court shook the legal landscape when it announced *District of Columbia v. Heller*,[10] which held for the first time that the Second Amendment protects an individual right to keep and bear arms.[11] Unsurprisingly, the decision did not craft a fully developed body of jurisprudence. Instead, the Court explicitly acknowledged that the contours of the right would be laid out in later cases, explaining, "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[12] While the Court later held that the Second Amendment limited both states and the federal government,[13] a fully formed body of doctrine surrounding the Second Amendment has not yet emerged.

The Second Amendment itself, like much of the Bill of Rights, does not define the contours of the right it protects. The amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[14] In addition to its broad scope, the Second Amendment is confusingly drafted. Because *Heller* was decided five-to-four and because the issues of gun rights, gun violence, and gun control are hotly debated political topics, there is a temptation to dismiss the Second Amendment as not protecting a

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6. ARIZ. REV. STAT. ANN. § 13-3101(A)(7)(b).

7. ARIZ. REV. STAT. ANN. § 13-3102(A)(4).

8. For example, Texas only bars felons from keeping a firearm in the home for five years, TEX. PENAL CODE ANN. § 46.04(a) (West 2011), while New Hampshire limits the prohibition to drug felonies and felonies against persons or property. N.H. REV. STAT. ANN. § 159:3 (2012).

9. The federal prohibition applies to firearms shipped in or affecting interstate commerce. *See* 18 U.S.C. § 922(g).

10. District of Columbia v. Heller, 554 U.S. 570 (2008).

11. *Id.* at 595.

12. *Id.* at 635.

13. *See* McDonald v. City of Chicago, 561 U.S. 742, 742 (2010).

14. U.S. CONST. amend. II.

"real" right. As Justice Thomas has noted, "We treat no other constitutional right so cavalierly."[15]

C. *Prohibited Possessor Laws and the Second Amendment*

Until *Heller*, there was little reason to analyze prohibited possessor statutes across the country. The Second Amendment was little regarded, rarely cited, and generally ignored.[16] To the extent that courts addressed it, they dismissed the argument that it protected an individual right to bear arms,[17] usually by relying on *United States v. Miller*, which held that firearm possession was only constitutionally protected if it bore "some reasonable relationship to the preservation or efficiency of a well regulated militia."[18] Consequently, the answer to the question "do prohibited possessor statutes violate the Second Amendment" was simple: no.

Heller complicated the issue. To the extent that courts prior to *Heller* upheld prohibited possessor statutes on the grounds that there was no individual right to possess a firearm, the validity of those decisions is now doubtful. More generally, and more importantly, any law that infringes on an individual's right to possess a firearm must now be examined critically, as it implicates a constitutionally protected right.

While the temptation to simply ignore *Heller* might be enticing to those who disagree with its holding (for either legal or political reasons), it would be patently untenable to do so. Unless the Supreme Court overturns *Heller*, all parties must recognize that "the Second Amendment confer[s] an individual right to keep and bear arms,"[19] and that "the inherent right of self-defense [is] central to the Second Amendment right."[20] Thus, in a post-*Heller* world, the Second Amendment cannot be ignored, and challenges to restrictions on

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15. Voisine v. United States, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting).

16. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 638–40 (1989).

17. *See, e.g.*, Lewis v. United States, 445 U.S. 55, 65 n.8 (1980); Adams v. Williams, 407 U.S. 143, 150–51 (1972) (Douglas, J., dissenting); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974). *But see* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the Second Amendment protected an individual right to keep and bear arms).

18. United States v. Miller, 307 U.S. 174, 178 (1939). *But see* District of Colombia v. Heller, 554 U.S. 570, 622 (2008) ("[*Miller*] is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia').").

19. Heller, 554 U.S. 570, at 595.

20. *Id.* at 628.

firearm ownership must be treated as seriously as challenges to restrictions on any other constitutional right.

Two years after *Heller*, the Supreme Court decided *McDonald v. City of Chicago*, incorporating the Second Amendment against the states. The Court held that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."[21] The language of "fundamental rights" necessary to a "system of ordered liberty" is commonly used to incorporate provisions of the Bill of Rights.[22] However, it cannot simply be dismissed as the boilerplate language of incorporation. Words have meaning, and the Supreme Court has not been silent about how courts protect fundamental rights. Typically, rights that are deemed "fundamental" are subject to strict scrutiny,[23] which makes restrictions on those rights possible, but difficult to justify. Indeed, Justice Thurgood Marshall once wrote that strict scrutiny is often "strict in theory, but fatal in fact."[24] But while it is difficult to uphold a restriction under strict scrutiny, it is not impossible.[25] Under strict scrutiny, "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly

21. McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

22. *Compare id.* ("[T]he right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."), *with* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) ("The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.") (incorporating the Sixth Amendment right to a trial by jury against the states).

23. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988) ("[A] statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' . . . ."); Plyler v. Doe, 457 U.S. 202, 216–17 (1982) ("Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.") (footnotes omitted); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) ("Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights . . . .") (footnote omitted). *But see* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights.").

24. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

25. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Burson v. Freeman, 504 U.S. 191 (1992); Korematsu v. United States, 323 U.S. 214 (1944); *cf.* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

drawn to express only the legitimate state interests at stake."[26] To this day, this remains the test for strict scrutiny.

