

NOTE

HELLER FREEZES OVER: DANGEROUS PERSONS AND FELON-IN-POSSESSION LAWS*

I. INTRODUCTION

Does the Bill of Rights protect convicted felons who have completed their punishment? Generally, yes¹—so long as they are American citizens or resident aliens.² While one might reasonably claim that this is undesirable as a matter of public policy, “the Constitution disables the government from employing certain means to prevent, deter, or detect . . . crime.”³ For example, to prohibit an exercise of First Amendment rights as a means of preventing an unlawful abuse of those rights would be an impermissible prior restraint.⁴ Following this principle, in 2017, the Supreme Court

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1. See, e.g., *United States v. Novitsky*, 208 F. Supp. 2d 1181 (D. Colo. 2002) (granting motion to suppress firearm obtained in a search that violated the Fourth Amendment), *aff'd*, 58 F. App'x 432 (10th Cir. 2003); *United States v. Mullins*, No. 19-00047-01-CR-W, 2020 WL 1102536 (W.D. Mo. Mar. 6, 2020); *United States v. Gray*, No. 11-CR-143, 2012 WL 2458391 (D. Nev. June 27, 2012); *United States v. Lopez*, No. 08-CR-94, 2009 WL 982777 (E.D. Tenn. Apr. 13, 2009); *United States v. Dye*, 544 F. Supp. 3d 1138 (D. Kan. 2021); *United States v. Johnson*, No. CR 16-0135, 2017 WL 2256599 (D. Md. May 22, 2017); *United States v. Knapp*, No. 17-CR-207, 2019 WL 11502454 (D. Wyo. June 13, 2019).

2. See Michael Kent Curtis, *The Bill of Rights and the States Revisited After Heller*, 60 HASTINGS L.J. 1445, 1452 (2009) (“After the ratification of the Bill of Rights, the Constitution’s rights were described as privileges and as rights of American citizens.”); *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (“The term ‘People of the United States’ includes ‘American citizens at home and abroad’” (quoting *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd on other grounds*, 494 U.S. 259 (1990))); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (“[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.” (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))). *But see* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682–83 (6th Cir. 2002) (“Since the end of the 19th Century, our government has enacted immigration laws banishing, or deporting, non-citizens because of their race and their beliefs. While the Bill of Rights jealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way.” (citations omitted)).

3. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1296 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (first citing *Mapp v. Ohio*, 367 U.S. 643 (1961); then citing *Miranda v. Arizona*, 384 U.S. 436 (1966); then citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); then citing *Crawford v. Washington*, 541 U.S. 36 (2004); then citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); and then citing *District of Columbia v. Heller (Heller I)*, 554 U.S. 570 (2008)).

4. *Cf. Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825) (“The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.” (citing *Dexter v. Spear*, 7 F. Cas. 624 (Story, Circuit Justice, C.C.D. R.I. 1825) (No. 3,867))); *Patterson v. Colorado*, 205 U.S. 454, 465 (1907)

held that a North Carolina law prohibiting convicted sex offenders who have completed their sentences from accessing social media websites violates the First Amendment.⁵ In doing so, the Court stated that it was “unsettling to suggest” that the government could limit sex offenders who have completed their sentence to use of only certain websites.⁶ And while North Carolina asserted that the law furthered its interest in protecting minors from sexual abuse, the Court reminded North Carolina that “the government ‘may not suppress lawful speech as the means to suppress unlawful speech.’”⁷

While courts treat prior restraints on First Amendment rights as unconstitutional, they have treated prior restraints on Second Amendment rights differently. Under 18 U.S.C. § 922(g)(1) and numerous state analogues, convicted felons who have completed their sentences are prohibited from possessing and carrying firearms—the very conduct protected by the Second and Fourteenth Amendments.⁸ The justifications for upholding these prior restraints, known as “felon-in-possession” laws, have varied. For many years, federal courts held that the Second Amendment did not protect *any person’s* right to arms, or only protected keeping and bearing arms in connection with “militia” service.⁹ Meanwhile, state courts generally upheld these prior restraints using “means-end” scrutiny, concluding that felon-in-possession laws were “reasonable” regulations.¹⁰ But after *District of Columbia v. Heller* held that the Second Amendment protected an individual’s right to possess firearms,¹¹ *McDonald v. City of Chicago* incorporated that right against the states via the Fourteenth Amendment,¹² and *New York State Rifle and Pistol Ass’n v. Bruen* held both that the Second Amendment protects an individual’s right to carry arms publicly and that courts are prohibited from using “means-end” scrutiny to determine the scope of the Second Amendment,¹³ the justifications courts use to uphold felon-in-possession laws have changed.

Now, courts are more likely to hold that the Second Amendment only protects “virtuous” people—and always has.¹⁴ Thus, under this “virtuous person” theory, a conviction of any crime removes a person from “the people” protected by the Second

(Harlan, J., dissenting) (cited with approval in *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 309 (2012)) (“The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them.”).

5. *Packingham v. North Carolina*, 582 U.S. 98, 109 (2017).

6. *Id.* at 108.

7. *Id.* at 109 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)).

8. *See, e.g.*, 18 U.S.C. § 922(g)(1); 18 PA. STAT. AND CONS. STAT. ANN. § 6105 (West 2024).

9. *See, e.g.*, *United States v. Tot (Tot I)*, 131 F.2d 261, 266 (3d Cir. 1942); *Cases v. United States*, 131 F.2d 916, 922–23 (1st Cir. 1942).

10. *See* Adam Winkler, *The Reasonable Right To Bear Arms*, 17 STAN. L. & POL’Y REV. 597, 603 (2006) (“Every state court to rule on a felon possession ban in the modern era—and the cases are numerous—has held that such laws are reasonable.”).

11. *See* 554 U.S. 570, 580 (2008) (“Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an *individual* right.” (emphasis added)).

12. 561 U.S. 742, 750 (2010).

13. *See* 142 S. Ct. 2111, 2126 (2022).

14. *See, e.g.*, *United States v. Riley*, 635 F. Supp. 3d 411, 428 (E.D. Va. 2022).

Amendment.¹⁵ Some judges, however, have argued that the virtuous person theory is made up and that, instead, the Second Amendment only permits legislatures to exclude “dangerous” people from its protection—and always has.¹⁶ Thus, under this “dangerous person” theory, a legislature may prohibit a person convicted of a “dangerous” crime from possessing and carrying firearms after they have completed their punishment.

