March 19, 2009

Arming Ex-Felons with Constitutional Protections: The Potential Impact of District of Columbia v. Heller on Felon Firearm Possession Bans

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I. INTRODUCTION

Few debates concerning constitutional rights are more polarizing than gun control laws and the Second Amendment. But while there is considerable contention between gun control advocates and staunch Second Amendment defenders, this level of division is easily surpassed by the degree of national agreement on felon firearm possession bans. In its amicus brief for the recent US Supreme Court case, District Columbia v. Heller, the NRA, the nation’s most recognizable guardians of the Second Amendment, noticeably distanced themselves from ex-felons seeking Second Amendment protections.¹ The landscape of state and federal felon possession bans reflects national opinion. Section 922(g)(1) of the federal Firearm Owners’ Protection Act states: “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 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

¹ Throughout its brief, the NRA vigorously emphasized that their proposed strict scrutiny test on gun control laws would not open a Pandora’s box of legal felon firearm possession; stating: “Petitioners and their supporting amici attempt to conjure fears of legal bedlam should courts examine firearms laws under strict scrutiny, yet they present no real argument that long-standing laws regulating the ownership and use of firearms, such as laws barring ownership by convicted felons or the insane, would fail to pass muster under that test.” Brief for National Rifle Association Civil Rights Defense Fund as Amici Curiae Supporting Respondents at 3-4, District of Columbia v. Heller, 128 S.Ct 2783 (2008).
foreign commerce.” 18 USC §922(g)(1). The federal statute is complemented by 49 similar state prohibitions.²

Federal and state courts have unanimously validated the constitutionality of such regulations, and have done so chiefly on two grounds. First, laws that forbid ex-felons from possessing firearms are reasonably related to protecting public safety.³ Secondly, courts have historically argued that felon possession bans do not even “trench upon any constitutionally protected liberties” because the Second Amendment does not recognize an individual right to bear arms.⁴

Though state and federal courts have upheld the constitutionality of felon possession bans in unison, at the very least, the latter justification of these regulations cannot survive the Supreme Court’s decision in *Heller*. But while *Heller* expanded the scope of Second Amendment protections, the noteworthy decision did little, on the surface, to provide relief to ex-felons stripped of the ability to possess firearms. Justice Scalia held that the court’s recognition of an

² Vermont is the only state in the Union that does not have a felon firearm possession prohibition.
Federal courts have found FOPA to be in accordance with the Commerce Clause of the federal Constitution. *See United States v. Chesney*, 86 F.3d 564, 570-72 (6th Cir. 1996). ( “[A] firearm that has been transported at any time in interstate commerce has a sufficient effect on commerce to allow Congress to regulate the possession of that firearm pursuant to its Commerce Clause powers .... Congress constitutionally may prohibit the possession by a felon of a firearm ....”) .

⁴ *See Lewis v. United States*, 445 U.S. 55, 66 (1980); *see also* Rice v. United States, 68 F.3d 702, 710 (3d Cir. 1995) (holding that the right to possess a firearm after a disabbling conviction is a privilege, not a right).
individual right to use arms for self-defense would not “cast doubt on longstanding prohibitions on the possession of firearms by felons…”\textsuperscript{5} Though the intended legal weight of Scalia’s dicta is unclear, subsequent lower courts have unmistakably taken this to mean that the constitutional analysis of felon possession bans remains completely unbothered by \textit{Heller}. In response to the recent onslaught of constitutional challenges to felon possession prohibitions, “every court faced with such an argument has squarely found that § 922(g) remains valid post- \textit{Heller}, particularly given the Court's explicit affirmation that its holding does not affect § 922(g)’s validity.”\textsuperscript{6} The Southern District of Alabama echoed this sentiment when it held, that “on its face”, \textit{Heller} did “not disturb or implicate the constitutionality of § 922(g), and was not intended to open the door to a raft of Second Amendment challenges to § 922(g) convictions.”\textsuperscript{7}

However, this paper questions the blind affirmation of the constitutionality of felon possession laws, especially in a post-\textit{Heller} Second Amendment terrain. By examining the chief rationales behind these laws, with \textit{Heller} in mind, this paper asserts how, contrary to Scalia’s opinion, the constitutional underpinnings of felon gun control laws should not be left wholly unaffected by \textit{Heller}. Courts and scholars have espoused two central rationales for prohibiting ex-felons from possessing firearms. First, history demonstrates that even though state constitutions had recognized an individual right to bear arms long before \textit{Heller}, the right to bear

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\item \textsuperscript{5} Stephen S. Cook, \textit{Selected Constitutional Questions Regarding Federal Offender Supervision}, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 5 (1997).
\item \textsuperscript{6} U.S. v. Whisnant, 2008 WL 4500118, at *7 (E.D. Tenn. Sept. 30, 2008); see also United States v. Gilbert, 286 Fed. Appx. 383, 386 (9th Cir. 2008) ( “Under \textit{Heller} ... convicted felons ... do not have the right to possess any firearms .”)
\item \textsuperscript{7} US v. White, 2008 WL 3211298, at *1 (S.D.Ala. Aug. 6, 2008).
\end{itemize}
arms has often been characterized as a citizenship or political right. Rather than being an inherent essential right, the right to bear arms, much like the right to vote, has been defined and limited by one’s place in the civil polity. Felons, through the commission of their crimes, have rendered themselves “civilly dead” and thus, unfit to bear arms. This theory has enjoyed considerable mileage, but it is difficult to reconcile with Heller’s holding that the Second Amendment is inextricably tethered to the inherent right of self-defense; an essential right that should, presumably, transcend civil standing. Moreover, while courts and scholars have likened felon possession laws with felon disenfranchisement laws, recognizing the distinctions between the two better highlights the flaws of the “civilly dead” rationale behind felon possession bans.

