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The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms

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THE HISTORICAL JUSTIFICATION FOR PROHIBITING DANGEROUS PERSONS FROM POSSESSING ARMS

*Joseph G.S. Greenlee**

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I. INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court deemed certain firearm regulations “presumptively lawful”—including “longstanding prohibitions on the

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possession of firearms by felons”¹ The *Heller* Court did not elaborate on why such laws were presumptively lawful, instead promising to provide a “historical justification” for such laws when a better opportunity arises.² Two years later, the Court again referenced these presumptively lawful regulations in *McDonald v. City of Chicago*, but did not use the opportunity to elaborate on the historical basis for the regulations.³

Thus far—over a decade since the *Heller* decision—the Court has not yet provided that historical justification. In the meantime, lower courts have been inundated with challenges to these presumptively lawful measures. The federal law prohibiting felons from possessing firearms has been the most challenged law under the Second Amendment post-*Heller*.⁴ This Article surveys English and American history to discover what historical justification the Supreme Court was referring to.

Part II examines what the Supreme Court has said about firearm prohibitions on felons. Section A explains why felon bans are presumptively lawful, Section B explains why the presumption of lawfulness is rebuttable, and Section C explains why any prohibition on felons must be rooted in history and tradition.

Part III explores the history of laws prohibiting categories of people from possessing arms. Section A explores disarmament efforts throughout England’s history. England had a long tradition of disarming dangerous persons, especially those disloyal to the government. Section B surveys laws from colonial America. Consistent with English tradition, colonial disarmament efforts focused on those perceived as posing a dangerous threat, including Loyalists to the British Crown, slaves, freedmen, and Native Americans. Section C summarizes the proposals from the ratifying conventions of Massachusetts, New Hampshire, and Pennsylvania. All three proposals are most reasonably read as allowing only dangerous persons to be disarmed. Section D provides examples of when prohibited persons could have their arms rights restored in the founding era. Unlike the lifetime bans that typically apply today, prohibited persons in the founding era could often regain their rights once they were no longer perceived as dangerous. Section E focuses on the nineteenth century, in which slaves, freedmen, and tramps were regulated most severely. Section F surveys the increasingly prevalent prohibitions in the twentieth century. The majority of these applied to non-citizens and are examined in Section F.1. The others applied to violent criminals and are examined in Section F.2.

¹ *District of Columbia v. Heller*, 554 U.S. 570, 626–27, n.26 (2008).

² *Id.* at 635 (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

³ *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

⁴ See *infra* note 16 and accompanying text.

Part IV addresses the theory embraced by some scholars and courts that the Second Amendment was understood in the founding era to protect only “virtuous” citizens. Section A examines how the “unvirtuous” citizen theory developed despite lacking historical foundation. Section B explores historical laws that expressly permitted unvirtuous citizens to retain their arms rights. Many founders believed a virtuous citizenry was necessary for self-government, but no law ever limited the right to keep and bear arms to virtuous citizens, and no founding-era source indicated that the Second Amendment was intended to be so limited.

In conclusion, this Article finds that there is no tradition of banning peaceable citizens from possessing firearms. The historical justification the Supreme Court relied on to declare felon bans “presumptively lawful” must be the tradition of disarming violent and otherwise dangerous—not merely unvirtuous—persons. Thus, prohibitions on violent felons may be presumptively lawful under *Heller*, but prohibitions on nonviolent felons contradict the original understanding of the Second Amendment.

II. THE SUPREME COURT

A. *Presumptively Lawful Regulations*

In 2008, the Supreme Court provided its “first in-depth examination of the Second Amendment” in *District of Columbia v. Heller*.⁵ *Heller* involved three District of Columbia ordinances: a prohibition on handguns; a prohibition on assembled, functional firearms inside one’s home; and a prohibition on carrying firearms without a license, which applied inside the home.⁶ The *Heller* Court analyzed the Second Amendment’s text, informed by history and tradition, and held that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation.”⁷ Thus, the Court held “that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”⁸ Additionally, “[a]ssuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.”⁹

As the Court’s “first in-depth examination” of the right, *Heller* did not “clarify the entire field.”¹⁰ But the Court explained which firearm regulations

⁵ *Heller*, 554 U.S. at 635.

⁶ *Id.* at 574–75.

⁷ *Id.* at 592.

⁸ *Id.* at 635.

⁹ *Id.*

¹⁰ *Id.*

may remain permissible. For example, the Court made a point to clarify that some historical laws, including longstanding firearm prohibitions on felons, are presumptively lawful:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹¹

In an accompanying footnote, the Court added that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”¹² The Court then promised “to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”¹³

Heller, therefore, provides that while “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is “elevate[d] above all [governmental] interests” in restricting the right, felons can be deprived of the right if that deprivation is consistent with history and tradition.¹⁴

In 2010, the Supreme Court struck two Illinois cities’ handgun bans in *McDonald v. City of Chicago*. In holding that “the Second Amendment right is fully applicable to the States” through the Fourteenth Amendment, the Court noted that *Heller* “did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons’”¹⁵ The *McDonald* Court did not use the opportunity to provide the historical justification promised in *Heller*, but it did reiterate that *Heller* was referring to “longstanding” prohibitions on felons.

Perhaps because of the Court’s terse treatment of the “presumptively lawful” regulatory measures in *Heller* and *McDonald*, few lines from either case have been more controversial or consequential.¹⁶ But the Court was clear in stating that

¹¹ *Id.* at 626–27.

¹² *Id.* at 627 n.26.

¹³ *Id.* at 635.

¹⁴ *Id.*

¹⁵ *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626–27).

¹⁶ See David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 214–28 (2017) (describing various disagreements among the

its listed restrictions had “historical justifications,” and that the regulations are only “presumptively” constitutional.¹⁷

federal circuit courts regarding the “presumptively lawful” measures, including what constitutes “longstanding,” how the enumerated laws should be analyzed, what unlisted laws are “presumptively lawful,” whether the presumption can be rebutted, and whether the language is dicta, among other issues). Courts dispute whether the “presumptively lawful” language is dicta or a limitation on *Heller*’s holding. But the distinction is trivial, because lower courts generally consider themselves bound by recent Supreme Court dicta. *See id.* at 199–200 n.16 (providing examples of each federal circuit court recognizing the authoritativeness of Supreme Court dicta).

Since *Heller*, the federal statute prohibiting felons from possessing firearms—18 U.S.C. § 922(g)(1) (2018)—has been the most challenged law under the Second Amendment. *See, e.g.*, *Holloway v. Attorney Gen.* United States, 948 F.3d 164, 168 (3d Cir. 2020); *United States v. Torres*, 789 F. App’x 655, 656 (Mem.) (9th Cir. 2020); *Medina v. Whitaker*, 913 F.3d 152, 154 (D.C. Cir. 2019); *United States v. Adams*, 914 F.3d 602, 604 (8th Cir. 2019); *Kanter v. Barr*, 919 F.3d 437, 440 (7th Cir. 2019); *Hatfield v. Barr*, 925 F.3d 950, 951 (7th Cir. 2019); *United States v. Griffith*, 928 F.3d 855, 864 (10th Cir. 2019); *King v. Attorney Gen.* United States, 783 F. App’x 111, 112 (3d Cir. 2019); *Baer v. Lynch*, 636 F. App’x 695, 696 (7th Cir. 2016); *United States v. Phillips*, 827 F.3d 1171, 1172 (9th Cir. 2016); *Binderup v. Attorney Gen.* United States of Am., 836 F.3d 336, 340 (3d Cir. 2016) (en banc); *United States v. Shields*, 789 F.3d 733, 738 (7th Cir. 2015); *Van Der Hule v. Holder*, 759 F.3d 1043, 1044 (9th Cir. 2014); *United States v. Woolsey*, 759 F.3d 905, 906 (8th Cir. 2014); *Bell v. United States*, 574 F. App’x 59, 60 (3d Cir. 2014) (per curiam); *United States v. Cooney*, 571 F. App’x 505, 506 (8th Cir. 2014) (per curiam); *Schrader v. Holder*, 704 F.3d 980, 982 (D.C. Cir. 2013); *United States v. Baird*, 514 F. App’x 898, 982 (11th Cir. 2013); *United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013); *United States v. Hauck*, 532 F. App’x 247, 248 (3d Cir. 2013); *United States v. Lapier*, 535 F. App’x 622, 622 (Mem.) (9th Cir. 2013); *United States v. Schrag*, 542 F. App’x 583, 584 (9th Cir. 2013) (Mem.); *United States v. Huet*, 665 F.3d 588, 592 (3d Cir. 2012); *United States v. Moore*, 666 F.3d 313, 315 (4th Cir. 2012); *United States v. Lunsford*, 470 F. App’x 184, 185 (4th Cir. 2012); *United States v. Molina*, 484 F. App’x 276, 278 (10th Cir. 2012); *United States v. Smoot*, 690 F.3d 215, 217–218 (4th Cir. 2012); *United States v. Kline*, 494 F. App’x 323, 324 (4th Cir. 2012) (per curiam); *United States v. Small*, 494 F. App’x 789, 791 (9th Cir. 2012); *United States v. Pruess (Pruess II)*, 703 F.3d 242, 244 (4th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 169 (3d Cir. 2011); *United States v. Pruess (Pruess I)*, 416 F. App’x 274, 274 (4th Cir. 2011) (per curiam); *United States v. Torres-Rosario*, 658 F.3d 110, 112 (1st Cir. 2011); *United States v. Ritchie*, 362 F. App’x 687, 688 (9th Cir. 2010); *United States v. Khami*, 362 F. App’x 501, 501 (6th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1113 (9th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 769 (11th Cir. 2010) (per curiam); *United States v. Schwindt*, 378 F. App’x 721, 722–23 (9th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 687 (7th Cir. 2010); *United States v. Yancey*, 621 F.3d 681, 682 (7th Cir. 2010); *United States v. Duckett*, 406 F. App’x 185, 186 (9th Cir. 2010) (Mem.); *United States v. Davis*, 406 F. App’x 52, 53 (7th Cir. 2010); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Brye*, 318 F. App’x 878, 879 (11th Cir. 2009); *United States v. Stuckey*, 317 F. App’x 48, 49 (2d Cir. 2009); *United States v. Smith*, 329 F. App’x 109, 110 (9th Cir. 2009); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Nolan*, 342 F. App’x 368, 372 (10th Cir. 2009); *United States v. Battle*, 347 F. App’x 478, 479 (11th Cir. 2009); *United States v. Banks*, 350 F. App’x 419, 420 (11th Cir. 2009); *United States v. Gilbert*, 286 F. App’x 383, 385 (9th Cir. 2008); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008); *United States v. Frazier*, 314 F. App’x 801, 802 (6th Cir. 2008); *see also* *Hamilton v. Pallozzi*, 848 F.3d 614, 617–18 (4th Cir. 2017) (focusing on § 922(g)(1) to determine the constitutionality of a state law prohibiting felons from possessing firearms).

¹⁷ *Heller*, 554 U.S. at 627 n.26, 635.