This Note addresses the dangerous person theory, and argues that, while there are instances in which it is constitutionally permissible to disarm dangerous people, prohibiting a felon convicted of a “dangerous” crime from ever possessing and carrying firearms after the completion of their punishment is not constitutionally permissible.¹⁷

II. OVERVIEW

At common law, merely possessing or carrying a firearm were not crimes.¹⁸ However, it was an offense to carry firearms in a manner which would “terrify and alarm” other people.¹⁹ During the nineteenth century, states enacted laws prohibiting the concealed carrying of firearms, regulating the manner in which citizens could carry firearms. In 1822, Kentucky’s highest court held that a state law prohibiting persons from wearing concealed arms was unconstitutional and void against Kentucky’s right to arms constitutional provision.²⁰ The court rejected Kentucky’s argument that a “partial restraint on the right of the citizens to bear arms” was a permissible regulation of the right, noting that “it is not only a part of the right that is secured by the constitution; it is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, . . . it is equally forbidden by the constitution.”²¹ Other state courts upheld concealed carry restrictions as consistent with the right to bear arms,²² and some states added provisions to their constitutions expressly authorizing the legislature to prohibit carrying concealed weapons.²³

15. *Id.* at 424.

16. *See* Folajtar v. Att’y Gen., 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting).

17. For brevity’s sake, I do not directly analyze the “virtuous person theory,” although my analysis implicitly stands for the proposition that prohibiting a person convicted of any crime from possessing or carrying firearms after the completion of their punishment is not constitutionally permissible.

18. *See* State v. Huntly, 25 N.C. (3 Ired.) 418, 422–23 (1843) (“It is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun.”).

19. *See id.* at 423 (“It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.”).

20. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 93 (1822).

21. *Id.*

22. *See, e.g.,* *Nunn v. State*, 1 Ga. 243, 251 (1846) (“We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void . . .*”).

23. *See, e.g.,* N.C. CONST. of 1875, art. I, § 24 (“[T]he right of the people to keep and bear arms shall not be infringed . . . Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against such practice.”); *State v. Speller*, 86 N.C. 697, 700

Other laws proscribed the carrying of firearms while engaging in certain types of conduct, such as being “under the influence of an intoxicating drink.”²⁴ An 1878 New Hampshire act, for example, provided: “Any person going about from place to place, begging and asking or subsisting upon charity, shall be taken and deemed to be a tramp, and shall be punished by imprisonment at hard labor”²⁵ The Act further provided: “Any act of beggary or vagrancy by any person not a resident of this State shall be evidence that the person committing the same is a tramp within the meaning of this act.”²⁶ And, in relevant part, the Act prohibited “[a]ny tramp” from “carrying any firearm or other dangerous weapon.”²⁷ The Act thus prohibited particular *conduct*—carrying a firearm *while* “going about from place to place, begging and asking or subsisting upon charity,” or *while* being a person not a resident of the state “committing” “[a]ny act of beggary or vagrancy.”²⁸

Judicial review of tramp laws confirms that the prohibition was consistent with the right to bear arms *only* because the laws prohibit unprotected *conduct*. In *State v. Hogan*, the Ohio Supreme Court addressed whether a statute prohibiting tramps from carrying firearms infringed on a tramp’s right to bear arms.²⁹ The statute provided, in relevant part,

Whoever, except a female or a blind person, nor being in the county in which he usually lives or has his home, is found going about begging and asking subsistence by charity, shall be taken, and deemed to be a tramp; any tramp who . . . is found carrying a firearm, or other dangerous weapon, . . . shall be imprisoned in the penitentiary³⁰

The court held that because the statute only prohibited unprotected *conduct*, it did not violate the tramp’s right to arms.³¹ The court explained that “[t]he constitutional

(1882) (“The distinction between the ‘right to keep and bear arms,’ and ‘the practice of carrying concealed weapons’ is plainly observed in the constitution of this state. The first, it is declared, shall not be infringed, while the latter may be prohibited.” (quoting N.C. CONST. of 1875, art. I, § 24)).

24. KAN. GEN. STAT. § 313 (1897); *see also* 2 W.C. WEBB, GENERAL STATUTES OF THE STATE OF KANSAS 1897, § 313, at 353 (Topeka, Kansas 1897). This Kansas statute also prohibited “any person who has ever borne arms against the government of the United States” from publicly carrying handguns. *Id.* While it is unclear if this provision was ever applied to anyone, it was, as a matter of law, unconstitutional at the time of its enactment in 1868 as an *ex post facto* law. *Cf. Cummings v. Missouri*, 71 U.S. 277, 279 (1867) (explaining that if Missouri were to have enacted a law providing: “[T]hat all persons who have been in armed hostility to the United States shall, upon conviction thereof . . . shall also be thereafter rendered incapable of holding any of the offices . . . mentioned in the second article of the constitution of Missouri;—no one would have any doubt . . . [i]t would be an *ex post facto* law, and void; for it would add a new punishment for an old offence”); *see also id.* at 325 (“The Constitution deals with substance, not shadows. . . . It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.”).

25. Punishment of Tramps, ch. 270, § 1, 1878 N.H. Laws 612, 612 (West) (codified at OHIO REV. STAT. § 6995 (West 1897)).

26. *Id.* § 4.

27. *Id.* § 2.

28. *See id.* §§ 1–2, 4.

29. 58 N.E. 572, 575 (Ohio 1900).

30. *Id.* at 572 (quoting OHIO REV. STAT. § 6995 (1897)).

31. *See id.* at 575–76.

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.”³² The court further explained that “[w]hile this secures to him a right of which *he cannot be deprived*, it enjoins a duty *in execution* of which that right is *to be exercised*.”³³ The court reached its conclusion by drawing an analogy between the *conduct* of “going about begging and asking subsistence by charity” while carrying a firearm and the *conduct* prohibited at common law of “[g]oing armed with unusual and dangerous weapons, to the [t]error of the people.”³⁴

At the time of the ratification of the Bill of Rights and continuing through the nineteenth century, no state prohibited a person convicted of a crime who had completed their punishment from possessing or carrying firearms.³⁵ In 1876, Texas amended its constitutional right to arms provision to provide, “Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.”³⁶ Texas also enacted a statute prohibiting any person from carrying a pistol in public, and the penalty for a violation of this law included a fine and the forfeiture of the pistol found on the person.³⁷ In the 1878 case, *Jennings v. State*, the Texas Court of Appeals held that the forfeiture provision was “not within the scope of legislative authority.”³⁸ The court explained that while the Texas legislature, by virtue of the explicit language of Texas’s constitutional right to arms provision, “ha[d] the power by law to regulate the wearing of arms, with a view to prevent crime, . . . it ha[d] not the power by legislation to take a citizen’s arms away from him.”³⁹

During the founding era and nineteenth century, there were two instances in which a felon could be constitutionally disarmed: upon arrest⁴⁰ and during post-conviction incarceration.⁴¹ The latter restriction was consistent with the right to keep and bear arms, because an incarcerated felon was legally considered to be “for the time being a *slave*, in a condition of penal servitude to the State, and is subject to such laws and regulations as the State may choose to prescribe.”⁴² While incarcerated, a

32. *Id.* at 575.