D. *Limits on the Right to Bear Arms*

When the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms, it was careful to note that it is not an unlimited right. Like all constitutional rights, it is subject to some restrictions. The Court made this point explicit, stating that the Second Amendment "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[27] Rather, the Court explained that certain limitations were "presumptively lawful," stating that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[28]

The very first of these exemptions—prohibitions on the possession of firearms by felons—is the subject of this Note. This portion of the opinion is peculiar because, as Justice Breyer's dissent notes, it fails to support its claim that these prohibitions are "longstanding."[29] This omission is especially odd because the rest of the opinion relies so heavily on historical sources.

Indeed, the evidence that these prohibitions are longstanding is subject to debate.[30] When faced with challenges to prohibited possessor statutes, courts quickly discover that "[f]ederal felon dispossession laws . . . were not on the books until the twentieth century, and the historical evidence and scholarly writing on

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26. Roe v. Wade, 410 U.S. 113, 155 (1973) (internal citations omitted); *see also Burson*, 504 U.S. at 199 ("To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest."); *Grutter*, 539 U.S. at 326 ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.") (internal citations omitted).

27. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

28. *Id.* at 626–27.

29. *See id.* at 721 (Breyer, J., dissenting).

30. *See* Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 127 (2013).

whether felons were protected by the Second Amendment at the time of its ratification is inconclusive."[31] To this day, "scholars continue to debate the evidence of historical precedent for prohibiting criminals from carrying arms."[32] In fact, the Second Militia Act of 1792 required every "free able-bodied white male citizen" between eighteen and forty-five years of age to obtain a firearm.[33] This mandate to purchase a firearm lacked a carved-out exemption for felons.

The history of prohibited possessor statutes belies the assumption that felons have always been categorically banned from possessing firearms. Indeed, the original federal prohibition, the Federal Firearms Act of 1938, only applied to felons "convicted of a crime of violence."[34] However, as part of a general trend towards "tough on crime" legislation, the prohibition was expanded to all felons in 1961.[35] Congress expanded the prohibition in response to the perceived "infiltration of racketeering into [ ] society and the exploding crime rate [that had] increasingly become a cause for national concern."[36] According to the bill's supporters, "New laws are needed so the Federal Government can better assist local authorities in the common assault against crime."[37] Similarly, Arizona's original prohibited possessor statute prohibited any person convicted of a "crime of violence" from possessing a pistol, with a crime of violence defined as "murder, manslaughter with a dangerous weapon or implement other than an automobile, assault with a dangerous weapon, rape, mayhem, kidnapping, robbery, burglary or assault with intent to commit any offense punishable by imprisonment for more than one year."[38] Like the federal statute, Arizona's prohibited possessor law was later rewritten to prohibit any person convicted of a felony from possessing a firearm.[39]

Finally, the Court's fleeting discussion of bans on felons possessing firearms seems to implicitly contradict its later holding that firearm possession is a "fundamental right." As Alexander Barrett

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31. United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010).

32. United States v. Yancey, 621 F.3d 681, 684 (7th Cir. 2010) (citations omitted).

33. Kahn, *supra* note 30, at 127 (internal citations omitted) (citing Militia Act of 1792, ch. 33, 1 Stat. 271); *See also* Nordyke v. King, 364 F.3d 1025, 1033 (9th Cir. 2004) (Gould, J., dissenting).

34. Tot v. United States, 319 U.S. 463, 464 (1943); Kahn, *supra* note 30, at 116 (internal quotations omitted).

35. Kahn, *supra* note 30, at 116.

36. H.R. REP. NO. 87-1202, at 3068 (1961).

37. *Id.*

38. State v. Harmon, 541 P.2d 600, 601 (Ariz. Ct. App. 1975).

39. 1977 Ariz. Sess. Laws. 766 (enacting the original version of ARIZ. REV. STAT. ANN. §§ 13-3101-02 (2010 & Supp. 2016)).

explained in his note *Taking Aim at Felony Possession*, "the limitations the majority endorsed would be difficult to reconcile with the application of strict scrutiny . . . gun control regulations would have serious difficulties meeting strict scrutiny's requirement that a law be narrowly tailored to achieve its ends."[40] Barrett is correct; strict scrutiny is *designed* to avoid the kind of overbreadth that prohibited possessor statutes create. In fact, it is difficult to conceive of a restriction on firearm possession that is less narrowly tailored. In his *Heller* dissent, Justice Breyer noted that the constitutionality of these bans under strict scrutiny "would be far from clear," and he criticized the majority for not giving lower courts guidance on how to analyze Second Amendment cases.[41]

The "presumptively lawful" language of *Heller* and the fact that firearm possession is a "fundamental right" creates a problem. Given the Second Amendment's protection of the fundamental right to keep and bear arms, can the "presumptively lawful" language in *Heller* be interpreted consistently with *McDonald*, or must the language in *Heller* be neutralized in some way? This Note attempts to solve this dilemma while also providing a workable legal framework that distinguishes between those criminals who can be constitutionally barred from firearm possession and those who cannot be so restricted.

II. THE STATE OF THE LAW

The second part of this Note explores the current state of the law regarding prohibited possessor statutes while critically examining the manner in which courts have dealt with these laws in light of *Heller*. It begins with an overview of how courts currently analyze Second Amendment claims, before turning to a discussion of how federal courts have used the *Heller* language to dismiss facial challenges to prohibited possessor laws. The part briefly questions these determinations before turning to an important circuit split concerning whether felons may bring as-applied challenges to prohibited possessor laws.