B. *Rebuttal of Presumed Lawfulness*

By describing certain firearms regulations—including prohibitions on felons possessing firearms—as “presumptively lawful,” the *Heller* Court indicated that a regulation’s presumed constitutionality can be rebutted. As Black’s Law Dictionary explains, “[a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.”¹⁸ For felons, a rebuttable presumption provides an opportunity to prove that an arms prohibition is unconstitutional as applied to them.¹⁹

Even ignoring the Court’s express language, it would be unreasonable to read *Heller*’s “presumptively lawful” as “conclusively lawful.”²⁰ For example, as the Third Circuit explained, if the presumption in favor of conditions and qualifications on the commercial sale of arms were irrebuttable, meaning “there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.”²¹

What is more, Congress and state legislatures could, by classifying any trivial crime as a felony, constrain the scope of the constitutional right to any extent desired. But, as *Heller* made clear, “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”²²

Indeed, the Supreme Court has already acknowledged that federal law currently prohibits such a broad class of convicts that its application might sometimes be considered unreasonable. Under 18 U.S.C. § 922(g)(1) (2018), anyone convicted of “a crime punishable by imprisonment for a term exceeding one year” is forever prohibited from possessing a firearm.²³ This includes even

¹⁸ *Presumption*, BLACK’S LAW DICTIONARY (11th ed. 2019); see *Binderup*, 836 F.3d at 360 n.6 (Hardiman, J., concurring in part and concurring in the judgments) (“A presumption of constitutionality ‘is a presumption . . . [about] the existence of factual conditions supporting the legislation. As such it is a *rebuttable* presumption.’” (quoting *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934))).

¹⁹ See *Binderup*, 836 F.3d at 347 (plurality) (a successful challenger must “present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class”).

²⁰ See *id.* at 360 n.6 (Hardiman, J., concurring in part and concurring in the judgments) (“[W]e doubt the Supreme Court couched its first definitive characterization of the nature of the Second Amendment right so as to completely immunize this statute from any constitutional challenge whatsoever. Put simply, we take the Supreme Court at its word that felon dispossession is ‘*presumptively* lawful.’” (quoting *Heller*, 554 U.S. at 627 n.26)).

²¹ *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

²² *Heller*, 554 U.S. at 634–35.

²³ 18 U.S.C. § 922(g)(1) (2018).

state misdemeanors if they are punishable by imprisonment for a term exceeding two years.²⁴ In *Old Chief v. United States*, the Court noted that “an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession.”²⁵ Such foolish bases could “prejudice the Government’s case” so severely that “the Government would have to bear the risk of jury nullification.”²⁶

Every indication from the Supreme Court supports a rebuttable presumption: *Heller* described firearm prohibitions on felons as *presumptively* lawful; a categorical exception for such laws would produce untenable results; and the Court has already cast doubt on some applications of federal prohibitions. Thus, most courts allow the presumptive validity of felon bans to be rebutted.²⁷

C. Historical Justification

Heller expressly stated that its list of presumptively lawful regulatory measures—including prohibitions on firearm possession by felons—have “historical justifications.”²⁸ Indeed, the Court’s holding and nearly its entire analysis—roughly fifty pages—focused on history to inform the Second Amendment’s text, ultimately leading to the Court’s “adoption of the original understanding of the Second Amendment.”²⁹ Moreover, the Court introduced

²⁴ *Id.* § 921(a)(20)(B). There are exceptions, however, for (nonviolent) convictions “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” *Id.* § 921(a)(20)(A).

²⁵ *Old Chief v. United States*, 519 U.S. 172, 185 n.8 (1997). More than just “otherwise legal,” the Supreme Court has since held that gun possession is a fundamental right. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (“[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

²⁶ *Old Chief*, 519 U.S. at 185 n.8.

²⁷ See *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 686 (6th Cir. 2016) (en banc) (“*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.”); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (“the Supreme Court implied that the presumption may be rebutted.”) (citation omitted); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (“A plaintiff may rebut this presumption.”); *Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (quoting *Heller II*, 670 F.3d at 1253); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (“the phrase ‘presumptively lawful regulatory measures’ suggests the possibility that one or more of these ‘longstanding’ regulations ‘could be unconstitutional in the face of an as-applied challenge.’”) (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)); see also *Pena v. Lindley*, 898 F.3d 969, 1004 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (“It is contrary to my instincts to read ‘presumptively lawful’ as ‘conclusively lawful.’”).

²⁸ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned”).

²⁹ *Id.* at 625.

the presumptively lawful regulations by explaining that, “we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment”³⁰ By introducing the presumptively lawful regulations with a reference to history, the Court indicated that these regulations were based on history like the rest of its decision.

The context in which the Court discussed the regulations further establishes the need for a historical justification. The Court mentioned the presumptively lawful regulatory measures in its three-paragraph third section. The first paragraph began with a pronouncement that “the right secured by the Second Amendment is not unlimited.”³¹ Providing examples of limitations, the Court immediately resorted to history, summarizing concealed-carry restrictions “[f]rom Blackstone through the 19th-century cases.”³² The Court then provided the presumptively lawful regulatory measures.³³ The second paragraph discussed “another important limitation on the right to keep and carry arms . . . the *historical tradition* of prohibiting the carrying of ‘dangerous and unusual weapons.’”³⁴ The third paragraph remained focused on history, with a discussion of “the conception of the militia at the time of the Second Amendment’s ratification,”³⁵ and an emphasis that the effect of “modern developments . . . cannot change our interpretation of the right.”³⁶

Justice Breyer recognized in his dissent that the “presumptively lawful” measures were supposed to be rooted in history, asking “[w]hy these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues.”³⁷

The *Heller* majority responded by explaining that it will provide the relevant history when the opportunity arises:

Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the

³⁰ *Id.* at 626.

³¹ *Id.*

³² *Id.* (citations omitted).

³³ “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27.

³⁴ *Id.* at 627 (emphasis added).

³⁵ *Id.*

³⁶ *Id.* at 627–28.

³⁷ *Id.* at 721 (Breyer, J., dissenting).

right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.³⁸

Clearly, as the Eighth Circuit noted, "the Supreme Court contemplated . . . a historical justification for the presumptively lawful regulations."³⁹

Under Supreme Court precedent, longstanding prohibitions on felons are presumptively lawful, but only if justified by history and tradition, and consistent with the founding-era understanding of the right. The following analysis reveals such a historical justification for violent or otherwise dangerous felons. But there is no historical basis for denying nonviolent felons the right to keep and bear arms.⁴⁰

III. HISTORY

A. *English Tradition of Arms Prohibitions*

England's historical tradition cannot be directly applied to an interpretation of the Second Amendment, because the American colonists developed their own distinct arms culture that reflected their heavy dependence on firearms for survival and sport.⁴¹ Nevertheless, as an ancestor of American arms culture, English arms culture is useful for understanding the background of the American right. As Justice Harlan wrote, the "liberty of the individual" in America was secured with

³⁸ *Id.* at 635 (emphasis added) (citations omitted).

³⁹ *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (quoting *Heller*, 554 U.S. at 627); see also *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 343 (3d Cir. 2016) (en banc) (plurality opinion) ("*Heller* catalogued a non-exhaustive list of 'presumptively lawful regulatory measures' that have historically constrained the scope of the right.>").

⁴⁰ "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). See *infra* notes 74–117 and accompanying text.

⁴¹ See NICHOLAS JOHNSON, ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* 240 (2d ed. 2017) ("Ultimately, the American Revolution came because the colonists were no longer English, having become a new people. Among the exceptional characteristics of this new people was their hybrid arms culture, the product of meeting and blending of English and Indian arms cultures.").

“regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”⁴²

One English tradition from which American tradition developed was that of disarming violent and other dangerous persons. The English tradition of preventing dangerous persons from accessing weapons dates back to at least 602 A.D., when The Laws of King Aethelbirht made it unlawful to “furnish weapons to another where there is strife”⁴³

“Dangerous persons” throughout English history were often those involved in or sympathetic to rebellions and insurrections. In practice, attempts to disarm such persons sometimes resulted in sweeping prohibitions that included entire regions or religions suspected of disloyal sympathies. Those willing to swear an oath of allegiance to the king, however, were often exempted.⁴⁴

The precedent for disarming rebellious segments of the population was established in Wales.⁴⁵ During the Welsh Revolt from 1400 to 1415, a new law ensured that “none of the . . . Welshmen from henceforth bear any manner Armour within such City, Borough, or Merchant Town, upon Pain of Forfeiture of the same Armour, and Imprisonment till they have made Fine in this behalf.”⁴⁶

The following century, Catholics throughout England “were excluded from the right to arms because they were considered potentially disloyal and seditious[.]”⁴⁷ Catholics had been deprived of civil rights since the 1580s.⁴⁸ And in 1610, King James I ordered the seizure of any “Armour, Gunpowder, and Munition” from “Popish Recusants.”⁴⁹ An exception in 1689 allowed Catholics

⁴² *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Justice Harlan continued to explain that “[a] decision of this Court which radically departs from [that tradition] could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.” *Id.*

⁴³ ANCIENT LAWS AND INSTITUTES OF ENGLAND 3 (Benjamin Thorpe ed. 1840).

⁴⁴ *See, e.g.*, 7 William III ch. 5 (1695) (“gentlemen” who swore an oath of allegiance to the king could possess a sword, case of pistols, and a long gun for fowling or home defense).

⁴⁵ *See* JOHNSON, ET AL., *supra* note 41, at 145.

⁴⁶ 2 Henry IV ch. 12 (1400–01). The towns included “Chester, Salop, Bridgenorth, Ludlow, Leominster, Hereford, Gloucester, Worcester, [and] other Merchant Towns joining to the Marches of Wales, [and] the suburbs of the same.” *Id.*

⁴⁷ JOHNSON, ET AL., *supra* note 41, at 133.

⁴⁸ *Id.*

⁴⁹ 1 STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING JAMES I 1603–1625, 247–48 (June 2, 1610) (James F. Larkin & Paul I. Hughes eds., 1973); *see also* MICHAEL DALTON, THE COUNTRY JUSTICE 94 (1619) (instructing justices of the peace to take away any “armour, gunpowder, or munition” belonging to “Popish Recusants.”); 2 STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING CHARLES I, 1625–1646, 736–37 (Nov. 11, 1640) (James F. Larkin & Paul I. Hughes eds., 1973) (calling for the seizure of all arms belonging to convicted “Popish Recusants”).

to possess arms “for the defence of his House or person” with permission from the justice of the peace.⁵⁰

It was not only Catholics that concerned the king. In 1660, the lords lieutenant were issued instructions for all “disaffected persons [to be] watched and not allowed to assemble, and their arms seized.”⁵¹ Additionally, Charles II ordered the lord mayor and commissioners for the lieutenancy of London “to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody.”⁵²

England’s 1662 Militia Act empowered the king’s agents “to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom.”⁵³ That same year, Charles II ordered Sir Thomas Peyton and two other deputy lieutenants of Kent “to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits.”⁵⁴

Charles II then ordered lieutenants in 1684 to seize arms “from dangerous and disaffected persons.”⁵⁵ “Disaffected persons” were those disloyal to the current government, who might want to overthrow it. Until the Glorious Revolution of 1688, this typically included Whigs and non-Anglican Protestants.⁵⁶ When roles were reversed after the Glorious Revolution, “disaffected persons” included Tories loyal to James II, who were perceived as posing a threat to King William III and Queen Mary II.⁵⁷ While the “dangerous” group changed depending on who was in charge of government, the purpose of disarmament laws was usually to preclude armed insurrections.