33. *Id.* (emphases added).

34. *See id.* at 575–76 (“A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people. And statutes punishing such offenses are constitutional.”).

35. *See United States v. Harrison*, No. CR-22-00328, 2023 WL 1771138, at *12 (W.D. Okla. Feb. 3, 2023).

36. TEX. CONST., art. 1, § 23.

37. *See Jennings v. State*, 5 Tex. Ct. App. 298, 298 (1878).

38. *Id.* at 300.

39. *Id.* at 300–01 (“One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation.”).

40. *See State v. Buzzard*, 4 Ark. 18, 21 (1842) (“Persons accused of a crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned.”).

41. *See Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871).

42. *Id.* at 798 (emphasis added); *see also Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (“[F]or much of this country’s history, the prevailing view was that a prisoner was a mere ‘slave of the State’ who ‘not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him.’”)

felon did not have “the rights of freemen,”⁴³ but these rights were only “suspended during the term” of imprisonment.⁴⁴ Upon release, the ex-convict “forefeit[ed] all public offices and all private trusts, authority and power.”⁴⁵

At common law, searches and arrests were considered to be “unlawful trespass unless ‘justified.’”⁴⁶ An arrest or search was “justified” if done under the directions of a specific warrant.⁴⁷ While an “unjustified” search or arrest exposed the officer carrying out the search or arrest to “lawful resistance by bystanders or the target of his intrusion,” and rendered the officer liable for trespass damages, it was an offense to resist an officer acting “within the directions of” a valid warrant, and an officer doing so “was ‘indemnified’ against trespass liability.”⁴⁸

Warrantless arrests were a different matter. During the framing era, warrantless arrests were only justified (1) “[f]or a public offence committed or attempted in [the officer’s] presence” (“on view”), (2) “[w]hen the person arrested has committed a felony although not in [the officer’s] presence” (“the actual guilt justification”), and (3) “[w]hen a felony has in fact been committed and [the officer] has reasonable cause for believing the person arrested to have committed it” (“on suspicion”).⁴⁹ A warrantless misdemeanor arrest could only be made “on view.”⁵⁰ At common law, all attempted crimes, as well as assaults, batteries, and kidnappings, were misdemeanors, and a warrantless arrest for those crimes was not “justified” unless the person carrying out the arrest had actually seen the arrestee commit the crime.⁵¹ For example, if an officer who had not witnessed a nonfatal shooting (i.e., a misdemeanor) attempted a warrantless arrest of the person who had in fact committed the shooting, the shooter would have had the right to lawfully resist the arrest and, even if convicted, could bring suit against the arresting officer for unlawful trespass.⁵²

From 1792 until the start of the Civil War, several states enacted laws imposing prior restraints on the possession and carrying of firearms by slaves and free persons of

(quoting *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting); *Johnson v. California*, 543 U.S. 499, 528 (2005) (Thomas, J., dissenting) (“For most of this Nation’s history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them.” (first citing *Shaw*, 532 U.S. at 228; and then citing *Ruffin*, 62 Va. at 796)).

43. *Ruffin*, 62 Va. at 796.

44. *In re Estate of Nerac*, 35 Cal. 392, 396 (1868); see also *Kanter v. Barr*, 919 F.3d 437, 461 (7th Cir. 2019) (Barrett, J., dissenting) (“[T]he rights of felons serving less than life were merely *suspended* during the term of the sentence.” (first citing *Nerac*, 35 Cal. at 396; then citing *Ruffin*, 62 Va. at 796; and then citing *Bowles v. Habermann*, 95 N.Y. 246, 247 (1884))).

45. *Nerac*, 35 Cal. at 396.

46. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624 (1999).

47. *Id.* at 626.

48. *Id.* at 625–27.

49. *Id.* at 628–29 (some alterations in original) (quoting *Elk v. United States*, 177 U.S. 529, 535–36, 535 n.1 (1900)).

50. *Id.* at 630.

51. *Id.* at 630 n.220.

52. See *id.* at 630.

color.⁵³ The legal “justification” for imposing a prior restraint on the possession and carrying of firearms by slaves was that they were slaves and, by definition, did not have rights.⁵⁴ The legal “justification” for imposing a prior restraint on the possession and carrying of arms by free persons of color was that they were not “citizens,” and thus not entitled to full constitutional protections.⁵⁵ This point was famously expressed by Chief Justice Taney in *Dred Scott v. Sandford*.⁵⁶ Black people, according to Chief Justice Taney, simply could not have been thought to be citizens at the time of the founding, for if they were, they would have, amongst other rights, the right “to keep and carry arms wherever they went.”⁵⁷ As Justice Thomas has noted, “For Taney . . . States’ longstanding and widespread practice of denying free blacks equal civil rights conclusively showed that blacks were not ‘citizens’ entitled to various constitutional protections.”⁵⁸ And as Ninth Circuit Judge Kozinski has more cynically noted, “Taney well appreciated [that] the institution of slavery required a class of people who lacked the means to resist.”⁵⁹

53. See Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 206–10 (2006).

54. Cf. Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1269 (2023) (“Of course, slave patrols did not trench on any recognized or arguable constitutional rights for the simple reason that pre-Revolutionary slaves had none.”).

55. See, e.g., *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 334 (1822) (“[A]s the laws of the United States do not now authorise any but a white person to become a citizen, it marks the national sentiment upon the subject, and creates a presumption that no state had made persons of color citizens.”); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824); *Crandall v. State*, 10 Conn. 339, 345–47 (1834); *Hobbs v. Fogg*, 6 Watts 553, 556–59 (Pa. 1837); *State v. Morris*, 2 Del. (2 Harr.) 534, 537 (1837); *Benton v. Williams*, Dallah 496, 497 (Tex. 1843); *Leech v. Cooley*, 14 Miss. (6 S. & M.) 93, 99 (1846); *Pendleton v. State*, 6 Ark. 509, 511–12 (1846); *White v. Tax Collector*, 37 S.C.L. (3 Rich.) 136, 139 (1846); *Heirs of Bryan v. Dennis*, 4 Fla. 445, 454 (1852); *Bryan v. Walton*, 14 Ga. 185, 198–207 (1853); *State v. Newsom*, 27 N.C. (5 Ired.) 250, 250 (1844).