40. Alexander C. Barrett, Note, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 174 (2013) (footnotes omitted).

41. District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting).

A. *Analyzing a Fundamental Right*

When analyzing constitutional rights, courts use different standards of review. Depending on the standard used, the government may have an easy or difficult time justifying an infringement on a constitutional right. In general, laws may be subject to government-friendly rational-basis review, or to the much higher burden of strict scrutiny. Other constitutional rights are analyzed under intermediate scrutiny, which falls between these two extremes. Courts have declined to settle on one standard of review for Second Amendment claims. Instead, they analyze cases based on the nature of the restriction or regulation in question. For example, the Fourth Circuit has written:

> The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.[42]

In short, under the Fourth Circuit's reasoning, laws that implicate the Second Amendment are subject to different standards of scrutiny depending on their nature and restrictiveness. Similarly, the Seventh Circuit has held that "for gun laws that do not severely burden the core Second Amendment right of self-defense there need only be a 'reasonable fit' between an important governmental end and the regulatory means chosen by the government to serve that end."[43] For example, a law banning firearms entirely would be subject to higher scrutiny than a law requiring firearms to have serial numbers.[44]

It would seem obvious given this classification system that prohibited possessor statutes would be subject to strict scrutiny. In *Heller*, the Court noted that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun

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42. United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (quoting United States v. Skoien, 587 F.3d 803, 813–14 (7th Cir. 2009), *vacated on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010)).

43. *Skoien*, 587 F.3d at 814.

44. *See* United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

ban,"[45] which placed it "at the far end of the spectrum of infringement on protected Second Amendment rights."[46] Presumably, such a restrictive law should be subject to strict scrutiny because it imposes a "severe burden on the core Second Amendment right of armed self-defense."[47] Prohibited possessor statutes are at least as restrictive as the handgun ban, imposing a *lifetime* ban on *any* felon possessing *any* firearm.

B. *Intermediate Scrutiny and the Second Amendment*

Despite the restrictiveness of these laws, lower courts have determined that prohibited possessor statutes should be subject to intermediate, rather than strict, scrutiny. For example, in *United States v. Chester*,[48] the Fourth Circuit determined that Chester's

> claim is not within the core right identified in *Heller*—the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense—by virtue of Chester's criminal history as a domestic violence misdemeanant. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.[49]

While the Seventh Circuit suggested that the distinction between intermediate and strict scrutiny rested on the severity of the restriction,[50] *Chester* focused on the importance of the "core right" protected by the Second Amendment, which is the right of *law-abiding* citizens to use firearms for self-defense. Because felons are, by definition, not law-abiding citizens, their right to keep and bear arms cannot be part of the core right protected by the Second Amendment. Instead, felons have a lesser interest that is adjudicated under intermediate scrutiny.

The exact definition of intermediate scrutiny is elusive. The Supreme Court has described it as "requir[ing] the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important' . . . and requir[ing] the fit between the challenged regulation and the asserted objective be

45. *Heller*, 554 U.S. at 629.
46. *Marzzarella*, 614 F.3d at 97.
47. *Chester*, 628 F.3d at 682 (quoting *Skoien*, 587 F.3d at 813).
48. 628 F.3d 673 (4th Cir. 2010).
49. *Id.* at 683.
50. *See supra* notes 42–43.

reasonable, not perfect."[51] As a form of heightened scrutiny, intermediate scrutiny is more demanding than rational-basis review, but less stringent than strict scrutiny, which requires that a restriction be narrowly tailored to serve a compelling government interest.[52]

C. *Looking to the First Amendment*

Because *Heller* is a recent decision, there has not been enough time for a substantial body of law to develop around the Second Amendment. Consequently, a number of courts have looked to First Amendment jurisprudence when analyzing Second Amendment claims after *Heller*. For example, in *United States v. Marzzarella*, the Third Circuit ruled that "[b]ecause *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice."[53] Similarly, the Fourth Circuit has stated, "we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment."[54] Over the past seventy years, courts across the country have developed an extensive body of First Amendment jurisprudence.[55] Like the Second Amendment, the First Amendment protects a fundamental individual right; it was one of the earliest Constitutional protections to be held binding on the states.[56] Thus, it is useful to look to First Amendment jurisprudence because courts across the country have already begun to do so when interpreting the Second Amendment. In sum, there are two reasons to analyze the First Amendment in this piece: the two amendments are similar, and courts across the country have already decided to do so.

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51. *Chester*, 628 F.3d at 683 (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989)).

52. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

53. United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010). The Third Circuit reasoned that because *Heller* frequently invoked the First Amendment by way of analogy, it was appropriate to use First Amendment jurisprudence when analyzing the Second Amendment. *Id.*

54. *Chester*, 628 F.3d at 682.

55. *See generally* 1 WILLIAM H. ERICKSON, B.J. GEORGE, JR., & TIMOTHY M. TYMKOVICH, UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE ¶?5A.01–.07 (Matthew Bender).

56. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

In First Amendment jurisprudence, all three types of judicial scrutiny are utilized. The most prominent First Amendment cases are those involving content-based speech restrictions—for example, laws that criminalize hate speech or anti-American speech. These restrictions are subject to strict scrutiny. The Supreme Court has held that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[57] Such laws are almost always struck down as violations of the First Amendment.[58]

Other First Amendment cases do not warrant heightened scrutiny at all. The First Amendment "restricts government regulation of private speech; it does not regulate government speech."[59] Consequently, the government cannot violate the First Amendment when it speaks on its own behalf, and any law regulating government speech is subject to nothing more than rational-basis review—the standard under which all laws not warranting heightened scrutiny are reviewed.

Content-neutral speech restrictions fall somewhere in the middle. These restrictions, which often involve limitations on the time, place, and manner of speech, must be "narrowly tailored to serve the government's legitimate, content-neutral interests."[60] This is a form of intermediate scrutiny. It is more demanding than rational-basis review but less stringent than strict scrutiny, which requires that the interest be compelling, rather than merely legitimate. In 2014, the Supreme Court decided *McCullen v. Coakley*.[61] The *McCullen* Court unanimously struck down a law prohibiting any person—with a few exceptions[62]—from entering a thirty-five-foot "buffer zone" around abortion clinics, holding that it was not narrowly tailored to the state's interest in maintaining access to those clinics. Although the Court held that the law was content-neutral, and

57. United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) (internal citations omitted).

58. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 394–96 (1992) (holding unconstitutional a law that banned fighting words "communicat[ing] messages of racial, gender, or religious intolerance," but not other fighting words); Texas v. Johnson, 491 U.S. 397 (1989) (holding unconstitutional a law that banned flag-burning). *But see* Burson v. Freeman, 504 U.S. 191 (1992) (holding that a law banning political speech within 100 feet of a polling place on election day satisfied strict scrutiny).

59. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

60. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

61. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

62. The exempt persons were people entering or leaving the clinic, employees of the clinic, law enforcement and other city employees, and people using the sidewalk to reach a destination other than the clinic. *Id.* at 2526.

therefore not subject to strict scrutiny,[63] the Court still noted that "the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics."[64]

A thirty-five-foot buffer zone around abortion clinics is certainly a broad restriction, but even that regulation is narrow when compared to a lifetime, categorical ban on gun ownership. While it is true that the Court in *McCullen* never explicitly declared that it was using intermediate scrutiny, it did use the standard for intermediate scrutiny, requiring that restrictions be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[65] Given the shared level of scrutiny between content-neutral speech restrictions and firearm restrictions, both should be analyzed in the same manner.

D. *Dismissing Challenges to "Presumptively Lawful" Statutes*

Heller's statement that prohibited possessor laws are "presumptively lawful" relies upon the questionable assumption that such prohibitions are longstanding.[66] Nonetheless, courts across the country have uniformly used it to dismiss Second Amendment challenges to prohibited possessor laws. Even courts that are sympathetic to these constitutional claims believe themselves bound by precedent: the Ninth Circuit has conceded that "there may be some good reasons to be skeptical about the correctness of the current framework of analyzing the Second Amendment rights of felons. But in light of *Heller* . . . those issues are beside the point here."[67] Every circuit court except the Federal Circuit has held that *Heller*'s language that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" is binding precedent.[68]

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63. *Id.* at 2534.

64. *Id.* at 2537.

65. *Id.* at 2529 (citing *Ward*, 491 U.S. at 791) (internal quotations omitted).

66. *See supra* notes 29–39 and accompanying text (discussing modern challenges to the view that prohibited possessor laws are longstanding).

67. United States v. Phillips, 827 F.3d 1171, 1176 (9th Cir. 2016).

68. District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* United States v. Bogle, 717 F.3d 281, 281 (2d Cir. 2013); Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013); United States v. Smoot, 690 F.3d 215, 220 (4th Cir. 2012); United States v. Torres-Rosario, 658 F.3d 110, 112–13 (1st Cir. 2011); United States v. Barton, 633 F.3d 168, 171 (3d Cir. 2011); United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); United States v. Carey, 602 F.3d 738, 741 (6th Cir. 2010); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir.

These courts have found that *Heller*'s "presumptively lawful" language is an essential part of the holding. For example, the Ninth Circuit has stated that "[c]ourts often limit the scope of their holdings, and such limitations are integral to those holdings. Indeed, '[l]egal rulings in a prior opinion are applicable to future cases only to the degree one can ascertain from the opinion itself the reach of the ruling.'"[69] In other words, *Heller* did more than simply establish that the Second Amendment protects an individual's right to keep and bear arms; it also recognized that the right has limits. According to this interpretation, both parts are vital to the holding, and the courts that have addressed the issue have determined that *Heller*'s language regarding "presumptively lawful" restrictions is essential to establishing the outer limits of the right.

There is one central problem with the reasoning of these courts: a statement about the constitutionality of prohibited possessor statutes cannot be essential to the holding of a case without a felon.[70] Dick Heller was a special police officer, not a felon, and it is difficult to argue that the constitutionality of prohibited possessor laws is essential to determine the outcome of his case. While the Ninth Circuit persuasively argues that limitations on rights can be part of a holding, prohibited possessor laws are simply irrelevant to the facts of *Heller*. Heller was not a felon, and he did not challenge a law that prohibited felons from possessing firearms. Thus, it cannot be argued that the constitutional status of prohibited possessor laws is an essential element of resolving *Heller*.

