

# DEFEASIBLE SECOND AMENDMENT RIGHTS: CONCEPTUALIZING GUN LAWS THAT DISPOSSESS PROHIBITED PERSONS

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## I

### INTRODUCTION

In 2011, Ricky Kanter pleaded guilty to mail fraud after bilking Medicare out of several hundred thousand dollars.<sup>1</sup> He served his year in prison, finished his term of supervised release, paid his criminal penalty, and reimbursed Medicare.<sup>2</sup> But, under federal law, his felony conviction bars him from possessing firearms for the remainder of his natural life.<sup>3</sup> He sued, claiming that this lifelong prohibition violates his Second Amendment right. The Seventh Circuit upheld the blanket federal ban as applied to Kanter.<sup>4</sup>

In a dissent from that decision, Judge Amy Coney Barrett sought to clarify a threshold question about these types of person-based firearms prohibitions and whose rights the Second Amendment guarantees. She described two views about the issue: “Some maintain that there are certain groups of people—for example, violent felons—who fall entirely outside the Second Amendment’s scope. Others maintain that all people have the right to keep and bear arms but that history and tradition support Congress’s power to strip certain groups of that right.”<sup>5</sup> She argued, however, that “[t]hese approaches will typically yield the same result; one uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature’s power to take it away.”<sup>6</sup>

The debate Judge Barrett described centers on how to think about prohibited persons’ Second Amendment rights: are such people carved out from the Constitution’s scope altogether? Or are they covered, but (in some situations)

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1. Kanter v. Barr, 919 F.3d 437, 440 (7th Cir. 2019).

2. *Id.*

3. 18 U.S.C. § 922(g)(1) (2018). Kanter’s only hope for restoration is a presidential pardon.

4. Kanter, 919 F.3d at 451.

5. *Id.* at 451–52 (Barrett, J., dissenting) (citations omitted).

6. *Id.* at 452.

permissibly dispossessed? In other words, are prohibited persons' Second Amendment rights nonexistent, or just defeasible? Or, to put it another way, are these persons' rights *void*, or merely *voidable*?

This distinction gets at whether to think of people-based prohibitions as coverage or protection questions. The question of *coverage* asks whether the conduct or activity falls within the scope of the particular constitutional guarantee.<sup>7</sup> The *protection* inquiry typically involves analyzing the government's justification for regulating the "covered" conduct and how closely its action tracks that justification.<sup>8</sup> This two-step framework pervades constitutional law. After all, most constitutional provisions cover conduct or activities for which they do not always secure protection. Commercial speech, for example, is covered by the First Amendment, but that speech is not always protected.<sup>9</sup> As Fred Schauer has observed, the distinction between coverage and protection "is important in separating the question of the category of action to which the right (any right) applies from the question of whether the right should prevail in cases of conflict with other interests, or for that matter other rights."<sup>10</sup>

This distinction has become embedded in Second Amendment jurisprudence. In the methodological framework that the courts of appeals use for adjudicating Second Amendment claims, courts undertake a two-step inquiry. As the Third Circuit explained, "[f]irst, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny."<sup>11</sup> In other words, first look to coverage; then analyze protection.

The conceptual debate over how to think about the Second Amendment rights of certain classes of people revolves around these categories. Federal law bars lots of people from having guns. Undocumented immigrants, felons, certain mentally ill individuals, those dishonorably discharged from the military, and others cannot possess firearms.<sup>12</sup> Many states bar additional categories of people from possessing firearms, including violent misdemeanants, certain juvenile offenders, stalkers, and alcohol abusers.

Some of the prohibitions exist only so long as a person remains in a particular status, such as restrictions for the term of a domestic violence restraining order or for however long a person is using or addicted to controlled substances.<sup>13</sup> But

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7. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 276 (1981).

8. *Id.*

9. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980) ("There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

10. Schauer, *supra* note 7, at 276.

11. *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

12. 18 U.S.C. § 922(g) (2018).

13. *Id.* § 922(g)(3), (8); see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1497 (2009)

some are permanent. Felons, for example, are barred for life from ever possessing a firearm, absent affirmative state action to restore their rights.<sup>14</sup> Should we think about challenges to these laws as coverage questions or protection ones? Do different classes of persons raise different conceptual issues? Answering these questions also has implications for thinking about other person-based restrictions on constitutional rights, like felon disenfranchisement and similar laws.

And how courts conceptualize the right could matter in many cases. For example, if those under twenty-one years of age fall outside the scope of the Second Amendment, they lack standing to challenge federal laws prohibiting direct interstate handgun sales.<sup>15</sup> If undocumented immigrants are not covered by the Second Amendment, they lack standing to challenge a state's assault weapons ban, even if no law bars them from possessing other guns. Or "imagine that a legislature disqualifies those convicted of crimes of domestic violence from possessing a gun for a period of ten years following release from prison. After fifteen years pass, a domestic violence misdemeanor challenges a handgun ban identical to the one that the Court held unconstitutional in *Heller*."<sup>16</sup> If the issue is one of coverage, the person lacks standing, despite expiration of the bar to possessing guns. On the coverage view, "[i]f domestic violence misdemeanants are out, they're out."<sup>17</sup> These groups might still have a privilege to own guns if no law prohibits their possession, but, on the coverage view, they have no *right*.

This Article analyzes the debate over these laws, discussing the theoretical foundations for the competing views and the levers the law has to relieve overbroad categorization. Part II describes the traditional two-part coverage-protection framework in Second Amendment litigation and questions whether classes of people should be treated differently than classes of arms or activities. Part III argues that people-based prohibitions should generally, although not exclusively, be considered protection issues. It describes the theoretical and practical reasons for assuming that the Second Amendment provides broad coverage to many classes of people and explains how presumptions and burdens of proof help guide the protection inquiry. Finally, Part IV explores the different approaches circuit courts have taken when analyzing people-based prohibitions and argues in favor of the Sixth Circuit's approach.

