The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms

Joseph G.S. Greenlee

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlr

Recommended Citation
Available at: https://scholarship.law.uwyo.edu/wlr/vol20/iss2/7

This Article is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.
I. INTRODUCTION ...................................................................................... 249
II. THE SUPREME COURT ............................................................................ 251
   A. Presumptively Lawful Regulations .................................................. 251
   B. Rebuttal of Presumed Lawfulness .................................................... 254
   C. Historical Justification ................................................................... 255
III. HISTORY .................................................................................................. 257
   A. English Tradition of Arms Prohibitions ........................................... 257
   B. Colonial America Arms Prohibitions ............................................. 261
   C. Ratifying Conventions and the Founding Era ................................. 265
   D. Restoration of Arms Rights in the Founding Era ......................... 268
   E. Nineteenth-Century Arms Prohibitions ........................................ 269
   F. Twentieth-Century Arms Prohibitions ........................................... 272
      1. Non-Citizens .............................................................................. 272
      2. Violent Criminals ....................................................................... 273
IV. “UNVIRTUOUS” CITIZENS ..................................................................... 275
   A. Lack of Historical Justification ....................................................... 275
   B. Unvirtuous Citizens Retained Their Arms ..................................... 283
V. CONCLUSION ............................................................................................ 285

I. INTRODUCTION

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

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*. 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.

---

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

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. Laper, 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. Bronson, 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).
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.

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 Amend-
ment . . . .”\textsuperscript{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 estab-
lishes 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.”\textsuperscript{31} Providing examples of limitations, the
Court immediately resorted to history, summarizing concealed-carry restrictions
“[f]rom Blackstone through the 19th-century cases.”\textsuperscript{32} The Court then provided
the presumptively lawful regulatory measures.\textsuperscript{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.’”\textsuperscript{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,”\textsuperscript{35}
and an emphasis that the effect of “modern developments . . . cannot change our
interpretation of the right.”\textsuperscript{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.”\textsuperscript{37}

The \textit{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

\begin{footnotes}
\item[30] Id. at 626.
\item[31] Id.
\item[32] Id. (citations omitted).
\item[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.
\item[34] Id. at 627 (emphasis added).
\item[35] Id.
\item[36] Id. at 627–28.
\item[37] Id. at 721 (Breyer, J., dissenting).
\end{footnotes}
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.  

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

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.

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. 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.”

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 Aethelberht made it unlawful to “furnish weapons to another where there is strife . . . .”

“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.

The precedent for disarming rebellious segments of the population was established in Wales. 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.”

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

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).
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.
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.
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 traiterous 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).
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”).

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).

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. Sedition was treated like treason and prosecuted frequently. One dissident, Anne Hutchinson, was convicted of sedition in 1637 for criticizing the colony’s clergy for its legalistic interpretation of the Bible. Hutchinson and some of her supporters were banished from the colony. Of her supporters permitted to remain in the colony, seventy-six were disarmed. Some supporters who confessed their sins were welcomed back into the community and able to retain their arms.

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. Consequently, Maryland and Virginia disarmed Catholics in 1756. 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. 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.” In 1759, Pennsylvania also disarmed Catholics.

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.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{94} Soon after, such Tories were “convicted of high treason, and sentenced to death,” rather than merely disarmed or imprisoned.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{97} The confiscated arms were provided to the Continental Army. Pennsylvania enacted similar laws in April 1776 and June 1777.\textsuperscript{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

\textsuperscript{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).


\textsuperscript{93} Id. at 283 n.2.

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 284.

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

\textsuperscript{97} Mass. Gen. Laws ch. 21 (1776).

\textsuperscript{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

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.
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).
106 Id. at 625.
the people of the United States who are peaceable citizens, from keeping their own arms.”

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.

“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.” Thomas Sheridan defined “peaceable” as “Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent.” Noah Webster defined “peaceable” as “Not violent, bloody or unnatural.” The *Heller* Court relied on Johnson’s, Sheridan’s, and Webster’s definitions in defining the Second Amendment’s text.

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.” 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.

---

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).
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 purposed to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace.”).

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.


\(^{122}\) 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.

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

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. In Utah, someone who twice operates a recording device in a movie theater is forever prohibited from possessing a firearm. 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. 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.