E. *A Debate over "Presumptively" Lawful Bans*

There is another issue raised by *Heller*'s "presumptively lawful" language. If a ban is *presumptively* lawful, there must be a scenario in which it is *un*lawful; otherwise, the use of "presumptively" would be superfluous. The Seventh Circuit has held exactly that: "*Heller* referred to felon disarmament bans only as 'presumptively lawful,'

2010); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).

69. *Vongxay*, 594 F.3d at 1115 (quoting Penuliar v. Mukasey, 528 F.3d 603, 614 (9th Cir. 2008)).

70. Consider Black's Law Dictionary's definition of obiter dictum: "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." *Obiter Dictum*, BLACK'S LAW DICTIONARY (8th ed. 2004); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005). Because the plaintiff in *Heller* was not a felon, the Supreme Court could have decided the case and reached precisely the same result without ever discussing felons. Thus, the discussion of felons was not essential to the holding of the case.

which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."[71] While one could argue that "presumptively" was simply a recognition that the Court was not yet addressing the issue, twelve circuits have held it to be part of *Heller*'s binding precedent.[72] However, as previously discussed, *Heller* cannot truly speak on the subject of prohibited possessor laws, and this Note will demonstrate why these laws should not be held "presumptively lawful."

Not all circuits rely on the "presumptively lawful" language to dismiss challenges to prohibited possessor laws. One important aspect of *Heller*'s historical analysis was the Second Amendment's focus on the duty of a virtuous citizenry to protect the nation. Thus, the amendment covers the right of "law-abiding citizens" to carry weapons typically possessed "for lawful purposes."[73] It also means, according to some courts, that the right *only* protects law-abiding citizens. For example, the Ninth Circuit has held that "felons are categorically different from the individuals who have a fundamental right to bear arms," meaning that felons are not protected by the Second Amendment—and that prohibited possessor laws do not implicate *Heller* at all.[74] Likewise, the Fifth Circuit has held that "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens."[75] The Eleventh Circuit has interpreted *Heller*'s "presumptively lawful" language as "suggest[ing] that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment."[76] Similarly, the Third Circuit has held that although some misdemeanor crimes might not warrant a categorical ban, "The category of 'unvirtuous citizens' is thus broader than violent criminals; it covers any person who has committed a serious criminal offense, violent or non-violent."[77] For decades, this view was considered historically sound; for example, in 1983 Don Kates wrote that at the time of the founding, "Felons simply did not fall within the benefits of the common law right to

71. United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

72. *See supra* note 68.

73. Heller, 554 U.S. at 625.

74. *Vongxay*, 594 F.3d at 1115.

75. United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004).

76. United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010).

77. Binderup v. Att'y Gen., 836 F.3d 336, 348 (3d Cir. 2016).

possess arms."[78] However, in recent decades new scholarship on the original meaning of the Second Amendment has challenged this view, and the debate regarding the historical basis for these bans rages on.[79]

The Seventh Circuit disagrees with these circuits on another crucial point, arguing that *Heller* ought to be read narrowly. While leaving open the possibility that the Second Amendment might protect some felons,[80] the Seventh Circuit also warned against using the *Heller* language to decide prohibited possessor cases:

> "We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether [the federal prohibited possessor law] is valid . . . . [Supreme Court] Justices have told us . . . not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open."[81]

Of course, courts across the country have overwhelmingly ignored this advice, instead citing to *Heller*'s brief discussion of the issue as binding precedent.[82]

Even if we ignore the Seventh Circuit's warning and treat the language in *Heller* as binding, the rulings of the Fifth, Ninth, and Eleventh Circuits are perplexing. If bans on gun possession by felons fail to implicate the Second Amendment, why are those bans only *presumptively* lawful? If *Heller* meant to assert that prohibited possessor statutes were always constitutional, it would have said so. The Third Circuit at least makes logical sense of *Heller*'s language by acknowledging that some prohibited possessor statutes might be unconstitutional.[83]

The lower courts have disagreed about how to interpret *Heller*'s assertion that it does not cast doubt on "presumptively lawful" bans on felons possessing firearms. While all courts to address the issue have determined that this language precludes facial challenges to

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78. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

79. *See* discussion *supra* notes 30–33.

80. *See* United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

81. United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010).

82. *See supra* note 68 (listing the circuits that have cited the *Heller* language as binding precedent).

83. *See* Binderup v. Att'y Gen., 836 F.3d 336, 348 (3d Cir. 2016) (applying a framework for deciding as-applied challenges to prohibited possessor laws).

prohibited possessor laws,[84] they have disagreed about whether an as-applied challenge could succeed. Some courts have interpreted *Heller* as holding that prohibited possessor statutes can never violate the Second Amendment, while other courts have held that there may be cases in which these laws are so irrational that they violate the Constitution. Part III takes a side in this debate and formulates a rational framework for analyzing prohibited possessor laws.

III. MAKING PROHIBITED POSSESSOR LAWS CONSTITUTIONAL

The final part of this Note proposes a reform that allows states to satisfy their legitimate interest in preventing dangerous criminals from possessing firearms without running afoul of the Second Amendment. The reform has three parts:

1) prohibitions on firearm possession by felons should be subject to intermediate scrutiny;
2) prohibitions on violent felons possessing firearms should presumptively satisfy intermediate scrutiny;
3) violent felons should be able to bring as-applied challenges to prohibited possessor laws.[85]

This part begins by using existing law to delineate the distinction between violent and non-violent felonies. It demonstrates the irrationality of the blanket ban on firearm possession by all felons and criticizes the universal application of the ban to non-violent felons. Next, it discusses why bans on firearm possession by violent felons are presumptively valid. Finally, it concludes by arguing that violent felons should be able to bring as-applied challenges, since there are some violent felons for whom a lifetime ban on firearm possession is also irrational.