In the end, though most people come within the scope of the Second Amendment, triggering conduct or circumstances (for example, certain types of criminal convictions or mental illness adjudications) can make individual's rights defeasible.

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("Some of the statuses that trigger the laws—minority, alienage, being under indictment, being a felon in those states that allow for restoration of civil rights some years after the conviction—are temporary, and may expire in years or even months.")

14. 18 U.S.C. § 922(g)(1).

15. *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 211 (5th Cir. 2012) (upholding the federal ban on handgun sales to minors).

16. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J. dissenting) (citing *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

17. *Id.*

## II

## ASSESSING CONSTITUTIONAL COVERAGE AND PROTECTION QUESTIONS FOR CLASSES OF PERSONS

## A. The Traditional Paradigm

*Heller* presaged the two-part coverage-protection framework for Second Amendment questions. It described the scope of the Second Amendment with reference to text, history, and tradition.<sup>18</sup> And it explained that certain activities, arms, and perhaps people simply fall outside that scope. For example, the majority suggested that concealed carrying falls outside the scope of the right.<sup>19</sup> The Second Amendment still, *Heller* suggested, covers a lot. Yet not everything covered is immune from regulation. “[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms,”<sup>20</sup> but that does not mean it grants “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>21</sup> In other words, *Heller* recognized that courts would confront questions both about the Second Amendment’s coverage and about its protection.

The two-part test employed in the courts of appeals provides a framework for assessing all types of Second Amendment challenges. It arose in the aftermath of *Heller* as courts grappled with how the right to keep and bear arms applies to different situations.<sup>22</sup> In perhaps its first use in the courts of appeals, a Seventh Circuit panel articulated the framework as follows:

[W]e read *Heller* as establishing the following general approach to Second Amendment cases. First, some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified. If the government can establish this, then the analysis need go no further. If, however, a law regulates conduct falling *within* the scope of the right, then the law will be valid (or not) depending on the government’s ability to satisfy whatever level of means-end scrutiny is held to apply . . . .<sup>23</sup>

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18. See *Heller*, 554 U.S. at 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”).

19. See *id.* at 626 (noting that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions” and that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful”).

20. *Id.* at 582; *but see id.* at 623 (“*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”).

21. *Id.* at 626.

22. The test arose not just because of the hints from *Heller*, but also because courts drew on the First Amendment framework with which they were so familiar. See Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. (forthcoming) (manuscript at 13–14) (on file with author).

23. *United States v. Skoien*, 587 F.3d 803, 808–09 (7th Cir. 2009), *aff’d on reh’g en banc*, 614 F.3d 638 (7th Cir. 2010).

This approach rapidly took hold in other courts of appeals,<sup>24</sup> although some courts phrased the steps slightly differently.<sup>25</sup> Courts have applied the framework to all sorts of Second Amendment challenges, whether they raise questions about the types of arms protected,<sup>26</sup> how those arms can be carried,<sup>27</sup> or, importantly, about who gets to keep and bear them.<sup>28</sup>

The two-part framework follows a predictable pattern in constitutional adjudication. As Joseph Blocher and Darrell Miller describe it: “The first question is rule-like and concerns coverage: Is this a Second Amendment case at all?”<sup>29</sup> Some cases are easy at the first step—machine guns are out,<sup>30</sup> as are pipe bombs, “[s]ilencers, grenades, and directional mines.”<sup>31</sup> For laws imposing these restrictions, the government need not mount a defense of how the law advances any important or compelling interests or defend the tailoring of its regulation to meet that need. The conduct is simply not covered by the right at all.

“The second question is standard-like and concerns protection: When and how are these restrictions on Second Amendment rights justified?”<sup>32</sup> The question here is what interest the government has in regulating the conduct and whether its solution is sufficiently tied to that interest. Courts at this stage typically calibrate the level of scrutiny depending on two factors: (1) how closely the law infringes on core constitutional conduct, and (2) how substantially it burdens that conduct. For example, in assessing a ban on certain semi-automatic weapons and high-capacity magazines, the First Circuit noted that after “[a]ssuming (favorably to the plaintiffs) that the Act implicates the core of the Second Amendment right,” it next had to “train the lens of [its] inquiry on how heavily [the ban] burdens that right.”<sup>33</sup> Some judges, in dissent, have questioned

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24. *E.g.*, *United States v. Chester*, 367 F. App’x 392, 393 (4th Cir. 2010), *vacated on reh’g*, 628 F.3d 673 (4th Cir. 2010) (agreeing with *Skoien* that means-end scrutiny is necessary).

25. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (“As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny.” (citation omitted)).

26. *E.g.*, *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019) (reviewing regulation of assault weapons and high-capacity magazines); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (same).

27. *E.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013) (reviewing a good cause requirement for public carry license).

28. *E.g.*, *Hamilton v. Pallozzi*, 848 F.3d 614, 623 (4th Cir. 2017) (reviewing regulation on possession by felons).

29. JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION AND THE FUTURE OF HELLER* 110 (2018).

30. *See Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (“[W]hatever the individual right to keep and bear arms might entail, it does not authorize an unlicensed individual to possess unregistered machine guns for personal use.”).

31. *United States v. McCartney*, 357 F. App’x 73, 76 (9th Cir. 2009).