Thus, a more compelling and relevant rationale for felon possession laws is a concern for public safety. The reasoning is simple enough – a cavalcade of armed ex-felons poses a considerable threat to public order and personal security, and thus, banning such possession is a legitimate use of a state’s police power. However, the rational relationship between the regulation and the legitimate government end starts to break down when dealing with the dozens of blanket state laws that do not make a distinction between felons convicted of violent crimes and those who were not. Though FOPA and many state laws limit the scope of the prohibition to certain types of felons, 33 state statutes capture classes of felons that conceivably pose no threat to public safety whatsoever; thus robbing these ex-felons of the right to bear arms and fundamentally impairing their inherent right to self-defense. Despite this staggering overinclusiveness, equal protection challenges against such felon possession laws have universally failed under highly deferential rational basis tests. Comparing these failures with successful equal protection challenges in other felons’ rights contexts underscores the notion that overbroad felon possession laws would have difficulty passing constitutional muster under
anything but the most cursory of rational basis tests. And after *Heller*, which left unanswered what level of scrutiny courts should use in restricting an individual’s right to bear arms, this constitutional inquiry becomes all the more important.

II. “Civilly Dead” Felons: Right to Bear Arms as a Citizenship Right

In striking down a constitutional challenge against the federal felon possession ban, the Supreme Court in *Lewis v. United States* held: “These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties…the Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia.”8 (internal quotes omitted). The concept of the Second Amendment as being limited to the establishment of local militias – an interpretation emphatically dismissed by *Heller* – symbolizes a deeper, underlying notion: the right to bear arms is inherently restricted and defined by the community or political polity. Constitutional historians argue that from the very beginning, the Constitutional framers envisioned a model class who should be endowed with the right to bear arms. Don B. Kates notes that in classical republican political philosophy, “the concept of a right to arms was inextricably and multifariously tied to that of the ‘virtuous citizen.’” He writes:

> “Free and republican institutions were believed to be dependent on civic virtu which, in turn, depended upon each citizen being armed-and, therefore, fearless, self-reliant, and upright. Since possession of arms was the hallmark of citizen's independence, the ultimate expression of civic virtu was his defensive use of arms against criminals, oppressive officials, and foreign enemies alike. One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude

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8 *Lewis*, 445 U.S. at 65.
laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.’”

Thus, many see the right to bear arms as an exclusionary tool – a right granted and rescinded to not only highlight who was “in” and who was “out” but to build and bolster the protective wall surrounding the “in.” Historical analysis demonstrates the pervasiveness of this idea throughout the formation of a right to bear arms.

Prior to the Second Amendment, the common law right to bear arms did not encompass everyone present on American soil, but rather, was only held by citizens and those who swore allegiance to the Government. Early campaigns in support of a constitutionally protected right to bear arms employed limiting language to clarify who would be protected by the potential Amendment and who would not. Samuel Adams urged the Massachusetts ratifying convention to keep Congress from “preventing the people of the United States, who are peaceable citizens, from keeping their own arms.” Similarly, the New Hampshire proposed that Congress “shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” Thus, as David Yasky writes, “[t]he average citizen whom the founders wish to see armed was a man of republican virtue – a man shaped by his myriad ties to his community…”

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10 The connection between the right to bear arms and citizenship is further highlighted by the FOPA provisions that extend firearm possession bans to exclude undocumented aliens and those who have renounced their US citizenship.


It follows, that by committing felonious acts, ex-felons have betrayed the trust of the community, demonstrated their lack of virtue, and have rendered themselves “civilly dead.” A term that traces its origins back to medieval times, “civil death” is fundamental to the very notion of a social contract, for it describes the consequences individuals must face when breaching the sacred oath.13 As described by a medieval French author, civil death “sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen ... he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in the law.”14 The spirit of this medieval philosophy has enjoyed considerable mileage in the context of felon possession bans.15 Kates argues that the “constitutionality of such legislation cannot seriously be questioned on a theory that felons are included within ‘the people’ whose right to arms is guaranteed by the second amendment.” The Oregon Supreme Court in State v. Hirsch echoed this sentiment when it held: “in light of the political theories that guided the framers of the United States Constitution and the Bill of Rights, the framers never intended felons to obtain the benefit of the Second Amendment guarantee because they did not qualify as “virtuous citizens.””16 The right to bear arms “carried with it the responsibility for upstanding citizenship” and “upon violating the social compact between the citizenry and society-and, simultaneously, the duty to act as a virtuous citizen-by committing serious crime, the lawbreaker’s right to bear arms is subject to restriction.” Far from being an


14 Id.

15 The “civilly dead” rationale for felon possession laws has been strongly endorsed by legal scholars and constitutional historians but has received less explicit promotion by courts themselves.

inherent right, the right to bear arms was intrinsically tied to one’s standing in the community. Committing a crime was not only a demonstration of one’s lack of virtue, but an affirmative declaration that one did not want to be part of the civil community. Thus, under the “civilly dead” rationale, felon possession laws have been placed on the same plane as other curtailments of felon rights, most notably felon disenfranchisement laws. However, recognizing the differences between the two laws highlights the defects in the “civilly dead” theory as a rationale for felon possession bans; especially in a post-\textit{Heller} legal era.