⁵⁰ 1 William & Mary ch. 15 (1688).

⁵¹ 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1660–1661, 150 (1860).

⁵² 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, DOMESTIC SERIES OF THE REIGN OF CHARLES II, 1660–1670, 237 (1895).

⁵³ 8 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II, TO THE LAST YEAR OF KING JAMES II 40 (1763).

⁵⁴ 1 CALENDAR OF THE REIGN OF CHARLES II, *supra* note 51, at 538.

⁵⁵ 27 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684–1685, 26–27, 83–85, 102 (1938).

⁵⁶ See JOHNSON, ET AL., *supra* note 41, at 125–31; *see also id.* at 758 (“Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies.”) (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 31–53 (1994); LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, 76 (1981)).

⁵⁷ *See id.* at 133, 145–49.

In the first year of the reign of William and Mary, a statute forbade those who refused to declare themselves non-Catholic to “have or keepe in his House or elsewhere . . . any Arms Weapons Gunpowder or Ammunition (other then such necessary Weapons as shall be allowed to him . . . for the defence of his House or person).”⁵⁸ A 1695 statute required Catholics in Ireland to forfeit all their guns and ammunition and authorized searches of their homes.⁵⁹ In addition to distrusted “papists,” a legal manual instructed constables to search for arms possessed by persons who were “dangerous.”⁶⁰

Like his predecessor, William III called in 1699 for the disarming of “great numbers of papists and other disaffected persons, who disown his Majesty’s government.”⁶¹ The following year, The House of Lords prayed that William III “would be pleased to order the seizing of all Horses and Arms of Papists, and other disaffected Persons, and have those ill Men removed from London according to Law.”⁶² In response, William III “assured them he would take Care to perform all that they had desired of him.”⁶³ Then in 1701, King William III “charge[d] all lieutenants and deputy-lieutenants, within the several counties of [England] and Wales, that they cause search to be made for arms in the possession of any persons whom they judge dangerous.”⁶⁴

In 1715, “frequent rebellions and insurrections . . . by the popish inhabitants” gave Great Britain “reason to apprehend, that the main body of papists . . . may hereafter again endeavor to disturb the publick peace and tranquility.”⁶⁵ So Great Britain revamped its militia and required Irish Catholics to pay twice as much as Protestants to support it.⁶⁶ In 1739, Irish Catholics were ordered to forfeit their arms, and constables were commanded to annually “search . . . for arms, armour, and ammunition, in the possession, keeping, power, or custody of all papists.”⁶⁷

⁵⁸ 1 William & Mary ch. 15 (1688). The declaration of non-Catholicism, originally required to sit in either house of Parliament, was codified in 30 Charles II ch. 1 (1678).

⁵⁹ 7 William III ch. 5 (1695). This discriminatory prohibition on the Irish did not violate the English Bill of Rights, because the Bill of Rights protected the arms rights of only Protestants.

⁶⁰ ROBERT GARDINER, *THE COMPLEAT CONSTABLE* 18 (3d ed. 1708).

⁶¹ 5 *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699–1700*, 79–80 (1937).

⁶² 2 *THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME* 20 (1742).

⁶³ *Id.*

⁶⁴ 6 *CALENDAR OF STATE PAPERS: DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1700–1702*, 234 (1937) (second brackets in original).

⁶⁵ 2 George I, ch. 9 (1715).

⁶⁶ *Id.*

⁶⁷ 13 George II, ch. 6 (1739).

And when adherents to King James II revolted in 1715, Parliament responded by forbidding many of those involved “to have in his or their Custody, use or bear Broad Sword, or Target, Poynard, Whingar, or Durk, Side-pistol, or Side-pistols, or Gun, or any other warlike Weapons” in various places beyond the home.⁶⁸ Similar or supplemental acts were passed in 1724,⁶⁹ 1746,⁷⁰ and 1748.⁷¹ As the 1746 Disarmament Act explained, the focus was “preventing Rebellion and traitorous Attempts in Time to come, and the other Mischiefs arising from the Profession or Use of Arms, by lawless, wicked, and disaffected Persons.”⁷²

Additionally, as William Blackstone explained, governments fearing a rebellion sometimes used anti-hunting laws “[f]or prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . a reason oftener meant, than avowed, by the makers of forest or game laws.”⁷³

In sum, by the time of American independence, England had established a well-practiced tradition of disarming dangerous persons—violent persons and disaffected persons perceived as threatening to the crown. While public safety was a concern, most disarmament efforts were meant to prevent armed rebellions. The early Americans adopted much of that tradition in the colonies.

B. Colonial America Arms Prohibitions

Firearms were an essential part of daily life in Colonial America. The colonists depended on firearms for food, protection, trade, sport, and conquest.⁷⁴ Thus, they soon grew contemptuous of the constricted nature of the English arms right. And the right ultimately codified in the Second Amendment of the United States Constitution reflects the broad, robust, and uniquely American tradition.⁷⁵

⁶⁸ 1 George I, stat. 2, ch. 54 (1715).

⁶⁹ 11 George I, ch. 26 (1724).

⁷⁰ 19 George II, ch. 39 (1746).

⁷¹ 21 George II, ch. 34 (1748).

⁷² 19 George II, ch. 39 (1746).

⁷³ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 (Edward Christian ed., 12th ed. 1794).

⁷⁴ “The Colonists in America were the greatest weapon-using people of that epoch in the world. Everywhere the gun was more abundant than the tool. It furnished daily food; it maintained its owner’s claims to the possession of his homestead among the aboriginal owners of the soil; it helped to win the mother country’s wars for possession of the country as a whole.” 1 CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 1 (1910).

⁷⁵ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES 143–44 n.40 & n.41 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803) (denouncing statutory infringements of the English right, and noting that the American right was broader); James Madison, *Notes for Speech in Congress Supporting Amendments*, June 8, 1789, in THE ORIGIN OF THE SECOND AMENDMENT 645 (David Young ed., 1991) (introducing the Second Amendment in Congress, Madison’s notes show that he denounced the limited scope of the “English Decln. of Rts,” including that it protected only

Nevertheless, Americans continued some English arms traditions, including the tradition of disarming those perceived as dangerous. Like English laws, colonial laws were sometimes discriminatory and overbroad—but even those were intended to prevent danger.⁷⁶

Inspired by England's 1328 Statute of Northampton, some American laws forbade carrying arms in an aggressive and terrifying manner.⁷⁷ Such laws were passed in Massachusetts Bay in 1692, New Hampshire in 1759, and Massachusetts in 1795.⁷⁸ A 1736 Virginia legal manual allowed for confiscation of arms, providing that a constable “may take away Arms from such who ride, or go, offensively armed, in Terror of the People” and may bring the person and their arms before a Justice of the Peace.⁷⁹

“arms to [Protestants]”); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 126 (2nd ed. 1829) (“In most of the countries of Europe, this right does not seem to be denied, although it is allowed more or less sparingly”); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 747 (1833) (“under various pretences the effect of this provision [in England’s 1689 Declaration of Rights] has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.”); *cf.* *Bridges v. State of Cal.*, 314 U.S. 252, 264 (1941) (“to assume that English common law in this [First Amendment] field became ours is to deny the generally accepted historical belief that ‘one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.’”) (quoting Henry Schofield, *Freedom of the Press in the United States*. 9 PUBLICATIONS AM. SOC. SOC’Y., 67, 76 (1914)).

⁷⁶ See, e.g., 2 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 687 (James B. Lyon ed., 1894) [hereinafter *COLONIAL LAWS OF N.Y.*] (1664 New York law forbidding “any slave or slaves to have or use any gun Pistoll sword Club or any other Kind of Weapon whatsoever, but in the presence or by the Direction of his her or their Master or Mistress, and in their own Ground.”); *LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674*, 234–35 (1868) (1656 New York law “forbid[ing] the admission of any Indians with a gun . . . into any Houses” “to prevent such dangers of isolated murders and assassinations”).

⁷⁷

Item, it is enacted, that no man great nor small, of what condition soever he be, except the king’s servants in his presence, and his ministers in executing of the king’s precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King’s justices, or other of the King’s ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King’s pleasure.

2 Edw. 3, c. 3 (1328).

⁷⁸ Acts and Laws Passed by the Great and General Court of Assembly of Their Majesties Province of the Massachusetts-Bay 18 (1692); Acts and Laws of His Majesty’s Province of New-Hampshire in New-England 2 (1759); 2 *Laws of the Commonwealth of Massachusetts*, from November 28, 1780 to February 28, 1807, 652–53 (enacted Jan. 27, 1795) (1807).

⁷⁹ GEORGE WEBB, *THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE* 92–93 (1736).

As in England, those disloyal to the government were the focus of most prohibitions throughout the colonial period. Massachusetts Bay leadership was especially sensitive to sedition, maintaining power by suppressing dissidents.⁸⁰ Sedition was treated like treason and prosecuted frequently.⁸¹ One dissident, Anne Hutchinson, was convicted of sedition in 1637 for criticizing the colony's clergy for its legalistic interpretation of the Bible.⁸² Hutchinson and some of her supporters were banished from the colony.⁸³ Of her supporters permitted to remain in the colony, seventy-six were disarmed.⁸⁴ Some supporters who confessed their sins were welcomed back into the community and able to retain their arms.⁸⁵

England's distrust of Catholics revealed itself in the colonies. The French and Indian War was perceived by many in the United Kingdom as a war between Protestantism and Catholicism.⁸⁶ Consequently, Maryland and Virginia disarmed Catholics in 1756.⁸⁷ Maryland additionally disarmed anyone who refused to take an oath of allegiance to King George III, while Virginia exempted from disarmament anyone willing to take such an oath.⁸⁸ Virginia included an additional exception, allowing those being disarmed to keep "such necessary weapons as shall be allowed to him, by order of the justices of the peace at their court, for the defence of his house or person."⁸⁹ In 1759, Pennsylvania also disarmed Catholics.⁹⁰

Disaffected persons became an even greater concern for the colonists as the Revolutionary War approached. The concern was the same—that people opposed to those in power would join or support insurrections—but now the disaffected

⁸⁰ BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660*, 103 (2010).

⁸¹ *Id.* at 102.

⁸² *Id.* at 103.

⁸³ *Id.* at 104.

⁸⁴ EDWARD JOHNSON, *JOHNSON'S WONDER-WORKING PROVIDENCE: 1628–1651*, 175 (J. Franklin Jameson ed., 1959) (“[T]hose in place of government caused certain persons to be disarmed in the severall Townes, as in the Towne of Boston, to the number of 58, in the Towne of Salem 6, in the Towne of Newbery 3, in the Towne of Roxbury 5, in the Towne of Ipswich 2, and Charles Towne 2.”).

⁸⁵ *See id.*

⁸⁶ JOHNSON, ET AL., *supra* note 41, at 197.

⁸⁷ 52 *ARCHIVES OF MARYLAND* 454 (J. Hall Pleasants ed., 1935); 7 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; A COLLECTION OF ALL THE LAWS OF VIRGINIA* 35 (1820).

⁸⁸ 52 *ARCHIVES OF MARYLAND*, *supra* note 87, at 451–52; 7 HENING, *supra* note 87, at 36.

⁸⁹ 7 HENING, *supra* note 87, at 37.