Moreover, by 1841, nearly every state or territory that had enacted a prior restraint on the possession and carrying of firearms by race either had no constitutional provision protecting the right to arms or had constitutional right-to-arms provisions that *explicitly* protected only white people. See Volokh, *supra* note 53, at 206–10 (collecting state constitutional right-to-bear-arms provisions by date). In 1834, Tennessee amended its provision covering “freemen” to covering only “free white men.” *Id.* at 209. In 1836, Arkansas enacted a provision covering only “free white men,” as did Florida in 1838. *Id.* “Florida went back and forth on the question of licenses for free blacks In 1828, Florida twice enacted provisions providing for free blacks to carry and use firearms upon obtaining a license from a justice of the peace.” Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 337 & n.136 (1991) (first citing Act of Nov. 17, 1828, § 9, 1828 Fla. Laws 174, 177 (West); and then citing Act of Jan. 12, 1828, § 9, 1827 Fla. Laws 97, 100 (West)). In 1831, Florida “repealed all provision[s] for firearm licenses for free blacks. This development predated by six months the Nat Turner slave revolt in Virginia” *Id.* at 337–38 (footnote omitted).

56. See 60 U.S. (19 How.) 393, 417 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

57. *Id.*

58. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring).

59. *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc); cf. *id.* at 569–70 (“All too many of the other great tragedies of history—Stalin’s atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece”).

The first felon-in-possession law was enacted in 1923, in an attempt by a gun-rights organization to fend off the spread of New York's handgun licensing regime.⁶⁰ In 1911, New York enacted the Sullivan Law, making it a felony to carry a handgun without a license and a misdemeanor to possess a handgun, even in one's home, without a license.⁶¹ In 1913, New York amended the Sullivan Law to permit magistrates to issue concealed carry permits to a person "only if that person proved 'good moral character' and 'proper cause.'"⁶²

In 1922, the United States Revolver Association, fearing the spread of the Sullivan Law, "drafted their own model gun control law and began promoting it around the country."⁶³ Proposed as an alternative to a restrictive handgun licensing regime, the Revolver Association Act, in relevant part, prohibited any person convicted of a "felony against the person or property of another" from possessing a handgun.⁶⁴

In July 1923, "largely on the recommendation of R.T. McKissick, president of the Sacramento Rife and Revolver Club," the governor of California signed the Revolver Association Act into law.⁶⁵ McKissick described the Act as introducing "an element of sanity into firearms legislation, so as to provide adequate punishments upon an increasing scale for the habitual gunman and, at the same time, permit law-abiding citizens to continue to own firearms for home defense and other legitimate uses."⁶⁶

In the 1924 case *People v. Camperlingo*, a California appellate court upheld the Act's prohibition against a convicted felon's possession of a handgun.⁶⁷ The court explained that "the right to keep and bear arms is not a right guaranteed either by the federal constitution or by the state constitution."⁶⁸ The court also noted that "the [l]egislature is entirely free to deal with the subject" of keeping and bearing arms, and that, insofar as the statute in question deprives a citizen "of one of his natural rights, in that his ability to better defend himself is somewhat lessened," the legislature may still

60. See David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127, 154 (2016) [hereinafter Kopel, *The First Century*] ("The statute was a model law, originally known [as] the Revolver Association Act, since it was proposed by the United States Revolver Association as an alternative to the New York State 1911 law which required a permit to purchase or possess a handgun.").

61. See *People ex rel. Darling v. Warden*, 134 N.Y.S. 335, 336 (Sup. Ct. 1911) *rev'd by* 139 N.Y.S. 277 (App. Ct. 1913); Don B. Kates, Jr., *The Battle Over Gun Control*, PUB. INT., Summer 1986, at 42, 43 (1986).

62. Bruce W. Dearstyn, *New York Searches for New 'Concealed Carry' Policy 111 Years After Its First*, GOTHAM GAZETTE (Jun. 28, 2022), <https://www.gothamgazette.com/130-opinion/11427-new-york-new-concealed-carry-gun-control> [<https://perma.cc/9BD6-QHJL>].

63. David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 347 (2016).

64. See, e.g., Act of June 13, 1923, ch. 339, § 2, 1923 Cal. Stat. 696 (West) (prohibiting persons convicted of a "felony against the person or property of another or against the government of the United States or of the State of California or of any political subdivision thereof" from owning or possessing a pistol, revolver, "or other firearm capable of being concealed upon the person").

65. *New Firearms Law Effective on August 7*, S.F. CHRON., July 15, 1923, at 3.

66. *Id.*

67. 231 P. 601, 603 (Cal. Ct. App. 1924).

68. *Id.* (emphasis omitted).

“regulate[.]” or “entirely destroy[.]” such rights “in the exercise of the police power of the state.”⁶⁹

In 1926, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Firearms Act, which prohibited persons convicted of “a crime of violence” from owning or possessing a pistol.⁷⁰ Then the federal government got in on the action:

In 1934, the Roosevelt Administration proposed the National Firearms Act [(NFA)] to address the gangster-style violence of the Prohibition Era by reducing the sale of automatic weapons and machine guns. Stymied by the federal government’s lack of police power, Attorney General Homer Cummings urged Congress to regulate guns indirectly through its enumerated taxing power. Congress accepted that suggestion, avoiding the acknowledged constitutional problem by imposing a tax—rather than a direct prohibition—on the making and transfer of particular firearms.

The landscape changed in 1937, when the Supreme Court adopted an expansive conception of the Commerce Clause. Newly empowered, Congress promptly enacted the Federal Firearms Act of 1938 [(FFA)]. For the first time, that law disarmed felons convicted of a “crime of violence”⁷¹

The FFA prohibited “any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”⁷² Section 2(f) of the FFA created a statutory presumption that a person’s prior “convict[ion] of a crime of violence and . . . possession of a firearm or ammunition” was sufficient to show that “the firearm was . . . received by . . . [him] in violation of th[e] Act.”⁷³ In *United States v. Tot (Tot I)*, the United States Court of Appeals for the Third Circuit upheld the FFA against a Second Amendment challenge.⁷⁴ The court stated that the Second Amendment, “unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.”⁷⁵

In *Tot v. United States (Tot II)*, the Supreme Court reversed the Third Circuit’s decision in part, holding that Section 2(f)’s statutory presumption was unconstitutional.⁷⁶ The Court noted that a statutory presumption could not rest on an “arbitrary” inference of “lack of connection” between the operative fact necessary to

69. *Id.* at 603–04 (internal quotation mark omitted).