A. *Defining Violent Felonies*

A violent felony is one that constitutes a crime of violence, which is defined under federal law as:

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84. *See* cases cited *supra* note 68.

85. *See Williams*, 616 F.3d at 692 (noting that "there must exist the possibility that the ban could be unconstitutional in the face of an as applied challenge").

a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[86]

This statute, and statutes like it, have engendered controversy in recent years. Subsection (b) has been challenged on the grounds that it is void for vagueness,[87] following a Supreme Court decision holding that a similar part of the Armed Career Criminal Act was unconstitutional.[88] At the time of writing, the Supreme Court has agreed to hear the case.[89] However, these challenges do not implicate subsection (a), which remains a sensible approach for defining violent crimes. Thus, prohibited possessor laws should define a crime of violence as a crime that has "the use, attempted use, or threatened use of physical force against the person or property of another."[90] Although some attempts to specifically delineate violent crimes have encountered difficulty,[91] defining violent felonies as all felonies involving the use or threat of physical force presents a far more manageable standard than one in which violent felonies must be specifically delineated.[92]

B. *Current Bans Fail Intermediate Scrutiny*

Without question, the government has a compelling interest in keeping firearms out of the hands of those who would use them to commit acts of violence. However, the existence of the Second Amendment limits what the government may do to pursue that goal. As the *Heller* Court noted, "the enshrinement of constitutional

86. 18 U.S.C. § 16 (2012).
87. Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). Technically, the challenge is to 8 U.S.C. § 1101(a)(43)(F) (2012), which incorporates 18 U.S.C. 16's definition of crime of violence.
88. Johnson v. United States, 135 S. Ct. 2551 (2015) (holding that "conduct that presents a serious potential risk of physical injury to another" in the Armed Career Criminal Act's "residual clause" was void for vagueness).
89. Lynch v. Dimaya, 137 S. Ct. 31 (2016).
90. 18 U.S.C. § 16(a).
91. Jazmine Ulloa, *What Is a 'Violent Crime'? For California's New Parole Law, the Definition Is Murky—and It Matters*, L.A. TIMES (Jan. 27, 2017, 12:05 AM), http://www.latimes.com/politics/la-pol-sac-proposition-57-violent-crime-list-20170127-story.html.
92. 18 U.S.C. § 16(a).

rights necessarily takes certain policy choices off the table."[93] A lifetime ban on firearm possession is the most restrictive infringement possible, in some ways even more so than the ban in *Heller*, which only applied to Washington, D.C.—at least a person could leave the District of Columbia. By contrast, the federal prohibited possessor law applies to felons throughout the nation.

Bans on firearm possession by felons should be subject to intermediate scrutiny,[94] and prohibited possessor statutes as currently formulated do not survive under that standard. These statutes are illogical when applied across-the-board to non-violent felons. Prohibited possessor laws typically bar all convicted felons from using or possessing a firearm, even though there are a plethora of non-violent felonies, including felonies that have no connection to firearms. To use two examples from Arizona: it is a felony to knowingly drop over 300 pounds of litter on public property,[95] and it is also a felony to write bad checks "in an amount of five thousand dollars or more" without paying back the money within sixty days of receiving notice.[96] What public safety interest could possibly justify banning the possession of guns by people who drop 301 pounds of litter? More absurdly, why are people who drop 301 pounds of litter a danger to society who must be kept away from firearms, but people who drop 299 pounds of litter are not? Similarly, while there are certainly felons who pose a danger to the public, and who would pose an even greater danger if armed, it is difficult to seriously believe that people who write bad checks categorically fall into that group. And again, there is an entirely arbitrary distinction separating those who can possess firearms from those who are barred for life: was the fraudulent check written for $4,999 or $5,000?

Not only are these crimes non-violent, they also defy attempts to relate them to firearms in any way. While a person could hypothetically litter while brandishing a firearm, it is difficult to see how the firearm might make the crime more dangerous, and it is even more difficult to imagine why firearm usage transforms only mass-littering, and not petty-littering, into a dangerous crime. Of course, the danger of armed littering seems downright banal when compared to that other great scourge of the American polity: armed check

93. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

94. *Cf.* United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) ("[W]e believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense . . . . Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.").

95. ARIZ. REV. STAT. ANN. § 13-1603(B)(1) (Supp. 2016).

96. ARIZ. REV. STAT. ANN. § 13-1807(E) (2010).

fraud. If there is some reason why a fraudster writing a bad check while seated at a barren desk is less of a danger to public safety than a fraudster who writes at a desk furnished with firearms, it eludes the author of this Note. And again, why is the firearm possession only a danger if the check is for an amount over $5,000? Clearly, laws barring these felons from possessing firearms restrict the right to keep and bear arms substantially more than is necessary to serve the government's interest of keeping guns out of the hands of those who threaten public safety.

But what of the question of bad moral character: are people who commit any kind of crime inherently more dangerous? In some sense, they are. After all, the United States has extremely high recidivism rates.[97] However, even accepting that people who have previously committed crimes might be more likely to commit crimes again does not imply that those crimes will be dangerous, or that those crimes might be made dangerous by the presence of firearms. Because the Second Amendment protects a fundamental constitutional right, the justification for a universal ban must be significantly more potent.