32. BLOCHER & MILLER, *supra* note 29, at 110.

33. *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) (citations and quotation marks omitted).

this second focus on how substantially the right is burdened,<sup>34</sup> but for the most part courts have looked to these factors in articulating the proper level of scrutiny.<sup>35</sup>

These inquiries into coverage and protection are easy enough to understand when dealing with arms or activities. The analysis they call for is no more difficult than the analogous inquiries into whether the right to obscenity,<sup>36</sup> or child pornography,<sup>37</sup> or videos of animal abuse,<sup>38</sup> or violent video games<sup>39</sup> are guaranteed by the First Amendment's notion of freedom of speech. To be sure, as the First Amendment cases show, that analysis is difficult and often contestable, but we have an established way for conceptualizing the inquiry. Yet we might wonder, as the next Subpart suggests, are Second Amendment people-based restrictions different?

### B. Are People Different?

As we saw, the traditional two-part framework applies whether the challenge arises from a regulation of arms, activities, or people. Few question the traditional two-step inquiry for ascertaining the scope and strength of the Second Amendment with respect to certain arms or activities. To be sure, some judges and academics have been critical of the *way* the two-part framework has been fleshed out in the courts, because they see the tiers-of-scrutiny inquiry as the type of balancing test *Heller* forbade. But they acknowledge the coverage-protection paradigm ensconced in the enterprise of constitutional litigation; some types of weapons are outside the scope of the Second Amendment (coverage issues) and some types of conduct within the scope of the right can be regulated (protection issues).

But Judge Barrett's dissent questions whether it makes any sense to employ this framework when talking about *people*. In a coverage paradigm, "[a]rms and activities would always be in or out."<sup>40</sup> "But a person could be in one day and out the next: the moment he was convicted of a violent crime or suffered the onset of mental illness, his rights would be stripped as a self-executing consequence of his new status."<sup>41</sup> She calls it "analytically awkward" and inconsistent with *Heller* to speak, for example, of felons and mentally ill individuals as without rights at all

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34. *E.g.*, *Ass'n of N.J. Rifle & Pistol Clubs v. Attorney Gen. N.J.*, 910 F.3d 106, 128 (3d Cir. 2018) (Bibas, J., dissenting) ("*How much* the law impairs the core or *how many* people use the core right that way does not affect the tier of scrutiny.").

35. *See, e.g.*, *Fyock v. Sunnyvale*, 779 F.3d 991, 998–99 (9th Cir. 2015) ("[T]o determine the appropriate level of scrutiny, the court must consider (1) how closely the law comes to the core of the Second Amendment right; and (2) how severely, if at all, the law burdens that right. Intermediate scrutiny is appropriate if the regulation at issue does not implicate the core Second Amendment right *or* does not place a substantial burden on that right." (citation omitted)).

36. *See generally* *Miller v. California*, 413 U.S. 15 (1973).

37. *See generally* *New York v. Ferber*, 458 U.S. 747 (1982).

38. *See generally* *United States v. Stevens*, 559 U.S. 460 (2010).

39. *See generally* *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

40. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

41. *Id.*

instead of simply possessing defeasible rights.<sup>42</sup> On her view, “a person convicted of a qualifying crime does not automatically lose his right to keep and bear arms but instead becomes *eligible* to lose it.”<sup>43</sup>

One could think this makes an important point but perhaps overstates the distinction between arms, activities, and people. *Heller*, after all, instructed courts to ask a coverage question about arms that suggests they would *not* “always be in or out”: are the regulated weapons in “common use” by law-abiding citizens for lawful purposes?<sup>44</sup> If so, they fall within the scope of the Second Amendment’s guarantee. Because this rule tethers the Constitution’s scope to consumer choice among legally available options, it allows at least the possibility that some arms that would have been “out” several decades ago may be “in” now. The reverse could also be true. If revolvers fall out of common use could they lose constitutional protection? Or might they become, à la Barrett, “*eligible* to lose” that protection?<sup>45</sup>

In addition, there are other constitutional limitations on otherwise protected conduct that kick in automatically without any state action. Citizens have the right to run for and assume political office. But a twenty-nine year-old cannot become a United States Senator. A thirty-four year-old cannot ascend to the presidency. An individual who serves two terms as president cannot be elected to a third. These restrictions don’t in and of themselves seem analytically awkward.<sup>46</sup>

*Heller* also appears to have limited the scope of the right to certain people—not just to *citizens*, but to *law-abiding* (and, perhaps separately) *responsible* ones. As Justice Stevens noted in dissent:

[T]he Court *itself* reads the Second Amendment to protect a “subset” significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to “law-abiding, responsible citizens.”<sup>47</sup>

And in *McDonald*, Justice Scalia himself emphasized that some of those “traditional restrictions go to show the *scope of the right*.”<sup>48</sup>

But there’s surely something correct in Judge Barrett’s diagnosis. We can more clearly assess that concern in considering how courts and commentators treat three different classes of persons prohibited from possessing firearms under federal law: (1) undocumented immigrants, (2) felons, and (3) mentally ill individuals.

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42. *Id.* at 453.

43. *Id.*

44. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); *see also* *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring in the judgment) (“[T]he pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*.”).

45. *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting).

46. I’m grateful to Darrell Miller for these examples.

47. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

48. *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring) (emphasis added).

### 1. Undocumented Immigrants

First, consider how courts construe the Second Amendment rights of undocumented immigrants. Three federal courts of appeals have held that undocumented immigrants are outside the scope of the Second Amendment.<sup>49</sup> The Fifth Circuit put it bluntly: “The Court’s language in *Heller* invalidates Portillo’s attempt to extend the protections of the Second Amendment to illegal aliens.”<sup>50</sup> “Illegal aliens,” the panel declared, “are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’ and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”<sup>51</sup> Thus, even if both the state and federal government repealed all legal restrictions on firearm possession by undocumented immigrants, these individuals would lack standing to assert Second Amendment challenges to hypothetical handgun bans in Mississippi, Maryland, or Missouri. They might be allowed to own some guns under this legal regime, but they would have no right to invoke the Constitution as a safeguard against any legislative encroachments.