70. Sam B. Warner, *Uniform Pistol Act*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 529, 531, 537 (1938).

71. *Range v. Att’y Gen.*, 69 F.4th 96, 107–08 (3d Cir. 2023) (Porter, J., concurring) (citations omitted).

72. Federal Firearms Act, Pub. L. No. 785, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938).

73. *Id.*

74. *Tot I*, 131 F.2d 261, 266 (3d Cir. 1942), *rev’d in part*, 319 U.S. 463 (1943).

75. *Id.*

76. *Tot v. United States (Tot II)*, 319 U.S. 463, 472 (1943).

prove the offense and the fact presumed under the statute.⁷⁷ In a concurring opinion, Justice Black noted that because the FFA “authorizes, and in effect constrains, juries to convict defendants . . . even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense,” the Constitution and Bill of Rights’ “procedural safeguards . . . stand as a constitutional barrier against thus obtaining a conviction.”⁷⁸ The Court did not address any Second Amendment questions in *Tot II*.⁷⁹ The Third Circuit’s view of the Second Amendment in *Tot I* would become “a prominent part of the jurisprudence of the lower federal courts from the 1940s through 2008,” with “nearly every Circuit Court of Appeals cit[ing] *Tot I*,” at some point.⁸⁰

Two decades after *Tot II*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (OCC),⁸¹ which was amended in part by the Gun Control Act of 1968 (GCA).⁸² Section 1202(a)(1) of the OCC prohibited any person convicted of a felony from receiving, possessing, or transporting firearms “in commerce or affecting commerce.”⁸³ Section 922(g) of the GCA prohibited, in relevant part, any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport any firearm or ammunition in interstate or foreign commerce,” and “to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”⁸⁴ Section 925(c) of the GCA “allowed the Secretary of the Treasury to grant an exemption from the firearm ban for certain felons,” upon a showing that “(1) they were not likely to conduct themselves ‘in an unlawful manner’ and (2) ‘that the granting of the relief would not be contrary to the public interest.’”⁸⁵ But as the Supreme Court has explained, “Since 1992 . . . the appropriations bar has prevented ATF . . . from using ‘funds appropriated herein . . . to

77. *Id.* at 467–68 (“[W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.”).

78. *Id.* at 473 (Black, J., concurring).

79. *See id.* at 463–72 (majority opinion).

80. Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens’s Heller Dissent*, 39 *FORDHAM URB. L.J.* 1503, 1506–07 (2012) (collecting cases).

81. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (current version at 34 U.S.C. §§ 10101–10755).

82. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (current version at 18 U.S.C. §§ 921–34); *see also* David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 *CUMB. L. REV.* 585, 595 (1986) (“[T]he early forms of the Gun Control Act were drafted with the assistance and encouragement of firearms manufacturers.”); *cf.* Brief of Black Guns Matter, et al. as Amici Curiae in Support of Petitioners at 5–6, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (“Fueled by a wave of racial violence in the summer of 1967 and ‘the fear inspired by black people with guns[,]’ Congress enacted new legislation aimed at restricting the possession of firearms.” (alteration in original) (quoting Adam Winkler, *The Secret History of Guns*, *THE ATLANTIC* (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/C2J2-YTCQ>])).

83. 18 U.S.C. app. § 1202(a)(1), *repealed by* Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

84. 18 U.S.C. § 922(g).

85. *Tyler v. Hillsdale Cnty. Sherriff’s Dep’t*, 837 F.3d 678, 709 (6th Cir. 2016) (Sutton, J., concurring in most of the judgment) (citing §§ 921(b)(3), 922(f), 925(c), 82 Stat. at 228, 231, 233).

investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§ 925(c)].”⁸⁶

In *Lewis v. United States*, the Supreme Court held that Section 1202(a)(1) of the OCC was constitutional under the “concept of equal protection embodied in the Due Process Clause of the Fifth Amendment” because “Congress could rationally conclude that any felony conviction . . . is a sufficient basis on which to prohibit the possession of a firearm.”⁸⁷ The Court also noted that it “has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm,” such as voting, “holding office in a waterfront labor organization,” and practicing medicine.⁸⁸

Despite Congress’s silence on the matter, several circuit courts have recognized the availability of a “justification defense”⁸⁹ to a federal felon-in-possession charge.⁹⁰ These courts “have justified this conclusion on the ground that Congress legislated against the backdrop of the common law which has historically recognized this defense.”⁹¹ In *United States v. Panter*, the United States Court of Appeals for the Fifth Circuit held that a convicted felon is not guilty of violating Section 1202(a)(1) when he, “reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself.”⁹² The court emphasized that its holding “protects a § 1202 defendant only for possession during the time he is endangered.”⁹³

Congress recodified Section 1202(a) as 18 U.S.C. Section 922(g) in 1986.⁹⁴ In *United States v. Gomez*, the United States Court of Appeals for the Ninth Circuit

86. *United States v. Bean*, 537 U.S. 71, 74–75 (2002) (alteration in original) (third omission in original) (quoting Treasury, Postal Service, and General Governmental Appropriations Act, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1993)).

87. 445 U.S. 55, 65–66 (1980).

88. *Id.* at 66 (first citing *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); then citing *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); and then citing *Hawker v. New York*, 170 U.S. 189, 204–05 (1898)). *But see McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (“[I]t is clear that the 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.”).

89. *United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991) (“This approach requires a defendant to establish that: (1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.”).

90. Kathryn Maza, *Necessity Defense to Felon-in-Possession Charges: The Third Circuit Justifies a Federal Justification Defense in Virgin Islands v. Lewis*, 56 VILL. L. REV. 725, 744 n.125 (2012); *Paolello*, 951 F.2d at 539 (collecting cases).

91. *Paolello*, 951 F.2d at 541 (“Congress in enacting criminal statutes legislates against the background of Anglo-Saxon common law.” (quoting *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980))).

92. 688 F.2d 268, 272 (5th Cir. 1982).