⁹⁰ 5 *THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801*, 627 (WM Stanley Ray ed., 1898).

persons were those loyal to the British, because the Patriots were the ones creating the rules.⁹¹

Connecticut punished disaffected colonists in 1775. Persons who actively assisted the British were imprisoned and forfeited their entire estate, while persons who libeled or defamed acts of the Continental Congress were disfranchised and prohibited from keeping arms, holding office, or serving in the military.⁹² “Early in the ensuing year (January 2, 1776) [the Continental] Congress again recommended ‘the most speedy and effectual measures to frustrate the mischievous machinations and restrain the wicked practices of these men;’ that ‘they ought to be disarmed, the dangerous kept in safe custody, or bound with sureties for good behavior.’”⁹³ The Connecticut Courant on May 20, 1776, complained of “[a] gang of Tories,” and exclaimed that “[i]f these internal enemies are suffered to proceed in their hellish schemes, our ruin is certain.”⁹⁴ Soon after, such Tories were “convicted of high treason, and sentenced to death,” rather than merely disarmed or imprisoned.⁹⁵

In 1776, in response to General Arthur Lee’s plea for emergency military measures, the Continental Congress recommended that colonies disarm persons “who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies.”⁹⁶ Massachusetts acted within months “to cause all persons to be disarmed within their respective colonies who are notoriously disaffected to the cause of America.”⁹⁷ The confiscated arms were provided to the Continental Army. Pennsylvania enacted similar laws in April 1776 and June 1777.⁹⁸

In 1777, New Jersey empowered its Council of Safety “to deprive and take from such Persons as they shall judge disaffected and dangerous to the present

⁹¹ The British, for their part, implemented far more severe gun control measures on the colonists. These laws—including bans on domestic commerce in gunpowder, bans on the importation of gunpowder and arms, and confiscation of gunpowder and arms—and the Patriots’ dogged defiance of the laws, led to the start of the Revolutionary War. Indeed, the Battles of Lexington and Concord occurred when British soldiers set out to seize American munitions at Concord, and American Patriots took up arms to prevent it. *See generally* David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution* 6 CHARLESTON L. REV. 283 (2012).

⁹² G.A. Gilbert, *The Connecticut Loyalists in 4 AM. HISTORICAL REV.* 273, 282 (1899).

⁹³ *Id.* at 283 n.2.

⁹⁴ *Id.*

⁹⁵ *Id.* at 284.

⁹⁶ 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 285 (1906).

⁹⁷ Mass. Gen. Laws ch. 21 (1776).

⁹⁸ 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 559–60 (1902); 9 *id.* at 110–14 (1903).

Government, all the Arms, Accoutrements, and Ammunition which they own or possess.”⁹⁹ That same year, North Carolina went further, essentially stripping “all Persons failing or refusing to take the Oath of Allegiance” of any citizenship rights. Those “permitted . . . to remain in the State” could “not keep Guns or other Arms within his or their house.”¹⁰⁰ In May 1777, Virginia did the same.¹⁰¹ In 1779, Pennsylvania determined that “it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms.”¹⁰² So Pennsylvania “empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state.”¹⁰³

Most disarmament efforts during the colonial period targeted disaffected persons. Like the English, and out of similar concerns of violent insurrections, the colonists disarmed those who might rebel against them. As the Fifth Circuit noted, “these revolutionary and founding-era gun regulations . . . targeted particular groups for public safety reasons Although these Loyalists were neither criminals nor traitors, American legislators had determined that permitting these persons to keep and bear arms posed a potential danger.”¹⁰⁴ The laws may have sometimes been misused to punish political dissidents, but as was the case with all disarmaments during the colonial period, the justification was always that those being disarmed were dangerous.

C. *Ratifying Conventions and the Founding Era*

The *Heller* Court emphasized that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.”¹⁰⁵ *Heller* thus concluded with “our adoption of the original understanding of the Second Amendment.”¹⁰⁶ The ratifying conventions are therefore instructive in interpreting the right that was ultimately codified.

Samuel Adams opposed ratifying the Constitution without a declaration of rights. Adams proposed at Massachusetts’s convention an amendment guaranteeing that “the said constitution be never construed . . . to prevent

⁹⁹ 1777 N.J. Laws 90, ch. 40 § 20.

¹⁰⁰ 24 THE STATE RECORDS OF NORTH CAROLINA 89 (Walter Clark ed.1905).

¹⁰¹ 9 WILLIAM WALLER HENING, THE STATUTES AT LARGE; A COLLECTION OF ALL THE LAWS OF VIRGINIA 282 (1821).

¹⁰² *Id.*

¹⁰³ THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782).

¹⁰⁴ Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 700 F.3d 185, 200 (5th Cir. 2012).

¹⁰⁵ District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

¹⁰⁶ *Id.* at 625.

the people of the United States who are peaceable citizens, from keeping their own arms.”¹⁰⁷

Adams’s proposal was celebrated by his supporters as ultimately becoming the Second Amendment. For example, an editorial in the *Boston Independent Chronicle* called for the paper to republish Adams’s proposed amendments alongside Madison’s proposed Bill of Rights, “in order that they may be compared together,” to show that “every one of [Adams’s] intended alterations but one [i.e., proscription of standing armies]” were adopted.¹⁰⁸

“Peaceable” did not necessarily mean law-abiding in the founding era. Contemporaneous dictionary definitions show that peaceable was better understood as meaning nonviolent. Samuel Johnson’s dictionary defined “peaceable” as “1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent.”¹⁰⁹ Thomas Sheridan defined “peaceable” as “Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent.”¹¹⁰ Noah Webster defined “peaceable” as “Not violent, bloody or unnatural.”¹¹¹ The *Heller* Court relied on Johnson’s, Sheridan’s, and Webster’s definitions in defining the Second Amendment’s text.¹¹²

New Hampshire proposed a bill of rights that allowed the disarmament of only violent insurgents: “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.”¹¹³ New Hampshire’s proposal would not have disarmed those who posed a mere danger to the public, but only those who had been engaged in armed conflict against the government.

¹⁰⁷ 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 675 (1971).

¹⁰⁸ *Editorial*, *BOSTON INDEPENDENT CHRONICLE*, Aug. 20, 1789, at 2, col. 2; *see also* STEPHEN HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 86 (revised ed. 2013) (“[T]he Second Amendment . . . originated in part from Samuel Adams’s proposal . . . that Congress could not disarm any peaceable citizens.”).

¹⁰⁹ 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (5th ed. 1773).

¹¹⁰ THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* 438 (2d ed. 1789).

¹¹¹ *Peaceable*, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE*, <http://webstersdictionary1828.com/Dictionary/peaceable> (last visited May 5, 2020) [<https://perma.cc/2YZH-UX9M>].

¹¹² For Johnson, *see* *District of Columbia v. Heller*, 554 U.S. 570, 581 (“arms”), 582 (“keep”), 584 (“bear”), 597 (“regulate”) (2008). For Sheridan, *see id.* at 584 (defining “bear”). For Webster, *see id.* at 581 (“arms”), 582 (“keep”), 584 (“bear”), 595 (“militia”). *See also* *Peaceable*, *BLACK’S LAW DICTIONARY* (6th ed. 1996) (defining “peaceable” as “Free from the character of force, violence, or trespass.”).

¹¹³ 1 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 326 (Jonathan Elliot ed., 2d ed. 1836). Webster defined “rebellion” as “[a]n open and avowed renunciation of the authority of the government to which one owes allegiance; or the taking of arms traitorously to resist the authority of lawful government; revolt.” *Rebellion*, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE*, <http://webstersdictionary1828.com/Dictionary/rebellion> (last visited May 5, 2020) [<https://perma.cc/4C29-DXCU>].

After Pennsylvania's ratifying convention, the Anti-Federalist minority—which opposed ratification without a declaration of rights—proposed the following right to bear arms:

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.¹¹⁴

While the language did not expressly limit “crimes committed” to violent crimes, every arms prohibition throughout American history to that point had been based—justified or not—on perceived dangerousness.¹¹⁵ And the non-criminal basis—“real danger of public injury”—was self-evidently based on dangerousness. There is no indication that the Anti-Federalists hoped to expand arms prohibitions for the first time beyond dangerousness through the phrase “crimes committed.” Colonial and founding-era tradition and the proposals from the other conventions suggest otherwise.¹¹⁶

As Judge Hardiman from the Third Circuit explained,

the ‘debates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered “highly influential” by the Supreme Court in *Heller* . . . confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.’ Hence, the best evidence we have indicates that the right to keep and bear arms was understood to exclude those who presented a danger to the public.¹¹⁷

Peaceable citizens, by contrast, were always intended to be protected and could not be disarmed under any proposal.

¹¹⁴ NATHANIEL BREADING ET AL., THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (Dec. 12, 1787), <https://www.loc.gov/resource/bdsdcc.c0401/?sp=1> [<https://perma.cc/5YTZ-J57V>].

¹¹⁵ See *supra* notes 41–104 and accompanying text.

¹¹⁶ See RAWLE, *supra* note 75, at 126 (explaining that the right to arms “ought not . . . be abused to the disturbance of the public peace. An assemblage of persons with arms, for an unlawful purpose, is an indictable offense, and even the carrying of arms abroad by an individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace.”).

¹¹⁷ *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments) (quoting *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)) (brackets omitted).

D. Restoration of Arms Rights in the Founding Era

Persons who may have been prohibited from keeping arms in the founding era were often punished by death.¹¹⁸ Many who committed firearms offenses were not disarmed at all, but instead had to pay a surety to ensure good behavior.¹¹⁹ Even so, there are examples from the colonial and founding periods of prohibited persons having their right to keep and bear arms restored. Connecticut's 1775 law disarmed "inimical" persons only "until such time as he could prove his friendliness to the liberal cause."¹²⁰ Massachusetts's 1776 law disarming disaffected persons provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court."¹²¹ Many disarmament acts provided exemptions for prohibited persons who swore loyalty to the king.¹²² And when Anne Hutchinson's supporters were being disarmed in the Bay Colony, some who sought forgiveness from the Colony were welcomed back into the community and could once again possess arms.¹²³ So, once the perceived danger abated, the arms disability was often lifted.

Another instructive example is Shays's Rebellion, an armed uprising in western Massachusetts starting in August 1786.¹²⁴ Armed bands attacked courthouses, the federal arsenal in Springfield, and other government properties, ultimately resulting in a military confrontation with a Massachusetts militia on February 2, 1787. As the rebellion ceased later that year, Massachusetts established "the disqualifications to which persons shall be subjected, who have been, or may be guilty of treason, or giving aid or support to the present rebellion, and

¹¹⁸ See *Baze v. Rees*, 553 U.S. 35, 94 (2008) (noting "the ubiquity of the death penalty in the founding era" and that it was "the standard penalty for all serious crimes") (Thomas, J., concurring) (quoting STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 23 (2002)).

¹¹⁹ For example, in 1759, New Hampshire persons "who shall go armed offensively" were not released "until he or she find such surities of the peace and good behavior." Acts and Laws of His Majesty's Province of New-Hampshire in New England 2 (1759). For an example of how this process worked, see *Welling's Case*, 47 Va. 670, 670 (Va. Gen. Ct. 1849) ("The County court has authority to require a party to enter into a recognizance to keep the peace In February 1848, Edward *Welling*, with two sureties, entered into a recognizance before a justice of the peace of the county, with condition to appear at the next term of the County court of *Wood*, and in the meantime to keep the peace towards all persons in the Commonwealth, and especially towards *Edward Taggart* The cause was then tried, and the Court required the defendant to enter into a recognizance, with sureties, to keep the peace for one year from that day.").