But not all courts or commentators think that this question can be settled as a matter of coverage. The Seventh Circuit, for instance, has held that any resident immigrant who has substantial connections with the United States comes within the scope of the Second Amendment: “In the post-*Heller* world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded.”<sup>52</sup> And the Ninth Circuit recently declined to exclude such individuals at step one, preferring to assume undocumented immigrants are covered, and moved to a protection analysis that upheld the restriction under intermediate scrutiny.<sup>53</sup>

Scholars generally agree that—consistent with the type of intertextual approach *Heller* seemed to employ—at least some non-citizens are covered. Pratheepan Gulasekaram, for example, argues that “in comparison to other rights associated with citizenship, the right of armed self-defense posited by *Heller* cannot coexist with the restriction of ‘the people’ of the Second Amendment to citizens.”<sup>54</sup> He notes that despite a long history of firearm

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49. See *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) as revised (June 29, 2011); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (per curiam).

50. *Portillo-Munoz*, 643 F.3d at 440.

51. *Id.*

52. *United States v. Meza-Rodriguez*, 798 F.3d 664, 671–72 (7th Cir. 2015).

53. See *United States v. Torres*, 911 F.3d 1253, 1264 (9th Cir. 2019).

54. Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1524 (2010); see also Justine Farris, Note, *The Right of Non-Citizens to Bear Arms: Understanding “The People” of the Second Amendment*, 50 IND. L. REV. 943, 957 (2017) (“Given the drafters’ use of the term ‘citizen’ in other constitutional provisions, use of the phrase ‘the people’ rather than ‘citizen’ demonstrates the conscious and clear intention that the phrase ‘the people’ includes more than just those individuals with citizen status.”); D. McNair Nichols, Jr., *Guns and Alienage: Correcting A Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2097 (2016) (“This Note



regulations, the restrictive view that excludes many non-citizens is inconsistent with modern treatment of constitutional rights and with *Heller*'s own emphasis on a personal self-defense right.<sup>55</sup>

## 2. Felons

Second, take challenges to the felon-in-possession ban. In *United States v. Vongxay*, the Ninth Circuit rejected a felon's challenge to the federal ban because "felons are categorically different from the individuals who have a fundamental right to bear arms."<sup>56</sup> They are, according to the court, simply not covered by the Second Amendment at all. In rejecting an as-applied challenge, the D.C. Circuit recently agreed: "felons are not among the law-abiding, responsible citizens entitled to the protections of the Second Amendment."<sup>57</sup> As one Third Circuit judge put it, the reason the Second Amendment does not guarantee the right to certain people or for certain weapons "is that they fall outside the historical 'scope of the right'—not that the right yields to some important or compelling government interest."<sup>58</sup> Many other courts have followed this path, concluding that felons—or at least certain types of felons—are excluded from the Second Amendment's coverage altogether.<sup>59</sup>

## 3. Mentally Ill Individuals

Third, consider treatment of prohibitions on possession by those with certain mental health histories. In *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit confronted a challenge to 18 U.S.C. § 922(g)(4), the relevant portion of which prohibits a "class of persons"—those with a prior involuntary commitment—from possessing firearms.<sup>60</sup> At the initial step, the court had to "determine whether those people, rather than their conduct, f[e]ll completely outside the reach of the Second Amendment."<sup>61</sup> It held that they did not. Because such individuals were presumptively covered, the court had to turn to the protection inquiry and measure the benefits of the regulation against its infringement.

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recommends that courts apply the 'substantial connections' test—in the same way courts currently apply that test to interpret 'the people' in the Fourth Amendment—to determine on a case-by-case basis whether a specific undocumented person qualifies as part of 'the people' for Second Amendment purposes.").

55. Gulasekaram, *supra* note 54, at 1524.

56. 594 F.3d 1111, 1115 (9th Cir. 2010).

57. *Medina v. Whitaker*, 913 F.3d 152, 154 (D.C. Cir. 2019).

58. *Binderup v. Attorney Gen.*, 836 F.3d 336, 359 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments)

59. *See, e.g., Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 500 (2017) ("[W]e simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment, absent the narrow exceptions mentioned below.").

60. 837 F.3d 678, 688 (6th Cir. 2016) (en banc).

61. *Id.*

Courts and commentators have by and large treated people the same way they have treated arms and activities. They assume that text, history, or tradition can guide the inquiry into the scope of the right for classes of people the same way it can for classes of arms. The next Part takes up the analytical and conceptual concerns with this approach to coverage questions.

### III

#### DEFEASIBILITY, BURDENS, AND TRIGGERS

##### A. Scope Justifications: How to Think About Who's Covered and Who's Not

###### 1. Collapsing Coverage and Protection: Definitional-Absolutism

One way to protect the strength of a constitutional right is to narrow its scope. “No right can be unlimited in coverage, but it is at least plausible to imagine a right that is unlimited in protection (absolute) within the scope of coverage.”<sup>62</sup> Some views of prohibited persons have this absolutist flavor to them; courts and commentators adopting this view would constrict the scope of the right to cover a narrow subset of citizens and then apply maximal protection to those within the covered sphere. For example, Robert Leider argues that proceeding to the second step of the inquiry undermines what it means to be a constitutional right in the first place.<sup>63</sup> In his view, the protection inquiry—in which the right exists merely as a *prima facie* privilege subject to government divestment—“is incompatible with our constitutional framework.”<sup>64</sup> Instead, he opts for a kind of definitional-absolutism, an approach that “combine[s] close attention to defining the boundaries of the category with a desire to grant absolute protection within those boundaries.”<sup>65</sup> As Leider says, “[a] court cannot coherently pronounce the same conduct protected by a constitutional right and subject to sanction.”<sup>66</sup> On this view, once people are covered, they are protected.