\textbf{III. Deconstructing the “Civilly Dead” Theory}

Scholars and commentators have often compared felon possession laws to felon disenfranchisement laws, finding that the two prohibitions are equal derivatives of the “civilly dead” theory.\footnote{Glenn Harlan Reynolds, \textit{A Critical Guide to the Second Amendment}, 62 TENN. L. REV. 461, 481 (1995).} Underlying this conclusion is the belief that the right to vote and right to bear arms are themselves intimately connected. Akhil Amar writes: “At the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic political right flanking the other main political rights of voting, office holding, and jury service.”\footnote{AKHIL REED AMAR, \textit{THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION}, 265-266 (Yale University Press, 2001).} Amar seems to argue that arms-bearing was integral to the process of political self-definition – popular sovereignty would be meaningless and vulnerable to tyrannical governments without the backing of arms. Rather than being a civil right enjoyed by members of the larger society, bearing arms had an exalted position in the spectrum of rights; one reserved for members of the polity.
Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for Citizens. So too, the right to bear arms had long been viewed as a political right, a right of Citizens.\textsuperscript{19}

Amar argues that the communal value of a right to bear arms was critical to the meaningful exercise of popular sovereignty. As both rights historically played a role in political self-definition, the inspirations behind the prohibition of the rights have similar origins.

Felon disenfranchisement laws are also largely founded on the notion of the virtuous citizen and the “civilly dead” – felons are undeserving of the right to vote as breakers of the social contract and incapable to vote as morally corrupt and untrustworthy deviants.\textsuperscript{20} Under a

\textsuperscript{19} Id. at 266.

\textsuperscript{20} Similar to felon possession laws, an alternative rationale to felon disenfranchisement laws derive from public policy concerns. Two common policy justifications are the fear that ex-felons will band together and use their vote to alter the substance or administration of criminal law and that felons will tangibly undermine the integrity of the electoral process by engaging in election fraud. However, recent scholarship has powerfully discredited these reasons as factual improbabilities and deceptive scare tactics. See Harvard Law Review. The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the Purity of the Ballot Box, 102 H\textsc{Arv.} L. \textsc{Rev.} 1300, 1302. (“No evidence suggests that ex-felons would base their votes solely, or even partially, on a candidate's positions on penal issues rather than other matters of policy and politics. Furthermore, even if ex-offenders were to base their votes on matters of criminal justice…regardless of how they might vote on issues of crime and the administration of justice, ex-felons are unlikely to constitute more than a tiny percentage of the population, and thus are electorally insignificant…. Supporters of disenfranchisement argue that, having shown a propensity to break the law, ex-felons are more likely to violate the particular prohibition against election fraud. Whether or not this characterization holds true, however, a blanket exclusion of all ex-offenders in order to protect society from those who would commit electoral offenses clearly is overinclusive. Other, less restrictive means of preventing vote fraud exist….Finally, disenfranchisement also can be an underinclusive measure, for in some states that disenfranchise ex-felons, commission of an election offense does not necessarily result in a loss of the right to vote.”) Therefore, this paper
Lockean theory of a social contract, once an individual breaks the law, he breaks the contract that binds all members of the polity together, forfeiting his right to dictate the political future of that society. On a slightly distinct note, felons have revealed their “impure” natures and thus must not be allowed to pollute the political process. \(^{21}\) But whether it is because they are undeserving or morally incapable, their disqualifying condition flows from their criminal past. Felon disenfranchisement laws are largely founded on the need to protect the “purity of the ballot box” from those who are unfit in various regards.

However, this argumentation cannot be cleanly mapped onto the relationship between the right to bear arms and felon possession bans. In any constitutional discussion, the interests of the government in a right must be balanced with the private interest in retaining the right – more pointedly, the injury one would suffer in relinquishing that liberty. And this is where the comparison between felon possession and disenfranchisement laws begins to break down. As described above, in the felon disenfranchisement context, the government or societal interest in regulating the right to vote – protecting the process of political self-definition – is in direct conflict with the private interest in exercising the right to vote. When felons attempt to vote they are participating in the very process which the larger society has deemed them incompetent or unworthy to engage in. Thus, when it comes to participation in, and formation of, the polity, that the attempting participant has been rendered “civilly dead” is distinctly relevant. Voting is a civil

\(^{21}\) See Daniel S. Goldman, The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination, 57 STAN. L. REV. 611 , 641 (“While the concept of a ‘pure’ ballot box is more than a century old, the importance of purity appears to have evolved from a group-based idea of what the polity should look like to an individualized assessment of what the voter should be like; that is, the voter must be ‘pure.’“)
act, an expression of one’s affiliation with and investment in a particular community – it stands to reason that those who are “civilly dead” may not participate. But these concerns are significantly less at play in the felon firearm possession context. An ex-felons’ desire to possess a firearm has little to do with political or civil engagement, and has everything to do with a personal interest in self-defense.\textsuperscript{22} Thus, as described below, \textit{Heller’s} recognition of an individual right to bear arms works to invalidate the “civilly dead” rationale for felon possession bans.