¹²⁰ Gilbert, *supra* note 92, at 282.

¹²¹ Mass. Gen. Laws 484 (1776).

¹²² See, e.g., 52 ARCHIVES OF MARYLAND, *supra* note 87, at 451–52; 7 Hening, *supra* note 87, at 36; THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 103, at 193.

¹²³ See Johnson, *supra* note 84, at 175.

¹²⁴ See *Shays' Rebellion*, HISTORY.COM, (Oct. 31, 2019), www.history.com/topics/early-us/shays-rebellion [https://perma.cc/9TQJ-NXAS].

to whom a pardon may be extended.”¹²⁵ Among these disqualifications were the temporary forfeiture of many civil rights, including a three-year prohibition on bearing arms.¹²⁶

By comparison to the treasonous rebels who took up arms to overthrow the government in Shays’s Rebellion and had their arms rights restored after three years, many nonviolent criminals today are prohibited forever from owning firearms. The contrast between Shays’s rebels and present-day felons can be stark. For example, in West Virginia, someone who shoplifts three times in seven years, “regardless of the value of the merchandise,” is forever prohibited from possessing a firearm.¹²⁷ In Utah, someone who twice operates a recording device in a movie theater is forever prohibited from possessing a firearm.¹²⁸ And in Florida, a man committed a felony when he released a dozen heart-shaped balloons in a romantic gesture and thus earned a lifetime firearm prohibition.¹²⁹ It is inconsistent with history for many nonviolent present-day felons—someone who shoplifts three packs of bubble gum in West Virginia—to receive a lifetime firearm prohibition, when prohibited persons in the founding era—including armed insurrectionists—regained their rights once they no longer posed a violent threat.¹³⁰

E. Nineteenth-Century Arms Prohibitions

Because the “original understanding” of the Second Amendment defines its scope,¹³¹ the *Heller* Court looked to nineteenth-century experiences only for help “understanding . . . the origins and continuing significance of the [Second] Amendment.”¹³² Nineteenth-century prohibitions on arms possession were mostly discriminatory bans on slaves and freedmen.¹³³ Another targeted group

¹²⁵ 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, 145 (1805).

¹²⁶ *Id.* at 146–47.

¹²⁷ See W. VA. CODE § 61-3A-3(c) (2020).

¹²⁸ See UTAH CODE ANN. § 13-10b-201(2)(b) (West 2020).

¹²⁹ Erika Pesantes, *Love Hurts: Man Arrested for Releasing Helium Balloon with His Girlfriend*, SUN SENTINEL (Feb. 22, 2013), www.sun-sentinel.com/news/fl-xpm-2013-02-22-fl-helium-balloon-environmental-crime-20130222-story.html [<https://perma.cc/2P9W-JTLU>]. The felony examples were provided in *United States v. Torres*, 789 F. App’x 655, 658 n.2 (9th Cir. 2020) (Lee, J., concurring).

¹³⁰ See W. VA. CODE ANN. § 61-3A-3(c).

¹³¹ *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (“We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.”); *id.* at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”).

¹³² *Id.* at 614.

¹³³ See, e.g., 1804 Miss. Laws 90; 1804 Ind. Acts 108 § 4 (slaves); 1806 Md. Laws 44 (slaves); 1851 Ky. Acts 296 § 12 (freedmen); 1860–61 N.C. Sess. Laws 68 (freedmen); 1863 Del. Laws 332 (freedmen).

starting in the latter half of the century were “tramps”—typically defined as males begging for charity outside of their home county.¹³⁴ Since, by definition, bans on tramps did not apply inside their home (or even their county), they were less restrictive than the current federal ban on felons, which applies everywhere.¹³⁵

New Hampshire, in 1878, imprisoned any tramp who “shall enter any dwelling-house . . . without the consent of the owner . . . or shall be found carrying any fire-arm or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another.”¹³⁶ The point of prohibiting armed tramps from threatening harm to another’s person or property was plainly to prevent violence.¹³⁷ Vermont enacted a similar law that year, followed by Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa.¹³⁸ Pennsylvania’s 1879 law was narrower; it prohibited tramps from carrying a weapon “with intent unlawfully to do injury or intimidate any other person.”¹³⁹ Pennsylvania’s wording reflects the fact that all these laws were enacted for the purpose of promoting public safety by disarming dangerous persons.

Ohio’s Supreme Court recognized this purpose, opining that Ohio’s prohibition on tramps was constitutional because it applied to “vicious persons”:

The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.¹⁴⁰

¹³⁴ See, e.g., 1 A DIGEST OF THE STATUTE LAW OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 to 1894, 541 (Frank F. Brightly ed., 12th ed. 1894) (“Any person going about from place to place begging, asking or subsisting upon charity, and for the purpose of acquiring money or living, and who shall have no fixed place of residence, or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp.”).

¹³⁵ 18 U.S.C. § 922(g)(1) (2018).

¹³⁶ 1878 N.H. Laws 612, ch. 270 § 2.

¹³⁷ See *State v. Hogan*, 63 Ohio St. 202, 215, 219 (1900).

¹³⁸ 1878 Vt. Acts 30, ch. 14 § 3; 1879 R.I. Laws 110, ch. 806 § 3; 1880 Oh. Rev. St. 1654, ch. 8 § 6995; Mass. Gen. Laws 232, ch. 257 § 4 (1880); 1 Annotated Statutes of Wisconsin, containing the General Laws in Force October 1, 1889, at 940 (1889); 1897 Iowa Laws 1981, ch. 5 § 5135.

¹³⁹ DIGEST OF PA., *supra* note 134, at 541.

¹⁴⁰ *State v. Hogan*, 63 Ohio St. 202, 218–19 (1900).

Arms prohibitions on tramps were justified as promoting public safety by disarming vicious persons and, therefore, a direct extension of colonial and founding-era laws that disarmed people based on dangerousness.

Two Kansas restrictions are also relevant. In 1868, Kansas prohibited “[a]ny person who is not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the government of the United States” from publicly carrying “any pistol, bowie-knife, dirk, or other deadly weapon.”¹⁴¹ Fifteen years later, Kansas prohibited the transfer of “any pistol, revolver or toy pistol . . . or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous weapons . . . to any person of notoriously unsound mind.”¹⁴² The Kansas Supreme Court held that “other deadly weapons” did not include long guns.¹⁴³ Thus, Kansas’s laws did not prohibit anyone from *possessing* any arms, nor did they apply to long guns—which makes them substantially less restrictive than the current federal ban on felons, which prohibits the keeping and bearing of handguns *and* long guns.¹⁴⁴

As Judge Barrett from the Seventh Circuit explained in a dissent, “[i]n 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.”¹⁴⁵

When the *Heller* Court interpreted the Second Amendment, it reviewed history and tradition from England, the colonial and founding periods, and the nineteenth century to determine how that history and tradition informed or reflected the founding-era understanding of the Second Amendment.¹⁴⁶

¹⁴¹ 2 GENERAL STATUTES OF THE STATE OF KANSAS 353 (1897).

¹⁴² 1883 Kan. Sess. Laws 159 § 1.

¹⁴³ After initially holding that shotguns (and therefore all firearms) were included based on the rule of *ejusdem generis*, *Parman v. Lemmon*, 244 P. 227, 229–30 (Kan. 1925), the court reversed itself on rehearing, *Parman v. Lemmon*, 244 P. 232, 233 (Kan. 1926).

¹⁴⁴ 18 U.S.C. § 922(g)(1) (2018).

¹⁴⁵ *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). Judge Barrett was dissenting from a decision upholding the federal firearm ban as applied to a nonviolent felon convicted of mail fraud.

¹⁴⁶ Part I (pages 574–76) of *Heller* summarized the facts of the case. Part II constituted the majority of the analysis. Part II.A presented a 24-page (576–600) textual analysis, informed by English and American history that defined the Second Amendment’s operative and prefatory clauses and their relationship. Parts II.B–D were a 19-page (600–19) historical analysis: II.B explored state constitutions in the founding-era; II.C analyzed the drafting history of the Second Amendment; and II.D “address[ed] how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.” *Heller*, 554 U.S. at 605. II.E (619–26) focused mostly on Supreme Court precedents. Part III (626–28) identified traditional restrictions on the right. Part IV (628–36) addressed the ordinances at issue.

Examining similar sources to identify the historical justification for felon bans reveals one controlling principal that applies to each historical period: violent or otherwise dangerous persons could be disarmed. Peaceable persons, conversely, could not.

F. Twentieth-Century Arms Prohibitions

1. Non-Citizens

Since the *Heller* Court found limited historical value in nineteenth-century sources, it is particularly dubious to rely on twentieth-century sources.¹⁴⁷ Nevertheless, it is noteworthy that disarmament practices continued to focus on persons perceived as potentially violent in the twentieth century. And it is significant that no previous law prohibited a category of people as broad as the current federal ban on felons.¹⁴⁸

In the early twentieth century, as immigration increased and immigrants were blamed for surges in crime and social unrest, several states enacted firearms restrictions on non-citizens.¹⁴⁹ Some states prohibited non-citizens from possessing arms under the guise of preserving game.¹⁵⁰ Pennsylvania made it “unlawful for any unnaturalized foreign born resident, within this commonwealth, to either own or be possessed of a shotgun or rifle of any make,” for the stated purpose of giving “additional protection to wild birds and animals and game.”¹⁵¹ North Dakota and New Jersey enacted similar laws, followed by New Mexico.¹⁵² Connecticut—without the pretense of protecting game—forbade any “alien resident of the United States” to “own or be possessed of any shot gun or rifle.”¹⁵³ Notably, all these laws allowed handgun ownership.

¹⁴⁷ *Heller*, 554 U.S. at 614 (“Since those [post-Civil War] discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.”).

¹⁴⁸ 18 U.S.C. § 922(g)(1).

¹⁴⁹ JOHNSON, ET AL., *supra* note 41, at 501.

¹⁵⁰ England had similarly used game laws to disarm segments of the population. See 2 BLACKSTONE, *supra* note 73; 1 TUCKER’S BLACKSTONE, *supra* note 75, at 300 (“In England, the people have been disarmed, generally, under the specious pretext of preserving the game”); RAWLE, *supra* note 75, at 121–23 (“An arbitrary code for the preservation of game in that country has long disgraced them.”). *But see* 2 BLACKSTONE, *supra* note 73, at 412 n.2 (stating generally, “everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game.”).

¹⁵¹ 1909 Pa. Laws 466 § 1.

¹⁵² 1915 N.D. Laws 225–26, ch. 161 § 67; 1915 N.J. Laws 662–63, ch. 355 § 1; 1921 N.M. Laws 201–02, ch. 113 § 1.

¹⁵³ 1923 Conn. Acts 3732, ch. 259 § 17.