E. Nineteenth-Century Arms Prohibitions

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

---

125 1 Private and Special Statutes of the Commonwealth of Massachusetts From 1780–1805, 145 (1805).
126 Id. at 146–47.
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.
starting in the latter half of the century were “tramps”—typically defined as males begging for charity outside of their home county.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{136} The point of prohibiting armed tramps from threatening harm to another’s person or property was plainly to prevent violence.\textsuperscript{137} Vermont enacted a similar law that year, followed by Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{140}

\textsuperscript{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 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.”).


\textsuperscript{136} 1878 N.H. Laws 612, ch. 270 § 2.

\textsuperscript{137} See State v. Hogan, 63 Ohio St. 202, 215, 219 (1900).

\textsuperscript{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.

\textsuperscript{139} Digest of Pa., supra note 134, at 541.

\textsuperscript{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, slug 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).
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).
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. 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.

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. Some states prohibited non-citizens from possessing arms under the guise of preserving game. 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." North Dakota and New Jersey enacted similar laws, followed by New Mexico. 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.” 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.”).
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.”)."
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.”\footnote{1917 Utah Laws 278.} Minnesota passed a similar law that same year,\footnote{1917 Minn. Laws 839–40, ch. 500 § 1.} followed by Colorado and Michigan.\footnote{1919 Colo. Sess. Laws 416–417 § 1; 1921 Mich. Pub. Acts 21 § 1.} In 1925, both Wyoming and West Virginia prohibited anyone who was not a United States citizen from owning any firearm.\footnote{1925 Wyo. Sess. Laws 110, ch. 106 § 1; 1925 W.Va. Acts 31, ch. 3 § 7.}

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.\footnote{See infra notes 151–157.} 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 . . . .”\footnote{1923 N.H. Laws 138, ch. 118 § 3.} North Dakota and California passed similar laws that same year, as did Nevada in 1925.\footnote{1923 N.D. Laws 380, ch. 266 § 5; 1923 Ca. Laws 696, ch. 339 § 2; 1925 Nev. Laws 54, ch. 47 § 2.} California amended its law in 1931 to include persons “addicted to the use of any narcotic drug.”\footnote{1931 Cal. Laws 2316, ch. 1098 § 2.} Then in 1933, Oregon passed a version of the law that also prohibited machine guns.\footnote{1933 Or. Laws 488.} Notably, none of these laws applied to rifles or shotguns, making them less burdensome than present-day felon bans that prohibit all firearm possession.\footnote{\textit{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.” 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.” “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.”

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.” “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.”

The federal felon ban codified in § 922(g)(1) (1938) itself was originally intended to keep firearms out of the hands of violent persons. 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.

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

---

166 Id.
sometimes disarmed, but peaceable citizens—even if not necessarily law-abiding—were not. 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.” 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. 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. 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*. 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.


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].

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.


179 Id. at 146.

180 Id.

181 See Kates, Original Meaning, supra note 175.

“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

[perhaps 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.
186 See id. (citing a discussion on page 680, which seemingly refers to a more elaborate discussion starting on page 670).
188 Id. at 492.
The Second Amendment: Structure, History, and Constitutional Change by David Yassky is often cited as well. 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.” But Yassky provided no example of the right being limited to such men.

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.’” 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.’” In addition to Reynolds, Cornell, and the Dissent of the Minority of Pennsylvania, the court included a quote from a 1697 article opposing standing armies in England. 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.’” This quote was not about colonial America but about the ancient “Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans.” And by clarifying that arms were “never lodg’d in the hand of any

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).
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. 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.” For support that most scholars agree, the court cited Kates’s *Dialogue* and Reynolds.

The Seventh Circuit acknowledged that “felon-in-possession laws could be criticized as ‘wildly overinclusive’ for encompassing nonviolent offenders.” 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.’” 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.’” 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.” Indeed, women were often required to possess firearms in the colonial and founding periods, and they were never prohibited from doing so. And hundreds of

---

201 Id.
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)).
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 himself 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
The 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 virtu (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
virtuous or worthy.”

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.”

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. 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.”

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.” Discriminatory bans on non-citizens, however, say little about “unvirtuous citizens.”

---


216 Id.


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.225

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

---


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) (quoting 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)).


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.”

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 . . . .” 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 writ of execution.”

Anyone who confiscated the arms was “liable to the suit of the party greived, wherein double damages shall be given upon a recovery.” 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.”

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.” 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 chimerial 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

---

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.