Similar to Leider, Judge Hardiman, in agreeing that the federal felon ban was unconstitutional as applied to two individuals, argued that the Second Amendment excludes dangerous persons from its scope, but absolutely protects the existence of the right for those inside.<sup>67</sup> As he said after finding non-dangerous felons covered:

It is true that courts typically apply some form of means-end scrutiny to as-applied challenges once it has been determined that the law in question burdens protected conduct. But when, as in these appeals, it comes to an as-applied challenge to a

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62. Schauer, *supra* note 7, at 276.

63. See generally Robert Leider, *What Is A Constitutional Right?*, U. CHI. L. REV. ONLINE (Nov. 15, 2018), <https://lawreviewblog.uchicago.edu/2018/11/15/what-is-a-constitutional-right-by-professor-robert-leider/> [<https://perma.cc/L77Y-UP4Z>].

64. *Id.*

65. Schauer, *supra* note 7, at 274.

66. Leider, *supra* note 63.

67. *Binderup v. Attorney Gen.*, 836 F.3d 336, 362 (3d Cir. 2016) (Hardiman, J., concurring); see also *id.* at 365 (“When the Second Amendment applies, its core guarantee cannot be withdrawn by the legislature or balanced away by the courts.”).

presumptively lawful regulation that *entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate . . . . This is because such laws are categorically invalid as applied to persons entitled to Second Amendment protection—a matter of scope.<sup>68</sup>

Many of the other judges in the case, meanwhile, concluded that answering the scope question didn't foreclose the separate protection inquiry: "to *guarantee absolutely* the ability to keep and bear arms even in cases where disarmament would survive heightened scrutiny would be a radical departure from our post-*Heller* jurisprudence and risk undermining many commonplace constitutional gun regulations."<sup>69</sup>

Although the definitional-absolutist approach seeks to cabin judicial discretion, it can fall victim to one of two types of dangers Schauer identified: (1) "simplify[ing] things to such an extent that the resultant formula has little if any analytical or predictive value," or (2) "achiev[ing] consistency and workability at the expense of excluding from coverage much that a full theory of [the Second Amendment] ought to include."<sup>70</sup> Judge Fuentes faulted Judge Hardiman's approach for falling into the first trap: its rule for who gets covered lacks the guidance necessary to avoid vagueness problems and "seems to require an analysis so particularized as to be practically characterological, raising additional problems of fair warning and due process."<sup>71</sup> In other words, it has no predictive value.

We might see categorical exclusions of nonviolent felons as falling into the second trap. That ban may be more efficient and workable than figuring out who's sufficiently dangerous or lacks sufficient virtue or doesn't exercise enough reason that we can exclude them from the scope of the right. But the flat ban might also exclude from coverage those whom our full theory of the Second Amendment would protect. After all, "[i]s the public safer now that Martha Stewart is completely and permanently disarmed?"<sup>72</sup> These twin dangers of the definitional-absolutist account give some reason for keeping the coverage and protection questions distinct.

Another reason to do so is that, in settling boundary disputes in the Second Amendment, we lack broadly agreed-upon theories about the purpose for the right.<sup>73</sup> And theory drives coverage questions, at least the hard ones. If, for example, the guiding purpose of the Second Amendment is national security—

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68. *Id.* at 363.

69. *Id.* at 345 (emphasis added). They also recognized the extremity of his view. *See, e.g., id.* at 344 ("Some judges—including Judge Hardiman and those colleagues who join his opinion concurring in the judgments—and commentators have interpreted *Heller* to mean that any law barring persons with Second Amendment rights from possessing lawful firearms in the home even for self-defense is *per se* unconstitutional.").

70. Schauer, *supra* note 7, at 275.

71. *Binderup v. Attorney Gen.*, 836 F.3d 336, 411 n.223 (3d Cir. 2016) (Fuentes, J., concurring).

72. C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 696 (2009).

73. BLOCHER & MILLER, *supra* note 29, ch. 6.

the “security of a free State”<sup>74</sup>—then excluding felons from coverage might make perfect sense.<sup>75</sup> But if the overriding purpose is personal self-defense, why should felons or mentally ill individuals be left out? “Felons,” after all, “may need arms for lawful self-defense just as much as the rest of us do.”<sup>76</sup> And if anti-tyranny concerns motivate the Second Amendment, then perhaps those who have shown reluctance to follow government demands would be well placed to oppose an overweening state. We thus have good reasons to reject a categorical-absolutism that collapses the constitutional inquiry into one step.

## B. Prying Them Apart: Defining In versus Defining Out

Commentators have identified as many as nine possible theories for the Second Amendment.<sup>77</sup> Though some of these have garnered more attention than others, it’s fair to say there is still considerable disagreement about the purpose of the Second Amendment. Given this lack of consensus, it makes more sense—and requires fewer contentious assumptions—to back into person-based questions by “defining out” groups of people whom we have no good reason to cover rather than try to start by “defining in” who gets to be within the scope of the right in the first place.

Choosing between these two approaches can have profound effect. For coverage questions, *defining in* means constructing a theory about the purpose of the right and including those arms, activities, and people that pass the test of inclusion. *Defining out* does the opposite—it starts with an intentionally broad view of the right and carves out some subcategories of groups. “These subcategories too must be conceived within the framework of a theory . . . , although the focus here is negative (no reason to grant special protection against the power of government) rather than positive (grant special protection here because . . .).”<sup>78</sup> So we start with a broad theory of what the Second Amendment protects—say, arms-bearing for lawful purposes—and then narrow from there.