Other states went further and prohibited ownership of all firearms. Utah forbade “any unnaturalized foreign born person . . . to own or have in his possession, or under his control, a shot gun, rifle, pistol, or any fire arm of any make.”¹⁵⁴ Minnesota passed a similar law that same year,¹⁵⁵ followed by Colorado and Michigan.¹⁵⁶ In 1925, both Wyoming and West Virginia prohibited anyone who was not a United States citizen from owning any firearm.¹⁵⁷

As had always been the case throughout American history, the people being disarmed were perceived as dangerous. Like some previous bans—for example, bans on slaves and freedmen—restrictions on non-citizens unquestionably included many peaceable persons who did not deserve to be deprived of their rights.¹⁵⁸ But, however misguided, preserving public safety was the underlying rationale for the restrictions.

2. *Violent Criminals*

In contrast to non-citizens, most early twentieth-century laws applicable to Americans restricted, rather than prohibited, arms possession—for example, by allowing the possession of long guns but not handguns. All such disarmament laws, however, targeted dangerous persons.

New Hampshire passed a law in 1923 providing that, “No unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another shall own or have in his possession or under his control a pistol or revolver”¹⁵⁹ North Dakota and California passed similar laws that same year, as did Nevada in 1925.¹⁶⁰ California amended its law in 1931 to include persons “addicted to the use of any narcotic drug.”¹⁶¹ Then in 1933, Oregon passed a version of the law that also prohibited machine guns.¹⁶² Notably, none of these laws applied to rifles or shotguns, making them less burdensome than present-day felon bans that prohibit all firearm possession.¹⁶³

¹⁵⁴ 1917 Utah Laws 278.

¹⁵⁵ 1917 Minn. Laws 839–40, ch. 500 § 1.

¹⁵⁶ 1919 Colo. Sess. Laws 416–417 § 1; 1921 Mich. Pub. Acts 21 § 1.

¹⁵⁷ 1925 Wyo. Sess. Laws 110, ch. 106 § 1; 1925 W.Va. Acts 31, ch. 3 § 7.

¹⁵⁸ See *infra* notes 151–157.

¹⁵⁹ 1923 N.H. Laws 138, ch. 118 § 3.

¹⁶⁰ 1923 N.D. Laws 380, ch. 266 § 5; 1923 Ca. Laws 696, ch. 339 § 2; 1925 Nev. Laws 54, ch. 47 § 2.

¹⁶¹ 1931 Cal. Laws 2316, ch. 1098 § 2.

¹⁶² 1933 Or. Laws 488.

¹⁶³ *E.g.*, 18 U.S.C. § 922(g)(1) (2018) (the federal prohibition on felons).

Pennsylvania's 1931 law applied to handguns and *some* long guns. It provided that, "No person who has been convicted in this Commonwealth or elsewhere of a crime of violence shall own a firearm, or have one in his possession or under his control."¹⁶⁴ It defined "firearm" as "any pistol or revolver with a barrel less than twelve inches, any shotgun with a barrel less than twenty-four inches, or any rifle with a barrel less than fifteen inches."¹⁶⁵ "Crime of violence" was defined as "murder, rape, mayhem, aggravated assault and battery, assault with intent to kill, robbery, burglary, breaking and entering with intent to commit a felony, and kidnapping."¹⁶⁶

The only law that applied to citizens and prohibited the keeping of all firearms was from Rhode Island in 1927. Importantly, it applied to only violent criminals. The law provided that, "No person who has been convicted in this state or elsewhere of a crime of violence shall purchase own, carry or have in his possession or under his control any firearm."¹⁶⁷ "Crime of violence" was defined as "any of the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering."¹⁶⁸

The federal felon ban codified in § 922(g)(1) (1938) itself was originally intended to keep firearms out of the hands of violent persons.¹⁶⁹ As the First Circuit explained in 2011,

the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses The law was expanded to encompass all individuals convicted of a felony . . . several decades later, in 1961.¹⁷⁰

Early twentieth-century practice reflected the traditions of previous centuries throughout American history: violent or otherwise dangerous persons were

¹⁶⁴ 1931 Pa. Laws 498, ch. 158, § 4.

¹⁶⁵ 1931 Pa. Laws 497, ch. 158, § 1.

¹⁶⁶ *Id.*

¹⁶⁷ 1927 R.I. Pub. Laws 257 § 3.

¹⁶⁸ 1927 R.I. Pub. Laws 256 § 1.

¹⁶⁹ See Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938).

¹⁷⁰ *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 52 Stat. at 1250–51 (1938); An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, § 2, 75 Stat. 757, 757 (1961) (some citations omitted)).

sometimes disarmed, but peaceable citizens—even if not necessarily law-abiding—were not.¹⁷¹ At Massachusetts’s ratifying convention, Samuel Adams proposed an amendment guaranteeing that “the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms.”¹⁷² American tradition reflects the right Adams envisioned.

IV. “UNVIRTUOUS” CITIZENS

A. *Lack of Historical Justification*

Some scholars and courts have embraced a theory that the Second Amendment protected only “virtuous” citizens in the founding era. This theory allows for “unvirtuous” citizens to be disarmed—a class that includes nonviolent felons and even nonviolent misdemeanants, and is thus far broader than the dangerous persons who have traditionally been excluded from the right.¹⁷³ While the Founders envisioned a virtuous citizenry, there is no tradition of disarming persons based on virtue, or even any indication that the right to arms was intended to be so limited.¹⁷⁴ The following sources are most commonly cited in support of the “unvirtuous” citizen theory, and demonstrate how the theory developed despite lacking historical foundation.

The “unvirtuous” citizen theory developed largely from Don Kates’s important 1983 article, *Handgun Prohibition and the Original Meaning of the Second Amendment*.¹⁷⁵ Kates’s article, however, provides no meaningful support for the theory. Professor Kates merely noted that “[t]he philosophical tradition

¹⁷¹ See *supra* notes 74–147 and accompanying text.

¹⁷² SCHWARTZ, *supra* note 107, at 675.

¹⁷³ See, e.g., *Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019) (upholding a firearm ban based on a decades-old felony conviction for a false statement on a bank loan application); *Holloway v. Attorney Gen. United States*, 948 F.3d 164, 171, 178 (3d Cir. 2020) (upholding a firearm ban based on a 15-year-old misdemeanor conviction for driving under the influence).

¹⁷⁴ The Founders similarly envisioned an engaged and informed citizenry, but that does not justify limiting the free speech of the roughly 37% of Americans who cannot name any of the rights protected by the First Amendment. See THE FEDERALIST NO. 46 (James Madison) (“the ultimate authority . . . resides in the people alone”); THE FEDERALIST NO. 49 (James Madison & Alexander Hamilton) (“the people are the only legitimate fountain of power”); THE FEDERALIST NO. 51 (James Madison & Alexander Hamilton) (discussing the need for citizen participation to safeguard against a repressive government); Thomas Jefferson, *Letter to Colonel Charles Yancy*, Jan. 6, 1816, in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 93 (E. Dumbauld ed., 1955) (“If a nation expects to be ignorant and free . . . it expects what never was and never will be.”); *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUBLIC POLICY CENTER, (Sept. 12, 2017), www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/ [https://perma.cc/8QCW-C8EF].

¹⁷⁵ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Original Meaning*].

embraced by the Founders regarded the survival of popular government and republican institutions as wholly dependent upon the existence of a citizenry that was ‘virtuous’ in upholding that ancient privilege and obligation” valued in classical Greece and Rome, “to keep arms in his home so as always to be ready to defend his own rights and to rush to defend the walls when the tocsin warned of approaching enemies.”¹⁷⁶ Professor Kates did not argue that citizens could be disarmed merely for being unvirtuous, nor did he provide examples of any such laws. In a separate discussion, Professor Kates asserted that, “[f]elons simply did not fall within the benefits of the common law right to possess arms,” but he did not provide examples of laws prohibiting felons either. Rather, he cited the ratifying convention proposals discussed above.¹⁷⁷

Professor Kates addressed the issue more directly in his 1986 article, *The Second Amendment: A Dialogue*.¹⁷⁸ Addressing to whom the right to arms extends, Professor Kates noted that “[f]ree and republican institutions were believed to be dependent upon civic *virtu* which, in turn, depended upon each citizen being armed—and, therefore, fearless, self-reliant, and upright.”¹⁷⁹ Professor Kates thus concluded that, “[o]ne implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.”¹⁸⁰ Professor Kates did not provide any examples of laws disarming “unvirtuous” citizens, however, and for support cited only his previous *Original Meaning* article, which did not include any examples of such laws either.¹⁸¹

Glenn Reynolds’s *A Critical Guide to the Second Amendment* article is frequently cited in support of the virtuous citizen theory.¹⁸² Professor Reynolds quoted Kates’s discussion about virtue in his *Dialogue* article, and reasoned that

¹⁷⁶ *Id.* at 231–32. Kates continued to explain that, “[i]n this philosophy, the ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent - defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.” *Id.* at 232; *see also id.* at 225 n.87 (explaining that to the Anti-Federalists, “[s]tanding armies were considered a threat to the development of the virtuous, self-reliant citizen on whom the vitality of the republic rested.”).

¹⁷⁷ *Id.* at 266.

¹⁷⁸ Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 *LAW & CONTEMP. PROBS.* 143 (1986) [hereinafter *Kates, Dialogue*].

¹⁷⁹ *Id.* at 146.

¹⁸⁰ *Id.*

¹⁸¹ *See Kates, Original Meaning, supra* note 175.

¹⁸² Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461, 480 (1995).

“felons, children, and the insane were excluded from the right to arms”¹⁸³ But it is often overlooked that Professor Reynolds noted that prohibitions on nonviolent felons might contradict history: “Given the rather promiscuous designation of felonies nowadays, one might imagine an argument to the contrary in the case of minor nonviolent felonies, crimes that would have been misdemeanors (or perhaps not even crimes at all) under the common law.”¹⁸⁴ The article included no examples of laws disarming “unvirtuous” citizens.

Two of Saul Cornell’s articles are commonly cited to demonstrate that the Second Amendment historically excluded unvirtuous citizens. In *“Don’t Know Much About History”: The Current Crisis in Second Amendment Scholarship*, Professor Cornell suggested that

[p]erhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right. Such a right 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.¹⁸⁵

For support, Professor Cornell apparently relied on a Pennsylvania prohibition on disaffected persons.¹⁸⁶ As discussed above, such laws were intended to disarm dangerous persons.

Professor Cornell’s other commonly cited article was co-authored by Nathan DeDino, and entitled, *A Well Regulated Right: The Early American Origins of Gun Control*.¹⁸⁷ The authors explained that “[h]istorians have long recognized that the Second Amendment was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue.”¹⁸⁸ But they did not show that unvirtuous citizens were excluded from the right. Rather, the authors cited an article “finding civic virtue to *come from* an individual right to bear arms,” which is contrary to the contention that the right depends on virtue.¹⁸⁹

¹⁸³ *Id.* at 480 (quoting Kates, *Dialogue*, *supra* note 178, at 215–16); Reynolds, *supra* note 182, at 480.

¹⁸⁴ Reynolds, *supra* note 182, at 481 n.90.

¹⁸⁵ Saul Cornell, “*Don’t Know Much About History*”: *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002).

¹⁸⁶ *See id.* (citing a discussion on page 680, which seemingly refers to a more elaborate discussion starting on page 670).

¹⁸⁷ Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004).

¹⁸⁸ *Id.* at 492.

¹⁸⁹ *Id.* (citing Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982)) (emphasis added).