This is not to say that *all* non-violent felons should be legally allowed to possess firearms. There are non-violent felonies that could be made more dangerous with the presence of firearms,[98] and there are non-violent felonies that could serve as "gateway" crimes to more serious offenses. In addition to my proposed narrowing of existing prohibited possessor statutes, legislatures could pass other laws banning firearm possession from people convicted of certain non-violent felonies if the restrictions are substantially related to an important government interest.[99] For example, given the dangers of

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97. *See, e.g.*, MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

98. A transaction for an illicit substance is the quintessential example of a non-violent felony made more dangerous by the presence of a firearm. *See, e.g.*, Smith v. United States, 508 U.S. 223, 240 (1993) ("When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination. In 1989, [fifty-six] percent of all murders in New York City were drug related; during the same period, the figure for the Nation's Capital was as high as [eighty] percent. The fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon.") (internal citations omitted); United States v. Foster, 133 F.3d 704, 707 (9th Cir. 1998) ("We can also speculate as to what purpose a prohibition on carrying a gun during and in relation to a violent or drug trafficking crime might serve. Using or carrying guns makes those crimes more dangerous. A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence.") (footnotes omitted).

99. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (defining intermediate scrutiny in the context of gender discrimination).

organized crime, it would be reasonable for a legislature to ban firearm possession by people convicted of trafficking large amounts of drugs. However, because firearm possession is protected as a fundamental right, these laws must be tailored to satisfy intermediate scrutiny.

C. *"Law-Abiding Citizens" and the Second Amendment*

It is sometimes argued that the Second Amendment only protects law-abiding citizens and is therefore simply irrelevant to discussions of prohibited possessor laws.[100] Admittedly, "law-abiding citizens" is a phrase often used in *Heller*. However, the words "law-abiding" do not appear in the Second Amendment. Instead, the right is reserved to "the people."[101] Basic principles of legal interpretation would suggest that the meaning of "the people" should be the same throughout the Constitution, and particularly throughout the Bill of Rights. After all, the Amendments were drafted at the same time. The phrase "the people" appears twice in the original Constitution, and five times in the Bill of Rights. Two amendments are most important for our purposes: the First Amendment protects "the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances,"[102] while the Fourth Amendment guarantees that "the right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[103] Notably, neither protection guaranteed to "the people" in the Bill of Rights is categorically barred to felons, a fact that Justice Stevens noted in his dissent in *Heller*.[104] The argument that felons are not included as part of "the people" protected by the Second Amendment proves

100. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) ("We recognize the phrase 'presumptively lawful' could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and the structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms.") (footnote omitted); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 414 (2009) ("The Court's approval of 'prohibitions,' rather than regulations, confirms that felons and the mentally ill, however defined, are excluded entirely from Second Amendment coverage.").

101. U.S. CONST. amend. II.

102. U.S. CONST. amend. I (emphasis added).

103. U.S. CONST. amend. IV (emphasis added).

104. District of Columbia v. Heller, 554 U.S. 570, 644 (2008) (Stevens, J., dissenting).

too much; such an argument would logically have to extend to the Fourth Amendment as well. To say that criminal defendants with prior felony convictions have no Fourth Amendment rights would shake the very foundations of the criminal justice system; only those with clean records would be protected from unreasonable searches and seizures, or be able to exclude illegally-obtained evidence from trial. This cannot be correct—and it is most assuredly not in line with modern doctrine.[105]

D. *A Ban on Violent Felons Possessing Firearms Is Presumptively Constitutional. . .*

We turn now to the second and third parts of this reform. There is an obvious government interest in keeping firearms out of the hands of those who would use them to commit acts of violence. This is a legitimate interest, and a ban on firearm possession by those convicted of violent felonies is narrowly tailored to serve that end.[106] There are compelling reasons to believe that those who have committed violent crimes in the past might commit violent crimes again. According to the Department of Justice, nearly one-third of all violent criminals are re-arrested within five years for another violent crime.[107] There is a substantial government interest in preventing those violent crimes from being aggravated by the use of firearms. Thus, prohibited possessor laws that only apply to those convicted of violent felonies are presumptively constitutional.

E. . . . *But that Ban Should Be Subject to As-Applied Challenges*

As a general matter, restrictions on firearm possession by violent felons should be upheld. However, this alone does not ensure that Second Amendment rights will be adequately protected. While the majority of violent felons may be constitutionally prohibited from

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105. It is true that one usage of "the people" in the Constitution ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .") can be restricted to non-felons. Under current law, states are permitted to strip felons of the right to vote. U.S. CONST. art. I, § 2, cl. 1; Richardson v. Ramirez, 418 U.S. 24 (1974). However, this decision relied on particular language in the Fourteenth Amendment related to voting. Thus, it is completely inapplicable to firearm possession.

106. *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (1989) (defining intermediate scrutiny in the context of the First Amendment).

107. DUROSE ET AL., *supra* note 97, at 9 ("Within the first 5 years of release from state prison in 2005, an estimated 28.6% of inmates were arrested for a violent offense.") (citation omitted).

possessing firearms, there are also people convicted of violent crimes who nevertheless pose little danger to society and to whom it would be wholly irrational to bar firearm possession for life.[108] In order to be consistent with the Second Amendment, these prohibitions must allow individuals to bring as-applied challenges in cases where a ban on their possession of firearms would be irrational.