\section*{IV. Reconciling the “Civilly Dead” Theory with \textit{Heller}}

Rivaling the “civilly dead” theory throughout American constitutional history is the notion that the right to self-defense pre-dates civil society, social contracts and ruling bodies. William Blackstone described the right to self-defense as “the primary law of nature,” and an organic and inextricable element to one’s person. In fact, rather than being a creation of the civil community, the right to self-defense is a shield from the potentially abusive and oppressive nature of the larger polity. Scholars who held this belief also viewed the right to bear arms as a necessary mechanism for the right to self-defense. Blackstone's classification of “arms for their defense” as an absolute right of the individual stemmed from “the natural right of resistance and self-preservation when the sanctions of society and law are found insufficient to restrain the violence

\footnote{Note that we must distinguish the historical product of the communal right to bear arms from the individual interest in bearing arms. While Amar argues that the right to bear arms played a crucial role in facilitating America’s political self-definition, this observation does not account for the personal interest in bearing arms that is completely distinct from the communal need of a militia to protect against tyranny.}
of oppression.” By similarly tethering the right to bear arms to the natural right of self-defense, the Supreme Court in *Heller* ushered in a new era of Second Amendment interpretation by declaring an individual right to bear arms.

*Heller* is damaging to the “civilly dead” rationale, not simply because the Court recognized an individual right to bear arms, but because of the manner in which the Court came to this conclusion. The emphasis on the right to self-defense as a fundamental inherent right was critical to the Court’s analysis. Quoting Constitution-era legal scholar, St. George Tucker, the Court noted that a right to self-defense predated civil society. Tucker believed the Second Amendment “may be considered as the true palladium of liberty .... The right to self-defense is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible.” Justice Scalia continued his opinion by articulating the extent to which the right to bear arms was a necessary prerequisite to any meaningful right to self-defense. Scalia asserted that without a right to use arms when defending one’s self, the guaranty of self-defense “would have hardly been worth the paper it consumed.”

It can be argued that by finding the right to bear arms so intrinsically intertwined with the right to self-defense, the Court elevated the Second Amendment into the pantheon of fundamental natural rights. Though the Court may not go as far in describing their own opinion, at the very least the Court’s articulation of the individual right to bear arms undermines the “civilly dead” theory of felon gun possession laws. This is not to say the Court themselves may endorse this position. To be sure, as described above, the Court seemed to reject any possibility

23 1 W. BLACKSTONE, COMMENTARIES *121, *143-44


25 *Id.*, at 2807.
that its opinion might disrupt the accepted constitutionality of felon possession laws. Moreover, the Court noted that the Constitution’s use of the term “the people” “unambiguously refers to all members of the political community, not an unspecified subset.”

The Court wrote:

[T]he people seems to have been a term of art employed in select parts of the Constitution .... [Its uses] suggest that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

It can be argued that while recognizing the individual right to bear arms as a necessary component of the right to self-defense, the Court still empowers the political and civil community to define who is entitled to this constitutional protection. But it is difficult to reconcile this interpretation with the spirit of Blackstone’s commentaries and the Supreme Court’s opinion; that the right to self-defense is an organic and natural impulse – an impulse so fundamentally tied to life and liberty that it not only predates civil society but transcends one’s relationship to the civil polity.

This is not to say the Second Amendment has or will be protected as an absolute right or should even be treated on the same plane as other “fundamental rights” - the Court certainly does not advance this position. But felon possession bans are fundamentally different from other gun control laws. It is one issue for the government to regulate the degree to which one can exercise the right to bear arms. It is a whole other proposition for the government to regulate who can bear arms. In rejecting the District of Columbia’s prohibition of handguns, the Court reiterated that the “inherent right of self-defense has been central to the Second Amendment right,” and

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26 Id., at 2790-2791.
27 Id., at 2791.
that the DC “handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.” By essentially equating the right to bear arms with the right to self-defense the Court invalidates the DC handgun ban for impermissibly robbing DC citizens’ of their right to self-defense. Thus, the exclusion of an entire class of people from the ability to defend themselves seems equally objectionable.

It is this blanket injury to a fundamental personal interest that makes felon possession bans unjustifiable under a “civilly dead” theory. The civil death justification to felon possession laws becomes even less tenable when considering the many contexts in which the “civilly dead” theory would seem to apply but is not applied. Felon disenfranchisement laws aside, it is difficult to reconcile the “civilly dead” theory with the many ways in which we reinstall ex-felons into society through renewed civic duties and social entitlements – among other things, ex-felons pay taxes, are entitled to welfare benefits, and may be admitted onto state Bars. Nor are ex-felons precluded from enjoying the rights and protections the Bill of Rights affords, save the Second Amendment. Thus, the application of the “civil dead” theory to a right the Supreme Court believes to be a natural right of man is especially dubious when, in many other contexts, ex-felons have been deemed to be very much “civilly alive.” As discussed above, the right to bear arms is distinct from other rights that invoke the civilly dead theory because the act of bearing arms has little to do with participating in society. Rather, it preserves a much more personal, important and fundamental interest – self-defense. While disenfranchisement laws may bar ex- 

\[28\] *Id.*, at 2787.

felons from engaging in an important and symbolic expression of social inclusion, felon possession bans produce a much more tangible and immediate harm.\textsuperscript{30}

The “civilly dead” rationale to felon gun laws does not take into account the magnitude of the private interest being deprived. As founding-era legal theorists and the Supreme Court have stressed, the natural right to self-defense precedes the government. Therefore, it stands to reason that the interest in self-preservation should transcend distinctions between “virtuous citizen” and unsavory outsiders. Therefore, while purporting not to alter the judicial stance on felon possession bans, by expressly linking the right to bear arms to the basic right to self-defense, the \textit{Heller} court does much to leave the “civilly dead” rationale dead.