For example, we could ask: Do second graders have Second Amendment rights?<sup>79</sup> One commentator argues that “[c]hildren, of course, are constitutional

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74. U.S. CONST. amend. II.

75. *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) (“Denying felons the right to bear arms is also consistent with the explicit purpose of the Second Amendment to maintain ‘the security of a free State.’”).

76. Volokh, *supra* note 13, at 1499; *see also* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 75 (2020) (“Ex-felons and the mentally ill maintain their self-defense rights, but, according to the list [in *Heller*], lose their Second Amendment rights.”).

77. *See, e.g.*, Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131 (2008).

78. Schauer, *supra* note 7, at 280.

79. *Cf.* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 530 (2019) (highlighting the Continental Congress’s warning to King George III “that the Americans’ superiority with arms, due to their training beginning in childhood, would make them a formidable foe: ‘Men trained to Arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy Conquest’”); *see also* *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (“The constitutional rights of children cannot be equated with those of adults.”).

persons and thus have constitutional rights.”<sup>80</sup> Or, to put it in Judge Barrett’s terms, *Heller* said the Second Amendment covers all Americans, and children are Americans.<sup>81</sup> Despite these intuitive appeals, we don’t have particularly good reasons for including children within the scope of the right.<sup>82</sup> They typically won’t have a great need for armed self-defense; teachers, parents, and other guardians are often legally required to ensure their welfare.<sup>83</sup> They weren’t allowed to serve in the early militias and are not allowed to serve in the military today, so they won’t help advance the cause of national security. And due to their fragility, immaturity, and youth, they won’t make great compatriots in a fight against government tyranny. Since we have no good reason to grant children protection, we can define them out. They can thus be considered outside the scope of the right.

This is one way to define out from the scope of the right. Another way is to focus more on language than on theory. The Second Amendment guarantees the right of “the people” to keep and bear arms. As Part II showed, *Heller* was far from clear on who exactly this language encompasses. The Court variously referred to Second Amendment rights-holders as “all members of the political community,”<sup>84</sup> “all Americans,”<sup>85</sup> “law-abiding, responsible citizens,”<sup>86</sup> and “law-abiding citizens.”<sup>87</sup> This conception is certainly narrower than one that would include all those within the territorial boundaries of the United States. Noting this coverage restriction, Gulasekaram argues that “[i]n altering—and thereby contracting—the definition of ‘the people’ to political membership as a function of constitutional interpretation, the *Heller* majority recalls *Dred Scott*’s express limitation on constitutional reach.”<sup>88</sup>

The defining out method puts the burden on those arguing that a group remains outside the scope of the right; it starts with a broad coverage presumption, “and then create[s] areas of noncoverage, regarding which the burden of proof of nonapplicability of [Second Amendment] principles can be met.”<sup>89</sup> It seems those who want to exclude children can meet their burden. It’s not entirely clear whether those who want to exclude undocumented immigrants can.

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80. Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 668 (2004).

81. See *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

82. The age of majority line may be blurry and its resolution might complicate the picture, but for the sake of the scope question, we can fairly easily say those under fourteen fall outside the scope of the right without raising more difficult questions about older teenagers.

83. Though this right is not, of course, absolute. See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989) (holding that “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause”).

84. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

85. *Id.* at 581.

86. *Id.* at 635.

87. *Id.* at 625.

88. Gulasekaram, *supra* note 54, at 1537.

89. Schauer, *supra* note 7, at 281.

This discussion helps to show that even the fairly rights-protective defining out method can establish that some classes of persons are outside the scope of the Second Amendment. But it also reveals that we have good reasons to think that not all classes should be treated the same. Perhaps some are categorically carved out (for example, young children and maybe undocumented immigrants), but others are not.

### C. Rethinking Defeasibility: Personalized versus Class-Based Inquiries

As the above discussion suggests, there are good reasons, contra Judge Barrett, to suggest that *some* classes of persons are excluded from the scope of the right. Like a pair of captains of industry who try to raise a First Amendment defense to their prosecution for a verbal price-fixing conspiracy, a toddler seeking solace in the Second Amendment is out of luck. But Judge Barrett is right to underscore the boundary-drawing issues around other types of prohibited-person laws, like those concerning felons and mentally ill individuals. Lacking a full-fledged theory of the Second Amendment, we ought to proceed slowly when settling questions about scope; *defining out* is preferable to *defining in*. And, for that reason, prudence suggests treating most person-based prohibitions as protection questions, not coverage ones.

We can think about these person-based prohibitions at two levels: (1) at the “class of person” level, or (2) at the individual level. Obviously, legislation cannot be written to prohibit John Doe from possessing guns because he assaulted that one guy with a bottle in a bar fight. Laws are general. But suppose we think of the question in a different way. Imagine that we repealed all prohibited person laws and replaced them with a permit-to-purchase regime. In that world, let’s assume, no one is barred from possessing firearms because they belong to a certain class (for example, those convicted of qualifying offenses), but everyone has to get a permit to purchase and possess a firearm. Anyone, except children and (perhaps) undocumented immigrants, can seek a permit. Suppose the local law enforcement officials charged with implementing the law are given some discretion over whether to grant permits.

We can build up to a view about coverage and protection by considering the types of people to whom we have considered it fair or just to deny permits. In other words, this conceptual exercise starts with a presumption that everyone who can apply for a permit is covered by the Second Amendment and puzzles out the way to think about who gets defined out.

Consider several different examples. A man named Carl, claiming to be Jesus Christ, walks into the station to get his permit. He relays his fears of the government monitoring his every move from a bug implanted in his head. He talks about the agents whispering in his ears as he tries to sleep. And he assures the officers that he will only use the weapon against the government agents that sometimes creep into his room at night. Should law enforcement issue the permit to Carl?