The Second Amendment: Structure, History, and Constitutional Change by David Yassky is often cited as well.¹⁹⁰ Yassky suggested that “[t]he average citizen whom the Founders wished to see armed was a man of republican virtue — a man shaped by his myriad ties to his community, the most important for this purpose being the militia.”¹⁹¹ But Yassky provided no example of the right being limited to such men.¹⁹²

Despite none of these sources providing a single historical law disarming “unvirtuous” citizens, many courts have been persuaded by them to exclude unvirtuous citizens from the Second Amendment’s protections.

The First Circuit Court of Appeals recognized that “there is an ongoing debate among historians about the extent to which the right to bear arms in the founding period turned on concerns about the possessor’s ‘virtue.’”¹⁹³ But the court was nevertheless persuaded that “[i]n the parlance of the republican politics of the time . . . limitations [on the right to keep and bear arms] were sometimes expressed as efforts to disarm the ‘unvirtuous.’”¹⁹⁴ In addition to Reynolds,¹⁹⁵ Cornell,¹⁹⁶ and the Dissent of the Minority of Pennsylvania,¹⁹⁷ the court included a quote from a 1697 article opposing standing armies in England.¹⁹⁸ The quote explained that in “the view of late-seventeenth century republicanism . . . [t]he right to arms was to be limited to virtuous citizens only. Arms were ‘never lodg’d in the hand of any who had not an Interest in preserving the publick Peace.’”¹⁹⁹ This quote was not about colonial America but about the ancient “Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans.”²⁰⁰ And by clarifying that arms were “never lodg’d in the hand of any

¹⁹⁰ David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).

¹⁹¹ *Id.* at 626–27.

¹⁹² Moreover, this argument was premised on the idea that “[t]he militia was a precondition for the right to arms,” which *Heller* expressly rejected. *Id.* at 627 (citing David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 555 (1991)).

¹⁹³ *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009).

¹⁹⁴ *Id.* at 15.

¹⁹⁵ *Id.* at 15 (quoting Reynolds, *supra* note 182, at 480).

¹⁹⁶ *Id.* (quoting Cornell, *supra* note 185, at 679).

¹⁹⁷ *Id.* at 15–16 (quoting BREADING ET AL., *supra* note 114).

¹⁹⁸ *Id.* at 16 (citing Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 130 (1986) (quoting JOHN TRENCHARD & WALTER MOYLE, AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 7 (1697))).

¹⁹⁹ *Id.* (citing Shalhope, *supra* note 198 at 130 (quoting TRENCHARD & MOYLE, *supra* note 198, at 7)).

²⁰⁰ TRENCHARD & MOYLE, *supra* note 198, at 7.

who had not an Interest in preserving the publick Peace,” the quote seems to be equating unvirtuous persons with dangerous persons, in which case it would be more consistent with English and American tradition.²⁰¹ But most importantly, the article did not provide any examples of actual laws prohibiting “unvirtuous” citizens from keeping arms—nor did any other source cited by the First Circuit.

The Ninth Circuit “observe[d] that most scholars of the Second Amendment agree . . . that the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals),” but while recognizing “that the historical question has not been definitively resolved.”²⁰² For support that most scholars agree, the court cited Kates’s *Dialogue* and Reynolds.²⁰³

The Seventh Circuit acknowledged that “felon-in-possession laws could be criticized as ‘wildly overinclusive’ for encompassing nonviolent offenders.”²⁰⁴ But the court dismissed the need to determine “the pedigree of the rule,” in part because “most scholars of the Second Amendment 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.’”²⁰⁵ The Seventh Circuit cited *Vongxay*, Reynolds, and Kates, then Thomas Cooley “explaining that constitutions protect rights for ‘the People’ excluding, among others, ‘the idiot, the lunatic, and the felon.’”²⁰⁶ But as one scholar previously noted, “[t]he . . . discussion in Cooley . . . concerns classes excluded from voting. These included women and the property-less—both being citizens and protected by arms rights.”²⁰⁷ Indeed, women were often required to possess firearms in the colonial and founding periods, and they were never prohibited from doing so.²⁰⁸ And hundreds of

²⁰¹ *Id.*

²⁰² United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting Kates, *Dialogue*, *supra* note 178, at 146).

²⁰³ *Id.* (quoting Kates, *Dialogue*, *supra* note 178, at 146; quoting Reynolds, *supra* note 182, at 480).

²⁰⁴ United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010).

²⁰⁵ *Id.* at 684–85.

²⁰⁶ *Id.* at 685 (quoting *Vongxay*, 594 F.3d at 1118 (citing Reynolds, *supra* note 182, at 480; Kates, *Dialogue*, *supra* note 178, at 146)); *id.* (quoting THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 29 (1868)).

²⁰⁷ Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709–10 (2009).

²⁰⁸ See, e.g., THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 31 (William Brigham ed., 1836) (1632 Plymouth law requiring that “every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare armes a sufficient musket and other serviceable peece.”); WILLIAM WALTER HENING, 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 226 (1808) (1639 Virginia law requiring “ALL persons except negroes to be provided with arms and ammunition or be fined at pleasure of the Governor and Council”); *id.* at 263 (1643 Virginia law providing that “masters of every family shall bring with them to church on Sundays one fixed and

statutes required the property-less to possess arms, whereas no one was disarmed based on a lack of property.²⁰⁹

In upholding a firearm ban on persons subject to a protection order, the Eighth Circuit noted that its decision was “consistent with the view that . . . the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.”²¹⁰ The court cited Kates’s *Dialogue* article,²¹¹ Reynolds,²¹² and two additional articles. Neither of the additional articles provides much support. The first was another article by Professor Kates, coauthored by Clayton Cramer, which—like Professor Kates’s previous articles—emphasized the “classical republican thought” that linked “the right to arms . . . to that of civic virtue (i.e., the virtuous citizenry).”²¹³ But the authors argued against a test that allows nonviolent felons to be categorically disarmed.²¹⁴ In *Heller’s Catch-22*, Adam Winkler acknowledged the unvirtuous citizen theory and says it “*may* be historically accurate,” before criticizing a test in which “rights are . . . selectively doled out by legislatures to those whom elected officials deem to be sufficiently

serviceable gun with sufficient powder and shot”); 2 *id.* at 333 (1676 law mandating “that in going to churches and courts in [] tymes of danger, all people be enjoyned and required to goe armed for their greate security”); PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND Jan. 1637/8—Sept. 1664, 77 (1883) (1638/9 act requiring “that every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed gunne.”); GEORGE H. RYDEN, DELAWARE—THE FIRST STATE IN THE UNION 117 (1938) (1741 Delaware law requiring that “every Freeholder and taxable Person” possess “[o]ne well fixed Musket or Firelock.”); VERMONT STATE PAPERS: BEING A COLLECTION OF RECORDS AND DOCUMENTS, CONNECTED WITH THE ASSUMPTION AND ESTABLISHMENT OF GOVERNMENT BY THE PEOPLE OF VERMONT 307 (William Slade ed. 1823) (1779 Vermont law requiring “every listed soldier and other householder” to “always be provided with, and have in constant readiness, a well fixed firelock.”).

²⁰⁹ See generally, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 586, 612 (2019) (describing hundreds of pre-1800 arms statutes).

²¹⁰ United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011).

²¹¹ *Id.* (quoting Kates, *Dialogue*, *supra* note 178, at 146).

²¹² *Id.* (citing Reynolds, *supra* note 182, at 480–81).

²¹³ Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359 (2009).

²¹⁴ *Id.* at 1362. Kates and Cramer explained that, “American state and federal law continues to criminalize many trivial matters as felonies,” including “[s]cores of civilian offenses, many of them posing no physical danger to others.” *Id.* While recognizing that “some kinds of prior felonious activity indicate a proclivity to dangerous lawlessness and so should disqualify one from possessing firearms for a number of years or even life,” they also call “any claim that income tax evasion [or] antitrust law violations . . . should disqualify anyone from owning a firearm” “absurd.” *Id.* at 1363.

virtuous or worthy.”²¹⁵ Professor Winkler suggested a better rationale, which happens to be historically accurate: “That some people are not virtuous enough for the legislature’s liking is not a good public policy reason [to prohibit arms possession]. That some people are too dangerous to permit to have firearms is.”²¹⁶ None of the Eighth Circuit’s sources provided an example of a law disarming “unvirtuous” citizens.

In upholding a firearm ban on an illegal alien, the Fourth Circuit was persuaded that the right could be limited to virtuous citizens.²¹⁷ The Fourth Circuit cited *Yancey*, *Vongxay*, Reynolds, Kates’s *Dialogue*, Yassky, Cornell, Cornell and DeDino, the Massachusetts and New Hampshire ratifying conventions, and noted the English tradition of “disarm[ing] those . . . considered disloyal or dangerous.”²¹⁸ The court also cited Joyce Lee Malcolm’s *TO KEEP AND BEAR ARMS*, in which Professor Malcom explained that historically, “Indians and black slaves . . . were barred from owning firearms.”²¹⁹ Discriminatory bans on non-citizens, however, say little about “unvirtuous citizens.”²²⁰

²¹⁵ Adam Winkler, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1563 n.67 (2009) (emphasis added).

²¹⁶ *Id.*

²¹⁷ *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012).

²¹⁸ *Id.* at 979 (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)); *id.* at 979–80 (citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)); *id.* at 980 (quoting Reynolds, *supra* note 182, at 480); *id.* (citing Kates, *Dialogue*, *supra* note 178, at 146); *id.* (quoting Yassky, *supra* note 190, at 626); *id.* (quoting Cornell, *supra* note 185, at 671); *id.* (quoting Cornell & DeDino, *supra* note 187, at 506); *id.* (quoting SCHWARTZ, *supra* note 107, at 681).

²¹⁹ *Id.* (citing MALCOLM, *supra* note 56, at 140–41); MALCOLM, *supra* note 56, at 140.

²²⁰ See, e.g., *Aldridge v. Commonwealth*, 4 Va. 447, 449 (Va. Gen. Ct. 1824) (“Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? The leading and most prominent feature in that paper, is the equality of civil rights and liberty. And yet, nobody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.”); *State v. Newsom*, 27 N.C. 250, 252, 254–55 (1844) (upholding North Carolina’s 1840 law entitled, “an act to prevent free persons of color from carrying fire arms,” which “imposes upon free men of color, a restriction in the carrying of fire arms, from which the white men of the country are exempt,” based on the “principle, settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them; so that they do not violate those great principles of justice, which ought to lie at the foundation of all laws.”).

“Look[ing] to the historical justification for stripping felons . . . of their Second Amendment rights,” seven judges on a fifteen-judge *en banc* Third Circuit adopted an “unvirtuous” citizen test in *Binderup v. Attorney General United States of America*.²²¹ “[T]he historically barred class” was determined to be those who were “unvirtuous” because they “committed a serious criminal offense, violent or nonviolent.”²²² The usual sources were cited for support: Cornell & DeDino, Cornell, Yassky, Reynolds, Kates’s *Original Meaning*, Kates’s *Dialogue*, *Carpio-Leon*, *Yancey*, *Vongxay*, *Rene E.*, and *Bena*.²²³

The D.C. Circuit noted that “[a] number of other circuits . . . have concluded that history and tradition support the disarmament of those who were not (or could not be) virtuous members of the community.”²²⁴ The court determined that the theory’s “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.”²²⁵ The court cited the Dissent of the Minority of Pennsylvania, Reynolds, Cornell and DeDino, *Carpio-Leon*, *Yancey*, *Vongxay*, *Binderup*, *Rene E.*, and referenced Massachusetts and Pennsylvania prohibitions on disaffected persons.²²⁶

Although seven federal circuit courts of appeals have acknowledged the virtuous citizen theory and some have even adopted it, no court nor any source a court has cited has provided any founding-era law disarming “unvirtuous” citizens—or anyone, for that matter, who was not perceived as dangerous. As Judge

²²¹ *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 348–49 (3d Cir. 2016) (*en banc*) (plurality opinion).