\textbf{V. Ex-Felons Armed and Dangerous: The Public Policy Rationale}

A much more defendable and rational justification for felon possession laws is to protect the public from armed ex-felons who have demonstrated a disregard for the law and present a threat to public order and safety. However, dozens of state laws ban ex-felons from possession of a firearm regardless of the nature of their offense. These blanket prohibitions blur the constitutional line connecting the statute with its policy goal and presents equal protection concerns. Moreover, in light of \textit{Heller} the constitutionality of such bans becomes even more suspect. Therefore, while \textit{Heller} assists us in questioning the theoretical validity of the “civilly

\textsuperscript{30} Contrast this with the Supreme Court in \textit{Lewis}, holding the Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm, including disenfranchisement.
dead” rationale, *Heller* helps us critique the constitutional validity of the public policy rationale as applied.

Federal and state legislatures have pointed to felons’ displayed propensity of violence and lawlessness as justifications for possession bans. The legislative history of the federal Firearm Owner’s Protection Act demonstrates Congress’ view that felons in possession of firearms present a great risk to society. In a congressional hearing, Senator Long, the sponsor of the felon possession statute, pained an image of the menacingly armed ex-felon terrorizing the streets.\(^31\) Long proclaimed that ex-felons may not be trusted to possess a firearm and that “[w]e do not want the habitual criminals who have committed all sorts of crimes armed and presenting a hazard to law-abiding citizens.”\(^32\) Similarly, when reenacting a state felon possession statute, the Washington State legislature emphasized the importance of the restrictions stating that, “the increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions.”\(^33\)

In lock-step, federal and state courts have been consistent and clear in holding that ex-felons simply do not have a constitutional remedy to felon possession bans. Equal protection challenges

\(^{31}\) Statistics seem to support this apprehension - 90 percent of US adult murderers have adult records – excluding often extensive juvenile records - with an average adult crime career of six or more years, including four major felonies. Criminologist Delbert Elliott provides more persuasive fodder for legislatures when he writes: "The vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system." See Don B. Kates, *Gun Rights for Felons?*, NEW YORK POST, July 22, 2008, available at http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun_rights_for_felons__120908.htm.

\(^{32}\) 114 Cong. Rec. 13, 868 (1968)

have been met with swift application of a rational basis test that has led to even swifter results. Pre-
Heller courts have declined to apply a more demanding standard of judicial review on two
grounds: first, ex-felons are not a suspect class warranting greater constitutional protection, and
secondly, the Second Amendment does not recognize an individual right to bear arms. The Court
in US v. Lewis held that federal felon possession bans are “neither based upon constitutionally
suspect criteria, nor do they trench upon any constitutionally protected liberties.” Finding that
Congress focused on the nexus between violent crime and the possession of firearm by anyone
convicted of a felony, the Court held that Congress could rationally conclude that any felony
conviction is a sufficient basis on which to prohibit possession of a firearm.34

As discussed above, any prohibition that excludes classes of individuals from a fully
effective right to self-defense is problematic.35 In an abstract sense, it seems objectionable to

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34 Lewis, 445 US at 66. See also Walker v. State, 222 S.W.3d 707 (Tex. App. 2007) (holding: a state ban on felon
use of body arm was rationally related to a legitimate state interest of precluding felons from possessing border
armor because of their great potential to abuse the right to possess body armor).

35 The Court in Lewis noted that there are sufficient remedies available for ex-felons, thus lessening the
constitutional concerns of felon possession bans. Though this paper does not intend to delve fully into all the
possible avenues an ex-felon can follow in order to legally possess arms, it is important to briefly discuss the
validity of these options. The Court addressed the most direct channel – a presidential or gubernatorial pardon or a
challenge to the underlying conviction. The Court felt these to be reasonable because it requires ex-felons to clear
“his status before obtaining a firearm, thereby fulfilling Congress' purpose to keep firearms away from persons
classified as potentially irresponsible and dangerous.” Lewis, 455 US at 64. However, both remedies are burdensome
processes that are practical impossibilities for most – moreover, when it specifically comes to challenging prior
convictions, a successful challenge means the person was not and is not a felon and thus restoration of rights in this
situation provides no remedy for properly convicted felons.
argue that by committing a crime, ex-felons have devalued their life and forfeited the right to self-preservation. This is why the “civilly dead” rationale is difficult to reconcile with *Heller’s* interpretation of the Second Amendment. Thus, the public policy rationale provides a more principled justification. The underlying message of the case law and legislative history, cited above, seems to be that limiting an ex-felons’ right to self-defense through possession bans is permissible because their possession may directly endanger others’ safety and ability to effectively exercise their own right to self-defense. In a conflict of rights, we favor the law-abiding citizens who are less likely to abuse their rights. This is hardly a controversial proposition and it manifests itself in contexts where we limit the exercise of rights – even

Another avenue is the state restoration of civil rights. Process of restoring one’s civil rights raises the same issues described above but also an added wrinkle. FOPA states: “Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” 18 U.S.C. §921(a)(20) Circuit courts are split on whether any state law banning felon gun possession would trigger the “unless clause” of §921(a)(20. This split creates a confusing and inconsistent landscape regarding the civil restoration remedy. See Daniel Brenner, *The Fireman Owners’ Protection Act and the Restoration of Felons’ Right to Possess Firearms*, 2008 U. ILL. L. REV. 1045.