93. *Id.*

94. *Id.* at 272.

vacated a conviction under Section 922(g)(1),⁹⁵ holding that the lower court erred in denying the defendant's motion "seeking permission . . . to prove that his possession of [a] shotgun was justified."⁹⁶ In a footnote, Judge Kozinski noted that because "[t]he Second Amendment embodies the right to defend oneself and one's home against physical attack," Section 922(g)(1) "might not pass constitutional muster were it not subject to a justification defense."⁹⁷ The two other panel judges wrote separate concurrences explaining that they joined the opinion in full except for that footnote.⁹⁸

Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause) grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁹⁹ Section 922(g)(1), like its precursor, Section 1202(a)(1), was enacted pursuant to Congress's Commerce Clause powers, requiring a felon to possess a firearm "in . . . or affecting commerce" as an element of the crime.¹⁰⁰ In a Section 922(g)(1) prosecution, the "in commerce or affecting commerce" nexus is satisfied upon a mere showing that the firearm at issue "had previously travelled in interstate commerce," meaning that the firearm, at some point in its history, crossed state lines.¹⁰¹ In *United States v. Travisano*, the United States Court of Appeals for the Second Circuit affirmed a lower court's dismissal of an indictment under Section 1202(a)(1) because the government "conceded that it [could not] establish that the firearm travelled in interstate commerce after its manufacture."¹⁰² Similarly, in *United States v. Jones*, the Second Circuit vacated a conviction under Section 922(g)(1), based on the lack of evidence. The only evidence that the government put forth regarding whether the firearm possessed in New York had a

95. 18 U.S.C. § 922(g)(1) (prohibiting "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce").

96. *United States v. Gomez*, 92 F.3d 770, 774, 778 (9th Cir. 1996).

97. *Id.* at 774 n.7 (opinion of Kozinski, J.) (considering when federal firearms regulation impedes citizen self-defense, especially when "organized societal protection" such as police fail to offer protection). *But cf. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

98. *Gomez*, 92 F.3d at 778–79 (Hall, J., concurring); *Id.* at 779 (Hawkins, J., concurring).

99. U.S. CONST. art. I, § 8, cl. 3.

100. *See United States v. Bass*, 404 U.S. 336, 347, 350–51 (1971), *superseded by statute*, 18 U.S.C. § 922(g)(1) (amended 1986).

101. *Scarborough v. United States*, 431 U.S. 563, 566 (1977) (explaining the burden of proof in a § 1202(a)(1) prosecution); Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 386 (2006) ("[M]ost felon-in-possession prosecutions in federal court appear practically to rest on a Crossing State Lines Clause that appears nowhere in the Constitution."); *see also* Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. APP. PRAC. & PROCESS 671, 673 n.13 (2001) (noting that "[t]he author has handled approximately fifty [§ 922(g)] cases as a defense attorney . . . [and] has never handled—or even heard of—a § 922(g) prosecution in which a felon actually crossed state lines while in possession of a firearm or acquired a firearm from out of state").

102. 724 F.2d 341, 347 (2d Cir. 1983) (noting that Section 1202(a)(1) cannot "be read as proscribing mere possession of a firearm").

sufficient nexus to interstate commerce was testimony from an FBI agent stating that “handguns are not presently manufactured in New York state.”¹⁰³

In 1989, University of Texas School of Law professor Sanford Levinson published *The Embarrassing Second Amendment* in the Yale Law Journal.¹⁰⁴ Professor Levinson drew attention to the fact that in academic contexts such as law reviews, casebooks, and scholarly legal publications, “the Second Amendment is not at the forefront of constitutional discussion.”¹⁰⁵ He also observed that this was odd in that “millions of Americans, even if (or perhaps *especially* if) they are not academics, can quote the Amendment and would disdain any presentation of the Bill of Rights that did not give it a place of pride.”¹⁰⁶ Professor Levinson asserted that the Second Amendment “may be profoundly embarrassing to many who . . . view themselves as committed to zealous adherence to the Bill of Rights (such as most members of the ACLU).”¹⁰⁷ Professor Levinson cautioned against rejecting a reading of the Second Amendment as an individual right due to social and practical concerns and not on a historical reading of the text:

If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?¹⁰⁸

Professor Levinson claimed that “[f]or too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members.”¹⁰⁹ He concluded by asserting, “It is time for the Second Amendment to enter full scale into the consciousness of the legal academy.”¹¹⁰ Echoing Professor Levinson’s concerns was attorney David I. Caplan.¹¹¹ In 1990, Caplan published the article *Gun Control Jeopardizes All Our Constitutional Rights*, endorsing the “individual rights” view of the Second Amendment and warning that “those who cherish liberty under the Constitution must oppose any restrictive ‘gun control’ legislation—whether past, present, or future—as well as any other legislation encroaching on constitutional rights.”¹¹² For Caplan, “any restrictive or prohibitory ‘gun control’ legislation threatens the Second Amendment and hence similarly

103. 16 F.3d 487, 491–92 (2d Cir. 1994).

104. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

105. *Id.* at 639.

106. *Id.* at 642.

107. *Id.*

108. *Id.* at 657.

109. *Id.* at 658.

110. *Id.*

111. See generally David I. Caplan, *Gun Control Jeopardizes All Our Constitutional Rights*, 3 J. ON FIREARMS & PUB. POL’Y 57 (1990).

112. *Id.* at 63.

threatens the rest of the Bill of Rights.”¹¹³ This was a perspective also taken at the time by lawyer Alan Dershowitz:

Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it’s not an individual right or that it’s too much of a public safety hazard don’t see the danger in the big picture. They’re courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.¹¹⁴

By 1996, the “individual rights” view would become the dominant view among legal scholars and historians.¹¹⁵ In 1996, Professor Michael A. Bellesiles published an article in the *Journal of American History*,¹¹⁶ which “present[ed] a startling reinterpretation of the role of guns in early America,” arguing that guns were scarce during this time and dealing a severe blow to the “individual rights” view.¹¹⁷ The following year, the Organization of American Historians awarded Professor Bellesiles the Binkley-Stephenson Award for this article.¹¹⁸ In September 2000, Professor Bellesiles expanded the ideas from his article into a book entitled *Arming America: The Origins of a National Gun Culture*.¹¹⁹ The book “enjoyed nearly universal critical acclaim.”¹²⁰ In a front-page editorial for the *New York Times Book Review*, historian and critic of the “individual rights” view Garry Wills wrote: “Bellesiles has dispersed the darkness that covered the gun’s early history in America. He provides overwhelming evidence that our view of the gun is as deep a superstition as any that affected Native Americans in the 17th century.”¹²¹ A similarly positive review was written by historian Edmund Morgan in *The New York Review of Books*.¹²² In April 2001, Columbia University awarded *Arming America* the coveted Bancroft Prize.¹²³

113. *Id.*

114. Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995) (quoting telephone interviews with Professor Alan Dershowitz, Harv. Univ. (May 3–4, 1994)).

115. Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); *see also id.* at 1144 n.13 (listing law review articles supporting the “individual rights” view).

116. *See generally* Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760–1865*, 83 J. AM. HIST. 425 (1996).

117. Clayton E. Cramer, *Why Footnotes Matter: Checking Arming America’s Claims*, 1 PLAGIARY 149, 149 (2006).

118. *Binkley-Stephenson Award*, ORG. OF AM. HISTORIANS, <https://www.oah.org/awards/article-essay-awards/binkley-stephenson-award/> [<https://perma.cc/4G4G-8PFY>] (last visited Jan. 28, 2024) (click “Past Winners”) (“The Binkley-Stephenson Award is given annually by the Organization of American Historians for the best article that appeared in the *Journal of American History* during the preceding calendar year.”).

119. MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000).

120. Cramer, *supra* note 117, at 149.

121. Garry Wills, Book Review, *Spiking the Gun Myth*, N.Y. TIMES, Sept. 10, 2000, § 7, at 5.

122. Edmund S. Morgan, *In Love with Guns*, N.Y. REV. BOOKS (Oct. 19, 2000), <https://www.nybooks.com/articles/2000/10/19/in-love-with-guns/> [<https://perma.cc/759K-NJA4>].

123. James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2201 (2002) (book review); *Libraries Awards*, COLUM. UNIV. LIBRS., <https://library.columbia.edu/about/awards.html> [<https://perma.cc/S64D-RKTK>] (last visited Jan. 28, 2024) (“The Bancroft Prize was

In support of his claims, Professor Bellesiles relied on historical probate data as his “principal evidence.”¹²⁴ Then-president of the NRA, Charlton Heston, “tried to dismiss the probate data as irrelevant and incomplete,” and was “criticized for not wanting to face facts and for anti-intellectualism.”¹²⁵ Professor Bellesiles responded to then-president Heston in an interview with *Salon* magazine:

Cheating on probate was a very great crime because resources were thinly stretched. When someone died, every single item owned—everything, even broken things—was recorded. Guns had to be listed. . . . The state had all priority rights over firearms. They could appropriate them at any time without recompense. There was actually greater value placed on recording firearms than any other single item.¹²⁶

As would soon be made apparent, Bellesiles had in fact fabricated evidence.¹²⁷ A year after *Arming America*’s release, “academic journals began publishing some devastating critiques.”¹²⁸ Law professor James Lindgren was instrumental in publicly exposing *Arming America*’s probate errors, had this to say about the book:

Unless one goes through all the book’s comments on a particular topic and the evidence cited to back them up, one can’t really see just how systematic the errors are. . . . Nearly every sentence that Bellesiles wrote about probate records in the original hardback edition of *Arming America* is false. Nearly everything that Bellesiles says about homicide is either false or misinterpreted, as is most of what he wrote about the relative merits of the axe over the gun.¹²⁹

In the 2001 case *United States v. Emerson*, the Fifth Circuit became the first federal appellate court to explicitly hold that the Second Amendment protects an individual right to keep and bear arms.¹³⁰ Nevertheless, the court noted that “it is clear that felons, infants and those of unsound mind may be prohibited from possessing

established at Columbia University in 1948 It is considered one of the most distinguished academic awards in the field of history.”)

124. Anthony Ramirez, *The Lock and Load Myth: A Disarming Heritage*, N.Y. TIMES, Apr. 23, 2000, § 4, at 3.

125. Lindgren, *supra* note 123, at 2228–29.

126. David Bowman, *The Reasonable Gun Nut*, SALON (Sept. 7, 2000, 8:09 AM), <http://www.salon.com/books/feature/2000/09/07/bellesiles> [<https://perma.cc/4XSW-JZTR>].

127. See Lindgren, *supra* note 123, at 2229 & n.200 (“For example, five of the six sentences on probate records on page 13 of *Arming America* are false; of the twenty-one sentences about probate records on pages 109–10, seventeen are false, two are misleading, and only two sentences (having little to do with the thesis) are true.”).

128. *Id.* at 2201 (first citing Robert H. Churchill, *Guns and the Politics of History*, 29 REVS. AM. HIST. 329 (2001); then citing Joyce Malcolm, Book Review, 79 TEX. L. REV. 1657 (2001) (reviewing BELLESILES, *supra* note 119); then citing Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship Between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 WM. & MARY Q. 223 (2002); then citing Ira D. Gruber, *Of Arms and Men: Arming America and Military History*, 59 WM. & MARY Q. 217 (2002); and then citing Gloria L. Main, *Many Things Forgotten: The Use of Probate Records in Arming America*, 59 WM. & MARY Q. 211 (2002)).

129. Lindgren, *supra* note 123, at 2229 (footnote omitted).

130. See 270 F.3d 203, 260 (5th Cir. 2001), *abrogated by* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023).

firearms.”¹³¹ In the 2003 case *United States v. Darrington*, the Fifth Circuit rejected a Second Amendment challenge to Section 922(g)(1), simply citing *Emerson*.¹³²

In 2008, the Supreme Court decided *District of Columbia v. Heller* (*Heller I*).¹³³ The case involved a Second Amendment challenge to District of Columbia laws that (1) barred the civilian ownership of handguns, (2) prohibited the carrying of a firearm in the home without a license, and (3) prohibited the use of “functional firearms within the home.”¹³⁴

Heller did not involve Section 922(g)(1), nor did it involve a convicted felon as the plaintiff. Nevertheless, in their brief as amicus curiae, the United States argued that “convicted felons[] simply do not enjoy Second Amendment rights,” and “[b]ecause such individuals fall outside the protection of the Second Amendment, a law restricting gun ownership by felons need not satisfy the heightened scrutiny appropriate for laws prohibiting the possession of categories of guns by law-abiding citizens.”¹³⁵ The United States supported this argument by stating that “[a]bundant historical evidence makes clear that Section 922(g)(1)’s ban on firearm possession by felons—by far the most frequently applied of the prohibitions currently contained in 18 U.S.C. 922(g)—is consistent with the Framers’ intent,” further noting that “[t]he validity of Section 922(g)(1) thus does not depend on the satisfaction of heightened scrutiny or on any empirical showing.”¹³⁶ The United States also criticized the “categorical test” adopted by the lower court—that “[o]nce it is determined . . . that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them”—stating that “[s]uch a categorical approach would cast doubt on . . . Congress’s general authority to

131. *Id.* at 261, 226 n.21 (first citing *Robertson v. Baldwin*, 165 U.S. 275 (1897); then citing Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983); then citing Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms”*, 49 L. & CONTEMP. PROBS. 151 (1986); and then citing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983)).