Or take Tim. He's a member of a white nationalist organization dedicated to promoting the message of white supremacy through whatever means necessary. He's been to prison for prior assaults, including beating a Hispanic man. He complains about minorities in his neighborhood ruining the "culture" of America. He intends to do something about them when he gets his permit. Should Tim be issued one?

Next, consider Sheila. She shows up to the police station ten years after her release from federal prison for a felony wire fraud conviction. She worked as an investment banker for twenty years before engaging in a Ponzi scheme that robbed thousands from investors. She served her two years of imprisonment, paid all her fines and restitution, and is no longer under government supervision. Does she get a permit?

Intuitions might differ about which, if any, of these individuals should be denied a permit. Under current federal prohibited-person laws, Sheila is barred from possessing firearms for life, Tim might be (depending on the nature of his assault charge), and Carl is not, absent any other information about him. These three characters are also paradigms for three main types of reasoning that judges and scholars have used for person-based prohibitions: (1) reason, (2) virtue, and (3) danger.

In *Tyler*, the court had to consider whether the permanent firearm bar for a man who had previously been involuntarily committed to a mental institution withstood constitutional scrutiny. It first noted that "[t]he government bears the burden at step one to conclusively demonstrate that the challenged statute burdens persons historically understood to be unprotected."<sup>90</sup> The court held that the government did not meet that burden and thus remanded for the lower court to perform the step two analysis.

In a concurring opinion, Judge Batchelder expanded on the step one inquiry, embracing the "reason" rationale for the scope of the right. She argued that, at the Founding,

the idea of right was intimately connected with the idea of reason, a term that referred not only to the "faculty of the mind by which it distinguishes truth from falsehood [and] enables the possessor to deduce inferences from facts or from propositions," but also to the mind's ability to distinguish "good from evil."<sup>91</sup>

Only those who could exercise reason were imbued with rights. "The emphasis on reason is significant, for, according to Founding-era legal definitions, an insane person was someone who had *lost his reason*."<sup>92</sup> Because such individuals could be confined at common law, they could also be disarmed. But, crucially, once they *regained* such reason, they could exercise their rights and hence could not continue to be disarmed. Thus, in her view, the fundamental question as to whether § 922(g)(4) can constitutionally be applied is whether a person is

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90. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 688 (6th Cir. 2016) (en banc).

91. *Id.* at 704–05 (Batchelder, J., concurring in part).

92. *Id.* at 705.

currently mentally ill as the Founding generation would have understood that condition.<sup>93</sup>

In addition to the reason view, some courts and scholars point to the notion of “virtue” as circumscribing the scope of the right. As historian Saul Cornell argues, the right to keep and bear arms “was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.”<sup>94</sup> Courts use this rubric at step one. “[M]ost scholars of the Second Amendment,” observed the Seventh Circuit, “agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens.’”<sup>95</sup> The Third Circuit uses this type of test to determine whether or not those convicted of an otherwise disqualifying felony can be constitutionally excluded from the scope of the right to keep and bear arms: “being convicted of a non-serious crime does not demonstrate a lack of ‘virtue’ that disqualifies an offender from exercising those rights,” but conviction for a serious one does.<sup>96</sup>

Finally, another view finds “danger” to be the touchstone of the inquiry into who is covered. As Judge Hardiman argued, “[t]he most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.”<sup>97</sup> Joseph Greenlee similarly argues that “[h]istory shows that the right could be denied only to mitigate threats posed by dangerous persons.”<sup>98</sup> And the Third Circuit recently said, in disagreeing with *Tyler*, “[w]e can therefore ascertain that the traditional justification for disarming mentally ill individuals was that they were considered dangerous to themselves and/or to the public at large.”<sup>99</sup> As we saw, Judge Barrett also focused on danger,

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93. See generally Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633 (2014) (arguing that those actively suffering from delusions or hallucinations, whether or not subject to § 922(g)(4), should be forbidden from possessing firearms).

94. Saul Cornell, “*Don’t Know Much About History*” the *Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002). On this view, exercising the right to keep and bear arms was part of civic virtue that not everyone participated in. “Women, free Africans, and resident aliens might claim a genuinely individual right such as the right of religious conscience, but they were not included among those who bore arms.” Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 165 (2004).

95. *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010); see also *Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019), cert. denied sub nom. *Medina v. Barr*, 140 S. Ct. 645 (2019) (“While we need not accept this [virtue] theory outright, its support among courts and scholars serves as persuasive evidence that the scope of the Second Amendment was understood to exclude more than just individually identifiable dangerous individuals.”); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010).

96. *Binderup v. Attorney Gen.*, 836 F.3d 336, 349 (3d Cir. 2016).

97. *Id.* at 357 (Hardiman, J., concurring in part and concurring in the judgments).

98. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Protecting Arms*, WYO. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3509040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3509040) [<https://perma.cc/S4LQ-P5PQ>].

99. *Beers v. Attorney Gen.*, 927 F.3d 150, 158 (3d Cir. 2019).



but for her this was part of the protection inquiry at step two, not a matter of coverage.<sup>100</sup>

Analyzing these individuals on a case-by-case basis also helps to reveal where individual rights conflict with class-based regulations. Almost by definition, a class will be overinclusive as to its purpose or the interest it seeks to serve.<sup>101</sup> But courts typically analyze claims on a class-wide basis. Felons of a certain type can be disarmed; those with certain mental health adjudications can be denied the right. Presuming broad coverage and then cautiously defining out leaves open a vast number of questions about how to implement this framework and vindicate the interests in the Second Amendment's underlying values. The next Part takes up some tentative answers and raises more questions.