²²² *Id.* at 348 (*en banc*) (plurality opinion).

²²³ *Id.* (plurality opinion) (citing Cornell & DeDino, *supra* note 187, at 491–92); *id.* (plurality opinion) (citing Cornell, *supra* note 185, at 679); *id.* (plurality opinion) (citing Yassky, *supra* note 190, at 626–27); *id.* (plurality opinion) (citing Reynolds, *supra* note 182, at 480); *id.* (plurality opinion) (citing Kates, *Handgun Prohibition*, *supra* note 175, at 266); *id.* (plurality opinion) (citing Kates, *Dialogue*, *supra* note 178, at 146); *id.* (plurality opinion) (citing Kates, *Dialogue*, *supra* note 178, at 146); *id.* (plurality opinion) (quoting *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012)); *id.* (plurality opinion) (citing *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)); *id.* (plurality opinion) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting Kates, *Dialogue*, *supra* note 178, at 146)); *id.* (plurality opinion) (quoting *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009); *id.* (plurality opinion) (quoting *United States v. Bena*, 664 F.3d 1180, 1184 (2011)).

²²⁴ *Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019).

²²⁵ *Id.* (citing *Carpio-Leon*, 701 F.3d at 979–80).

²²⁶ *Id.* at 158–59 (quoting SCHWARTZ, *supra* note 107, at 665); *id.* at 159 (quoting Reynolds, *supra* note 182, at 480); *id.* (citing Cornell & DeDino, *supra* note 187, at 506); *id.* (citing *Carpio-Leon*, 701 F.3d at 979); *id.* (quoting *Yancey*, 621 F.3d at 684–85); *id.* (citing *Vongxay*, 594 F.3d at 1118); *id.* (citing *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 348 (3d Cir. 2016) (*en banc*)); *id.* (quoting *Rene E.*, 583 F.3d at 15); *id.* (citing *Carpio-Leon*, 701 F.3d at 980 (citing Cornell & DeDino, *supra* note 187, at 506)).

Hardiman explained, he and the four judges joining his *Binderup* concurrence “found no historical evidence on the public meaning of the right to keep and bear arms indicating that ‘virtuousness’ was a limitation on one’s qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and ipse dixit.”²²⁷ Because it lacks historical foundation, the virtuous citizen theory is defective and contradicts *Heller*.

B. *Unvirtuous Citizens Retained Their Arms*

While no historical laws disarmed “unvirtuous” citizens, there were laws that expressly permitted citizens who were unvirtuous to keep arms. In 1692, Maryland forbade press masters or anyone else “to seize Press or Carry away from any Inhabitant Resident in this Province, any Armes or Ammunition of any kind whatsoever upon any duty or Service, or upon any Account whatsoever . . .”²²⁸ Violent felons were still punished by death, so this was not an exemption for dangerous persons, but it did prevent unvirtuous nonviolent colonists from being disarmed.

In 1705, to ensure that militiamen were able to provide their own firearms and ammunition, Virginia forbade arms required for militia service “from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writt of execution.”²²⁹ Anyone who confiscated the arms was “lyable to the suit of the party greived, wherein double damages shall be given upon a recovery.”²³⁰ Virginia passed similar laws in 1755 and 1757, additionally providing that “every person going to, attending at, or returning from muster” was “exempted from arrests.”²³¹

The federal Uniform Militia Act in 1792 exempted militia arms “from all suits, distresses, executions or sales, for debt or for the payment of taxes.”²³² This law, like Maryland’s and Virginia’s laws, intentionally kept unvirtuous citizens armed.

²²⁷ *Binderup*, 836 F.3d at 372 (en banc) (Hardiman, J., concurring in part and concurring in the judgments); see also *Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) (“[A]lthough the right protected by the Second Amendment is not unlimited, its limits are not defined by a general felon ban tied to a lack of virtue or good character.”) (citation omitted). Judges Fisher, Chagares, Jordan, and Nygaard joined Judge Hardiman’s *Binderup* concurrence.

²²⁸ 13 ARCHIVES OF MARYLAND 557 (William Hand Browne ed., 1894). Press masters were responsible for commandeering private possessions for public service.

²²⁹ 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE; A COLLECTION OF ALL THE LAWS OF VIRGINIA 339 (1823).

²³⁰ *Id.*

²³¹ 6 WILLIAM WALLER HENING, THE STATUTES AT LARGE; A COLLECTION OF ALL THE LAWS OF VIRGINIA 538 (1819); 7 HENING, *supra* note 87, at 100.

²³² 1 Stat. 271, § 1 (1792) (Uniform Militia Act).

In 1786 Massachusetts, if the tax collector stole the money he collected, the sheriff could sell the collector's estate to recover the stolen funds. And if the sheriff stole the money from the collector's estate sale, the sheriff's estate could be sold to recover the amount he stole. If an estate sale did not cover the stolen amount, the deficient collector or sheriff would be imprisoned. But the law made clear that the necessities of life—including firearms—could not be sold in any estate sale:

[I]n no case whatever, any distress shall be made or taken from any person, of his *arms* or household utensils, necessary for upholding life; nor of tools or implements necessary for his trade or occupation, beasts of the plough necessary for the cultivation of his improved land; nor of bedding or apparel necessary for him and his family; any law, usage, or custom to the contrary notwithstanding.²³³

Under this law, which existed when Samuel Adams proposed his amendment at Massachusetts's ratifying convention, even these unvirtuous citizens who were convicted of stealing tax money, imprisoned, and had nearly all their belongings confiscated retained the right to arms.²³⁴

It is no answer to suggest that statutes providing for estate sales without a firearm exception prove that those persons could be disarmed. They could immediately acquire a new firearm after the sale, just like any other item. They were no more prohibited from possessing firearms than they were kitchen utensils, bedding, or clothing.

It is true that many founders envisioned a virtuous citizenry and some believed it essential to the Republic.²³⁵ But like the Second Amendment's "well regulated militia"—which many founders also believed essential to the Republic—the

²³³ 1786 Ma. Laws 265 (emphasis added).

²³⁴ See *supra* note 107 and accompanying text.

²³⁵ George Washington said in his farewell address that "virtue or morality is a necessary spring of popular government." WASHINGTON'S FAREWELL ADDRESS: DELIVERED SEPTEMBER 17, 1796, 16 (1861). In a speech at Virginia's ratifying convention, James Madison stated, "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea." 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 393 (Jonathan Elliot ed., 1828). Thomas Jefferson wrote to John Adams that "[n]o government can continue good but under the control of the people" who need "to be encouraged in habits of virtue and to be deterred from those of vice." Thomas Jefferson, *Letter from Thomas Jefferson to John Adams*, (Dec. 10, 1819), in 7 THE WRITINGS OF THOMAS JEFFERSON 115 (1861). John Adams wrote that "[p]ublic virtue cannot exist in a Nation without private, and public Virtue is the only Foundation of Republics." *Letter from John Adams to Mercy Otis Warren* (Apr. 16, 1776), in John Adams, 4 PAPERS OF JOHN ADAMS 124 (Robert Joseph Taylor ed., 1979). And later, Adams wrote that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *Letter from John Adams to The Officers of the First Brigade of the Third Division of the Militia of Massachusetts*, (Oct. 11, 1798), in 9 THE WORKS OF

right to keep and bear arms was not conditioned upon it.²³⁶ Recognizing the broad necessity of virtue in society is different than suggesting that people can be deprived of fundamental and natural individual rights merely because they lack virtue. Atheists, adulterers, gamblers, liars, cheaters, lazy layabouts, and others viewed as unvirtuous in the founding era were never deprived of their right to keep and bear arms.²³⁷

In sum, no laws disarmed “unvirtuous” citizens, and some even provided language expressly permitting citizens who were unvirtuous to keep the arms they already owned. Contrasted with the myriad laws disarming dangerous persons, it must be that the “historical justification” for a ban on felons is the tradition of disarming dangerous—not merely unvirtuous—persons.

V. CONCLUSION

The *Heller* Court promised a “historical justification” for bans on felons.²³⁸ Indeed, there appears to be such a justification for violent felons. Violent and other dangerous persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes, persons expected to take up arms against the government, persons with violent tendencies, distrusted groups of people, and those of presently unsound mind.²³⁹

JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, (Charles Francis Adams, ed., 1854). John Adams’s second cousin, Samuel Adams, firmly believed in the necessity of virtue and frequently spoke of it. Samuel Adams wrote to his wife, “[i]t is the duty of every one to use his utmost exertions in promoting the cause of liberty and virtue.” *Letter from Samuel Adams to Elizabeth Adams*, (Nov. 24, 1780), in 3 WILLIAM VINCENT WELLS, *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 118 (1865). Benjamin Franklin wrote that, “only a virtuous people are capable of freedom.” *Letter from Benjamin Franklin to Messrs. the Abbes Chalut and Arnaud*, (Apr. 17, 1787), in 9 *THE WRITINGS OF BENJAMIN FRANKLIN* 569 (Albert Henry Smith, ed., 1907).

²³⁶ The preamble to a Massachusetts act to suppress tumults and insurrections started, “in a free government, where the people have a right to bear arms for the common defence, and the military power is held in subordination to the civil authority, it is necessary for the safety of the State, that the virtuous citizens thereof should hold themselves in readiness” *Mass. Gen. Laws* 227 (1787). But even this law—distinguishing between “the people” who had the right and the “virtuous citizens” necessary for the safety of the State—did nothing to limit the right to virtuous citizens. In fact, a conviction for refusing to serve, neglecting to serve, or desertion under this act resulted in a fine rather than disarmament. *Id.* at 367. Convicted officers were prevented from holding office for 10 years, but they were not disarmed either. *Id.*

²³⁷ See *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 372 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments) (“Contemporary advocates of a ‘virtuousness’ limitation have projected that constraint onto the right to keep and bear arms based on the fact that the very *existence* of the right was informed by republican philosophical principles. That is not enough.”).

²³⁸ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); see *supra* notes 20–40 and accompanying text.

²³⁹ See *supra* notes 41–146 and accompanying text.

While many of these bans have been unjust and discriminatory, the purpose was always the same: to disarm those who posed a danger.²⁴⁰

In contrast, there is no historical justification for completely and forever depriving peaceable citizens—even nonviolent felons—of the right to keep and bear arms. Nor is there a historical justification for disarming unvirtuous citizens.²⁴¹ History shows that the right could be denied only to mitigate threats posed by dangerous persons. Therefore, firearm prohibitions on peaceable citizens contradict the original understanding of the Second Amendment and are thus unconstitutional.

²⁴⁰ See *Binderup*, 836 F.3d at 357 (Hardiman, J., concurring in part and concurring in the judgments) (“The 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.”).

²⁴¹ See *supra* notes 147–238 and accompanying text.