Lastly, courts have recognized a felon’s right to self-defense with a firearm when he is in imminent danger but only “for a period no longer than is necessary or apparently necessary”. *State v. Blache* 480 So.2d 304, 307 (La. 1985) The Louisiana Supreme Court went on to hold: “[t]his is not to say that a convicted felon is entitled to own or maintain possession of a weapon, constructive possession or otherwise, for protection, or for any other reason.” Clearly, this is a flawed remedy for it creates a laughable dichotomy – an ex-felon can use a firearm that he fortuitously finds for immediate self-defense but he may not keep a gun in his home or on his person for the same exact reason.
historically revered constitutional rights, such as freedom of speech - when the exercise of such a right would threaten public safety or order. Moreover, it is equally uncontroversial to assert that the possible harm or threat to public safety that arises from an abuse of a right to bear arms is more immediate and tangible as compared to other instances of rights abuse.

However, the apparent constitutional infallibility of felon possession bans is somewhat complicated when considering the practical consequences of such laws. The public policy rationale is premised on the presumption, whether accurate or not, that ex-felons, due to a combination of their natural tendencies and life circumstances, are more likely to engage in violence again. But accepting the proposition that ex-felons are simply funneled back into their respective environments of crime and violence requires one to also accept the notion that it is precisely this environment or life experience that makes ex-felons’ need for a right to bear arms more pressing than for the average citizen. The constitutional implications of this are unclear – it could be argued that how much one needs a particular right, or in other words, the level of harm caused by the regulation, speaks to how tailored the regulation is to the governmental interest. Of course, that inquiry would require a heightened standard of review for felon possession bans that no court has ever granted. However, under those circumstances, an ex-felons’ heightened need for the right to bear arms becomes constitutionally relevant.

Moreover, if the rationale behind felon possession bans is to keep firearms out of the hands of people who may likely engage in lawlessness again, it stands to reason that these possession bans may have little, if any, deterrent effect on potential repeat-offenders. Thus, ex-felons most adversely affected by such prohibitions are law abiding ex-cons who do not pose the public

\[36\] The potential impact of \textit{Heller} on this will be discussed below
threat that propels these laws. Admittedly, this is a simplification of the science behind the deterrent force of gun control laws, as well as a generalization of the patterns and behaviors of ex-felons. But logic dictates a reasonable conclusion concerning the unintended and ironic consequences of felon possession bans: felon gun bans rob the right to bear arms and self-defense from people who are less likely to abuse these rights and who need this constitutional right the most. And when discussing blanket state felon possession bans that apply to all felons, regardless of the nature of their underlying crime, the overinclusiveness of such laws becomes even more undeniable and troublesome.

VI. Blanket Bans: Post-Heller Equal Protection Challenges to Felon Possession Bans

The constitutional connection between felon gun laws and public safety is in even greater doubt when discussing state laws that do not exclude non-violent felons from the prohibition. To be sure, not all felon possession bans on the books fall into this category. In its definition of “a crime punishable by imprisonment for a term exceeding one year”, the Federal Owner’s Protection Act excludes “antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,” 18 U.S.C. § 921(a)(20),” while notably keeping other classes of non-violent ex-felons, such as perjurers, underneath its regulatory umbrella. Similarly, sixteen states limit their felon possession bans to “violent felonies” or “specified felonies.”37 However, that leaves 33 state laws that do not make a distinction between violent and non-violent felons.38

37 States that limit the bans to “crimes of violence” include: Alabama, Minnesota, North Dakota, Ohio, South Carolina, South Dakota, Tennessee and Wyoming.
States that limit the bans to “certain felonies” or “serious crimes” include: Idaho, Louisiana, Montana, New Hampshire, North Carolina, Pennsylvania, Rhode Island, and Washington. See Statemaster.com, Gun Laws –
Blanket felon possession bans raise serious equal protection questions. Though any felon possession ban is overinclusive in including rehabilitated law-abiding ex-felons, blanket bans are wildly so – prohibitions that do not distinguish between violent and non-violent criminals punish those who have not posed a threat to public safety in the past nor demonstrated a likelihood of committing acts of violence in the future. These laws necessarily pose the question, do felons guilty of perjury, embezzlement, or mail fraud pose serious dangers to public safety. Under the public policy rationale, non-violent ex-felons are deprived of their fundamental right to a self-defense without there being any real benefit conferred upon society. Surveying the landscape of blanket laws, and the comic results these laws produce, further accentuates the constitutional dilemma. Individuals barred from possessing a firearm include: a white-collar criminal in all 33 blanket law states, a felon convicted of cheating while gambling in Connecticut, and a convicted bigamous in West Virginia.

Despite this puzzling reality, federal and state courts have consistently rejected equal protection challenges against overinclusive felon possession bans. Courts rejecting these equal protection challenges have reasoned that “[o]ne who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person.”


39 C.G.S.A. § 53a-127d
40 W. VA. CODE, § 61-8-1
41 State v. Brown, 571 A.2d 816, 821 (Me. 1990); see also People v. Blue, 544 P.2d 385 (Colo. 1975); Landers v. State, 299 S.E.2d 707 (Ga. 1983); State v. Amos, 343 So.2d 166 (La. 1977); People v. Swint, 572 N.W.2d 666
Correspondingly, courts have noted that “proof of an inescapable relationship between past and future conduct is not requisite,”\textsuperscript{42} and the felons’ commission of a federal or state felony has rendered him a public threat when armed, regardless of the nature of his underlying conviction.