As-applied challenges have a number of advantages over facial challenges. In an as-applied challenge, "the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances."[109] Courts are often hesitant to strike down laws based on facial challenges, and the Supreme Court has explained this hesitation by reasoning:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.' Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that 'a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'[110]

An as-applied challenge avoids these problems by not forcing a court to strike down the law in question, and by not forcing a court to consider whether "no set of circumstances exists under which the Act would be valid."[111] Instead, an as-applied challenge allows a court to look at a particular record, judge a case on its own merits, and vindicate the constitutional rights of a wronged party without making broad judgments that affect the legal landscape as a whole.

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108. *See, e.g.*, *infra* note 112 and accompanying text.

109. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010) (quoting Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex. 1995)).

110. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008) (citations omitted).

111. United States v. Salerno, 481 U.S. 739, 745 (1987).

For an example of a case that could involve a successful as-applied challenge, consider *Schrader v. Holder*.[112] In 1968, Schrader, then a twenty-year-old member of the Navy in Maryland, encountered a gang member who had allegedly assaulted him a week prior. An altercation occurred, during which Schrader punched the other combatant. For this, he was convicted of common-law misdemeanor assault and battery, resulting in a fine of one hundred dollars. Schrader did not spend any time in jail, and he received an honorable discharge from the Navy after serving a tour in Vietnam. Other than a single traffic violation, Schrader had no subsequent encounters with the law.[113]

The federal prohibited possessor statute bans firearm possession by any person "who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year,"[114] but not including "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less."[115] The operative word is punish*able*; the actual sentence imposed is irrelevant—what matters is the maximum sentence allowed by law.[116] In *Schrader*, the court first noted that at the time of his conviction, Schrader's crime had no statutory penalty.[117] Under Maryland law at the time, "The maximum term of imprisonment was ordinarily limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights."[118] Furthermore, nothing about common-law crimes suggested they were not susceptible to long prison sentences. To the contrary, attempted murder and attempted rape were both common-law misdemeanors that did not carry a statutory sentence, and common-law misdemeanor assault and battery covered virtually every form of assault.[119] Clearly, these were crimes that could—and often did—result in prison sentences that far exceeded two years. Thus, the *Schrader* court reasoned that common-law misdemeanor assault and battery was a crime punishable by more than two years imprisonment, placing it within the

112. *Schrader v. Holder*, 704 F.3d 980, 980 (D.C. Cir. 2013).

113. *Id.* at 983.

114. 18 U.S.C. § 922(g)(1) (2012).

115. 18 U.S.C. § 921(a)(20)(B) (2012).

116. *See Schrader*, 704 F.3d at 985–86. *See also* United States v. Coleman, 158 F.3d 199, 203–04 (4th Cir. 1998) (en banc); United States v. Horodner, 993 F.2d 191, 194 (9th Cir. 1993).

117. *Schrader*, 704 F.3d at 983.

118. Robinson v. State, 728 A.2d 698, 702 n.6 (1999).

119. *Schrader*, 704 F.3d at 985.

restriction set by 18 U.S.C. § 922(g)(1) and outside of the exception allowed under 18 U.S.C. § 921(a)(20)(B).[120] This was, of course, in spite of the fact that Schrader had only been fined one hundred dollars and did not spend a moment incarcerated.[121]

Considering Schrader's honorable military service and his forty-five years spent as a law-abiding citizen,[122] it is implausible to argue that his felony conviction proves he is a danger to society. Intermediate scrutiny requires that the government's objective be "advanced by means substantially related to that objective."[123] Keeping firearms away from those who would use them to commit violent crimes is clearly an important objective, but imposing a lifetime firearm ban on Schrader fails to advance that objective. While a temporary ban on his possession of firearms may have been justified in 1968, spending forty-five years as a law-abiding citizen dispels the notion that he currently constitutes a threat to public safety. In other words, although Schrader was convicted of a violent felony, he should be able to bring an as-applied challenge to the ban on his possession of firearms. Schrader should win that challenge, as he can demonstrate that the ban on *his* possession of firearms is not substantially related to public safety; there is no rational reason to think that *his* possession of firearms poses a threat to public safety.

CONCLUSION

The Second Amendment does not protect the right of every person in the United States to possess a firearm. However, while "the right secured by the Second Amendment is not unlimited,"[124] it also limits how the government may legislate in the interest of public safety: "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[125] To protect the public against those who would use firearms to commit acts of violence, legislatures across the country have passed laws prohibiting the possession of firearms by felons, reasoning that those who have previously broken the law are likely to do so again. While attempting to serve a worthy goal, these laws are overreaching.

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120. *Id.*

121. *Id.*, at 983.

122. During which he, presumably, possessed a firearm.

123. United States v. Williams, 616 F.3d 685, 692 (2010); *see also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980).

124. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

125. *Id.* at 636.

To ensure that prohibited possessor laws remain consistent with the Second Amendment, any law restricting firearm possession by non-violent felons should be subject to intermediate scrutiny. Furthermore, while bans on firearm possession by violent felons are facially constitutional, they can be unconstitutional when applied to certain individuals. These reforms create a framework that allows legislatures and courts to protect public safety while also acknowledging the Second Amendment and respecting that firearm possession is a fundamental right protected by the Constitution.