#### IV

##### AS-APPLIED CHALLENGES AND SOME REMAINING QUESTIONS

This Article argues that person-based prohibitions should, by and large, be treated as protection questions, and not coverage ones. Judge Barrett is right that it can be conceptually confusing to speak of individuals as within or outside the scope of the Second Amendment. But this Article parts ways with Judge Barrett on the absoluteness of the claim. There are in fact classes of persons who possess no Second Amendment rights regardless of whether or not the government takes any action. Young children are the most immediate example. There may be others such groups (for example, undocumented immigrants and individuals suffering delusions or hallucinations), but those proposing to exclude such individuals bear the burden of showing that such exclusion is justified by history or theory.

Although every circuit has rejected a facial challenge to 18 U.S.C. § 922(g), those that have permitted as-applied challenges disagree about whether such challenges should be resolved at the coverage or protection stage. The difference between as-applied challenges and the (universally rejected) facial challenges to prohibited-person laws illustrates the particularized nature of the debate. “If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances.”<sup>102</sup> This final Part suggests that the Sixth Circuit's as-applied framework best implements the defining out method and that these person-based claims should often be funneled to the protection stage.

In the Third Circuit, as-applied challenges take place through a burden-shifting framework. The first step is a threshold coverage inquiry in which the

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100. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting).

101. See Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. (forthcoming 2020).

102. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

challenger must present evidence to show that she is *not* part of the class of persons historically excluded from the Constitution's scope.<sup>103</sup> Only if she meets that task "does the burden . . . shift to the Government at step two to show the regulation as applied satisfies intermediate scrutiny."<sup>104</sup> In some ways, the burden on the challenger at the coverage stage requires the same type of evidence and analysis that typically takes place at the protection stage: what justification the government has for denying this class the right and whether that justification fits this context.<sup>105</sup> The Third Circuit's approach creates more confusion by placing the burden on the challenger at step one.<sup>106</sup>

By contrast, the Sixth Circuit's approach to as-applied challenges for person-based prohibitions is more straightforward and analytically clear. There, as in the two-step framework more broadly, the government bears the burden at each step of an as-applied challenge. First, "[t]he government bears the burden at step one to conclusively demonstrate that the challenged statute burdens persons historically understood to be unprotected."<sup>107</sup> Only if the government prevails at that step does the court move to step two and require the government to satisfy means-end scrutiny.<sup>108</sup>

The Sixth Circuit approach coheres well with the arguments for treating most people as covered and the burden-allocation role of the defining out method.<sup>109</sup> The benefit of this method—where the government bears the burden—also helps to make the outcomes of as-applied challenges more uniform. With the Third Circuit approach, one DUI misdemeanant could fail to make the best case for himself and lose his challenge, but another one might prevail. In the Sixth Circuit approach, by contrast, if the government proves DUI misdemeanants are not covered, then no others can prevail.

Funneling more challenges to the protection stage also serves the logic of as-applied challenges: as claims against rules. "The Constitution itself directs courts to focus on the constitutionality of a challenged statute rather than on the privileged or unprivileged character of the conduct of the litigant challenging

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103. *Beers*, 927 F.3d at 155.

104. *Folajtar v. Barr*, 369 F. Supp. 3d 617, 622 (E.D. Pa. 2019).

105. *See, e.g., Holloway v. Attorney Gen.*, 948 F.3d 164, 172 (3d Cir. 2020) (finding seriousness the rationale for excluding felons and then proceeding to delineate factors to determine seriousness, "including, but not limited to, whether the crime poses a danger or risk of harm to self or others, whether the crime involves violence or threatened violence, the classification of the offense, the maximum penalty, the penalty imposed, and how other jurisdictions view the crimes").

106. The Third Circuit is not entirely alone. *See, e.g., United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (dismissing the as-applied challenge because the challenger "ha[d] not shown that he is no more dangerous than a typical law-abiding citizen" (internal quotation marks omitted)).

107. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 688 (6th Cir. 2016).

108. *Stimmel v. Sessions*, 879 F.3d 198, 205–06 (6th Cir. 2018).

109. *See United States v. Skoien*, 614 F.3d 638, 650–51 (7th Cir. 2010) (Sykes, J., dissenting) ("The better approach is to acknowledge the limits of the scope inquiry in a more straightforward way: The historical evidence is inconclusive at best . . . . Because Skoien is not categorically unprotected, the government's use of § 922(g)(9) against him must survive Second Amendment scrutiny.").

it.”<sup>110</sup> For the person-based firearm prohibitors, though, § 922(g) doesn’t need to stand or fall at once; courts can and have discerned various subrules that preserve the “rights against rules” frame,<sup>111</sup> while also recognizing that not all prohibited persons are equally situated. Courts are able to discern subrules in the statute (such as different kinds of felons, different stages of mental illness) and sever the unconstitutional applications from the constitutional ones.<sup>112</sup> This properly puts the onus on the statute rather than the litigation resources of the individual. And, in many cases, it will lead more cases to the protection stage because the inconclusive theoretical and historical evidence for excluding certain people from the right will mean the government fails to meet the step one burden.

Of course, a regime in which anyone can raise an as-applied challenge to a generally applicable (and facially constitutional) law would create an administrability headache. But if Second Amendment scope questions—at least for people—should generally be answered at the protections stage and not the coverage stage, then many of these questions will be unavoidable.

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110. Dorf, *supra* note 102, at 248; *see also* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998) (“Constitutional rights in our own legal world are structured, not as shields around particular actions, but as shields against particular rules.”).

111. *See generally* Adler, *supra* note 110.

112. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1334 (2000) (“In a nutshell, even insofar as challenges are challenges to rules, it does not follow that all challenges call upon courts to adjudicate the validity of statutory rules in their entirety; some challenges are to subrules; and challenges to the precise subrules applicable to particular facts are, for all functional purposes, as-applied challenges that permit a court to sever a statute and separate valid from invalid subrules or applications.”).