But while the First Circuit in \textit{US v. Harris} did not require an “inescapable relationship between past and future conduct,”\textsuperscript{43} constitutional principles should demand, at the very least, a reasonable link between non-violent ex-felons and future violent conduct that is not grounded in conventional stereotypes of criminals. Plainly put, non-violent felons have demonstrated just as much of a propensity for violence as law-abiding citizens without a criminal record.

Furthermore, courts rejecting equal protection challenges seem to rely on the notion that once an individual commits any felony he passes a threshold that makes him on the same plane as all other ex-felons. The basic structure of the US criminal justice system does not support this proposition, as evidenced by the variations in classification, sentencing and incarceration of felons depending on the severity of their crime. Ex-felons are not all built the same and they should not be treated as such in a constitutional context concerning the fundamental right to self-defense.

Ex-felons elicit little sympathy from the public and it is highly unlikely a court would classify them as a suspect class warranting strict scrutiny or intermediate scrutiny protection. However, the unsupported assertion that all ex-felons, regardless of their violent nature, pose such a threat to public safety as to warrant a deprivation of their Second Amendment rights,

\begin{itemize}
\item (Mich. Ct. App. 1997);
\item State v. Comeau, 233 Neb. 907, 448 N.W.2d 595 (1989);
\item State v. Smith, 571 A.2d 279 (N.H. 1990) and
\item Carfield v. State, 649 P.2d 865 (Wyo. 1982).
\end{itemize}

\textsuperscript{42} U.S. v. Harris, 537 F.2d 563, 565 (1st Cir. 1976).

\textsuperscript{43} \textit{Id.}
dangerously floats into the unconstitutional waters of discrimination based on “irrational fears” and “invidious stereotypes.” Such was the sentiment expressed by a court upholding equal protection challenges in another felon rights context. In Collins v. AAA Homebuilders, the Supreme Court of Appeals of West Virginia struck down a local policy against renting federally funded housing to persons with criminal records. In rejecting the argument that the policy was meant to protect the safety of incumbent tenants, the Court held that while “excluding all persons with criminal records may indeed work toward accomplishing the stated ends, the blanket presumption that all persons with criminal records are a threat to people and property is difficult to sustain.” The Court noted that the policy excluded all persons with criminal records, “without regard to the nature and circumstances of the prior crimes,” and that such an “absolution exclusion” was patently overinclusive. The Court continued: “It is true that the Fourteenth Amendment is not violated simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Yet, an overinclusive classification that burdens more people than necessary to achieve the stated purpose is not rationally related and, therefore, violates equal protection guarantees.” (internal quotations omitted). Relating the Collins case to equally overinclusive felon firearm possession bans is an imperfect analogy – the housing policy made no distinction between misdemeanors and felons, the public safety risk may be arguably higher in the felon firearm possession context and it is unclear how the deprivation of liberty concerns arising from losing federally funded housing compares with the loss of one’s Second Amendment rights. However, the decision in Collins

44 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)

45 Collins v. AAA Homebuilders, Inc., 333 S.E.2d 792, 796 (W.Va. 1985)

46 Id. at 797. See also In re Manville, 538 A.2d 1128.
suggests that overinclusive felon firearm possession bans would struggle to survive anything more than the most deferentially applied rational basis test.

As discussed above, courts have not welcomed equal protection challenges to blanket possession bans. Nor have courts been receptive to any attempts by ex-felons to raise the standard of scrutiny. The remaining question is whether or not the current approach to equal protection challenges should survive *Heller*. *Heller* did not explicitly articulate a particular standard to be used when reviewing the constitutionality of gun control laws, thus leaving the exact impact of *Heller* on Second Amendment jurisprudence a mystery. However, Footnote 27 of Justice Scalia’s opinion may provide some answers. Scalia seemed to expressly reject a rational basis test for equal protection challenges to gun control laws when he wrote:

But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws….In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms….If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

While not pinpointing the exact impact of his opinion, Scalia unquestionably understands the work the Court has done by recognizing an individual right to bear arms. Scalia seems to argue that elevating the constitutional standing of the Second Amendment necessarily demands a heightened level of scrutiny when examining the constitutional validity of gun control laws.

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47 *Harris*, 537 F.2d at 563.

Herein lies the flaw in lower and state court opinions that blindly reaffirmed the constitutionality of felon possession bans. As described earlier, those courts relied completely on Scalia’s dicta stating that the _Heller_ decision would not disrupt the conventional stance on felon possession bans. Yet, the courts failed to appreciate the equally compelling dicta in which Scalia seemed to reject the very same rational basis tests used in upholding those felon firearm possession bans. This is not to say that raising the standard of scrutiny to “rational basis with bite” or intermediate scrutiny would necessarily compel courts to invalidate overinclusive felon possession bans that they have emphatically and consistently upheld. Yet, at the very least, Scalia’s stark rejection of the use of a rational basis test in future Second Amendment challenges should provoke serious and sincere deliberation on the part of federal and state courts. Despite the wealth of precedent suggesting otherwise, overinclusive felon possession bans were already constitutionally ill on their own. _Heller_, rather than remedying the constitutional concern, exacerbates the ailment.

To be sure, it can be argued that the proper interpretation of Scalia’s dicta runs counter to the explanation given above. Rather, it may be argued that Scalia, in keeping with the originalist theme of his opinion, foreclosed the application of constitutional balance tests to felon possession bans altogether. If so, the categorical exclusion of felons from “the people” would leave them outside the ambit of Second Amendment protections. This exclusion would depend upon the “civilly dead” rationale critiqued above. Yet, even if one were to disagree with the potential impact of _Heller_ on the “civilly dead” rationale, at the very least, blanket felon possession bans are also troublesome under the “civilly dead” rationale. Even proponents of the “civilly dead” rationale, such as Kates, contend that petty felons or non-violent criminals should
not be categorically excluded from the “virtuous citizenry.”\textsuperscript{50} Thus, it seems that proper application of the “civilly dead” rationale would similarly require a distinction between violent and non-violent felons. Blanket felon possession bans are equally overinclusive under the “civilly dead” rationale as they are under the public policy rationale. Thus, whether they are working under the civilly dead rationale or applying a constitutional balancing test, there are ample reasons for courts after \textit{Heller} to take constitutional pause before blindly affirming all felon possession laws.

\textbf{VII. CONCLUSION}

On the eve of the most important Second Amendment case in recent memory, the NRA, the nation’s most recognizable Second Amendment crusaders, made clear what \textit{Heller} was not about – arming ex-felons and other classes of people traditionally deemed incapable or undeserving of owning a firearm. And judging by his opinion, Justice Scalia assented to the NRA’s urgings when he emphasized that the court’s recognition of an individual right to bear arms for self-defense would not “cast doubt on longstanding prohibitions on the possession of firearms by

\textsuperscript{50} See Kates, \textit{Gun Rights for Felons?}, NEW YORK POST. Kates writes: “the constitutional right to arms simply does not extend to people convicted of serious criminal offenses. By ‘serious’ I refer to the early common law—under which felonies were real wrongs like rape, robbery and murder.” Kates argues that the modern expansion of what crimes constitute a felony makes the application of “civil death” to all felons unduly overinclusive. Kates continues: “For instance, in California an 18-year-old girl who has oral sex with her 17-year-old boyfriend has committed a felony. The courts should rule that conviction of such a trivial felony can’t deprive such a ‘felon’ of her right to arms.”
felons.”  

Yet, this paper has endeavored to do exactly that - to “cast doubt” on Scalia’s unambiguous message. This paper has sought to explore the ways in which *Heller* undermines the validity, whether in theory or in practice, of the two principal rationales behind felon firearm possession bans.

First, while the “civilly dead” theory has enjoyed considerable support from constitutional scholars, its contemporary relevance is questionable after the Supreme Court found the Second Amendment to be inextricably linked to a fundamental natural right that predates civil society – the right to self-defense. Unlike with the right to vote, an individual’s interest in exercising his right to bear arms has nothing to do with civil participation and almost everything to do with self-preservation. Thus, whether or not one accepts the proposition that ex-felons have rendered themselves “civilly dead”, an ex-felons’ civil status has little, if any, bearing on a right that transcends civil associations and standing. While proponents of felon possession laws draw comparisons between these bans and felon disenfranchisement laws, the analogy has a fatal flaw. Though disenfranchisement laws impair a felons’ ability to participate in the civil polity, felon possession bans deprive a right that is even more personal and sacred. Thus, it seems the conception of the Second Amendment forged by *Heller* has left the “civilly dead” rationale for dead.

The surviving rationale behind felon possession laws offers more practical value than its theoretical counterpart. In fact, courts who have struck down challenges against felon possession bans have largely rested their authority on the public policy rationale. The logic is simple enough – ex-felons have displayed a propensity for lawlessness and destructive behavior and should not

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51 Cook, *supra* note 5, at 5.
be trusted with firearms. However, felon possession bans are still rife with problems. If one were to accept the proposition that felons are likely to be stuck in violent environments upon their release, then as a result, felon possession bans take the right to self-defense away from those need it the most. Felon possession bans are absurdly overinclusive, especially the 33 state blanket prohibitions that do not distinguish between violent and non-violent ex-felons. While this seems constitutionally troublesome, equal protection challenges to felon possession laws have been swiftly struck down under the crushing weight of deferential rational basis tests. Yet *Heller* suggests that the recognition of an individual right to bear arms necessarily merits a stricter standard of review. Some may argue that this is irreconcilable with Scalia’s earlier dicta concerning felon possession bans and that Scalia must have not intended heightened scrutiny to apply to felon possession bans. However, it is the right itself that has been elevated under *Heller* and it is the right itself that warrants greater constitutional protection, regardless of who is exercising that right.

To be sure, it may be argued that Scalia meant to foreclose the application of constitutional balancing tests to felon possession bans altogether. Perhaps, the subsequent lower courts’ affirmation of felon possession bans with little, if any, constitutional analysis, indicate an adoption of the “civilly dead” rationale. But due to the modern proliferation of crimes considered felonies, the Founding-era concept of “virtuous citizenry” applied today is overinclusive. Blanket laws banning all felons from possessing firearms are equally problematic under the “civilly dead” rationale as they are under the public policy rational. Thus, at the very least, it seems reliance on the “civilly dead” rationale mandates a similar hesitation in affirming blanket bans that would arise from the application of a heightened standard of constitutional scrutiny to those blanket bans.
This paper does not argue that *Heller* will provoke sweeping revelations concerning the unconstitutionality of felon possession bans. Not only is the precise impact of *Heller* on gun control a mystery, there is also little reason to suspect that ex-felons will suddenly enjoy greater support in equal protection challenges. What this paper has attempted to accomplish, however, is to highlight the constitutional tensions present in felon possession bans and to demonstrate that, in spite of Scalia’s greatest efforts, the constitutional analysis of these laws are not left wholly untouched by the Supreme Court’s decision in *Heller*. 