132. 351 F.3d 632, 633–34 (5th Cir. 2003) (citing *Emerson*, 270 F.3d at 261, 226 n.21).

133. 554 U.S. 570 (2008).

134. *Id.* at 575–76; D.C. CODE ANN. § 7-2502.02(a)(4) (West 2008), *invalidated by Heller I*, 554 U.S. 570 (“A registration certificate shall not be issued for a . . . [p]istol not validly registered to the current registrant in the District prior to September 24, 1976”); D.C. CODE ANN. § 22-4504(a) (West 2009), *invalidated by Heller I*, 554 U.S. 570 (“No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law.”); D.C. CODE ANN. § 7-2507.02 (West 2008), *invalidated by Heller I*, 554 U.S. 570 (“[E]ach registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.”).

135. Brief for the United States as Amicus Curiae at 25, *Heller I*, 554 U.S. 570 (2008) (No. 07-290).

136. *Id.* at 25–26 (citations omitted) (first citing Kates, *supra* note 131, at 266 (“Felons simply did not fall within the benefits of the common law right to possess arms. . . . Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.”); then citing Dowlut, *supra* note 131, at 96 (“Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms].”); and then citing *Emerson*, 270 F.3d at 261 (“[I]t is clear that felons . . . may be prohibited from possessing firearms.”)).

protect the public safety by identifying and proscribing particularly dangerous weapons.”¹³⁷

In their amici curiae brief, a group of elected district attorneys¹³⁸ “urge[d] the Court to consider the potentially negative, unintended, and wholly unnecessary consequences of an affirming opinion,” arguing that “an affirmance could inadvertently call into question the well-settled Second Amendment principles under which countless state and local criminal firearms laws have been upheld by courts nationwide.”¹³⁹ As an example, the district attorneys noted that “[e]xplicitly relying on the decision below, one repeat felony offender recently sought to set aside a guilty verdict in connection with unlawful possession of a firearm,” by “advanc[ing] the proposition that *both* the authority of Congress to enact and the authority of this Court to adjudicate the possession of firearms by anyone, *including a convicted felon*, are prohibited by Article I and the Second Amendment to the Constitution.”¹⁴⁰ The district attorneys also predicted a change that “could needlessly compromise prosecutors’ ability to rely on and enforce current firearms laws, as well as disturb their allocation of resources to combatting gun crimes.”¹⁴¹ Accordingly, the district attorneys requested the Court limit its decision to the three provisions of the D.C. Code on which it granted certiorari to “avoid needless confusion and uncertainty about the continued viability and *stare decisis* effect of . . . prior Second Amendment jurisprudence[,] . . . help to discourage . . . constitutional challenges[,] . . . and provide necessary guidance for the lower courts to properly analyze those challenges.”¹⁴²

In his reply brief, Plaintiff Dick Heller argued that “[i]f a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact,” noting that “[b]ecause the governmental interest is so strong in this area, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country’s basic firearm safety laws.”¹⁴³ As an example, Heller stated that “[t]he prohibition on possession of guns by felons, 18 U.S.C. § 922(g), . . . would easily survive strict scrutiny.”¹⁴⁴ Similarly, in its brief as amici curiae, the NRA argued that “laws burdening Second Amendment rights should be subjected to strict scrutiny and struck down in their entirety when overly broad.”¹⁴⁵ The NRA further stated that “[p]etitioners and their supporting amici attempt to conjure fears of legal bedlam should courts examine firearms laws under strict scrutiny,” but noted that “they present no real argument that

137. *Id.* at 6, 21.

138. Amici Curiae Brief of District Attorneys in Support of Petitioners at 1, *Heller I*, 554 U.S. 570 (No. 07-290).

139. *Id.* at 5.

140. *Id.* at 17 (citing Motion to set Aside the Verdict and Dismiss the Charges at 3, 10–12, *United States v. Lucky*, No. 05-CR-33 (E.D.N.Y. Dec. 7, 2007)).

141. *Id.* at 18–19.

142. *Id.* at 23.

143. Respondent’s Brief at 57, *Heller I*, 554 U.S. 570 (2008) (No. 07-290).

144. *Id.*

145. Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent at 3, *Heller I*, 554 U.S. 570 (No. 07-290).

long-standing laws regulating the ownership and use of firearms, such as laws barring ownership by convicted felons[,] . . . would fail to pass muster under that test.”¹⁴⁶

At oral argument, the United States noted that “[t]his Court has recognized that there are certain pre-existing exceptions that are so well established that you don’t really even view them as Second Amendment or First Amendment infringement,” providing “libel” and “laws barring felons from possessing handguns” as examples.¹⁴⁷ When asked by Justice Ginsburg if any of the “panoply of Federal laws restricting gun possession” would “be jeopardized” under strict scrutiny, the United States stated, “Federal firearm statutes can be defended as constitutional . . . consistent with th[e] kind of intermediate scrutiny standard that we propose,” but noted that “[i]f you apply strict scrutiny, . . . the result would be quite different, unfortunately.”¹⁴⁸

Responding to the District of Columbia’s “description of the opinion below as allowing armor-piercing bullets and machine guns,” Chief Justice Roberts stated: “Well, I’m not sure that it’s accurate to say the opinion below allowed those. The law that . . . the court below was confronted with was a total ban, so that was the only law they considered.”¹⁴⁹ Continuing, Chief Justice Roberts further noted that “[i]f the District passes a ban on machine guns or whatever, then . . . that law would be considered by the court and perhaps would be upheld as reasonable[, b]ut the only law they had before them was a total ban,” to which Justice Scalia added: “Or a law on the carrying of concealed weapons, which would include pistols, of course.”¹⁵⁰ Later, Chief Justice Roberts asked the United States, “Why would you think that the opinion striking down an absolute ban would also apply to a . . . narrower one directed solely to machine guns?”¹⁵¹

Chief Justice Roberts also expressed skepticism toward adopting a level of scrutiny for evaluating alleged violations of the Second Amendment:

Isn’t it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time . . . and determine how . . . this restriction and the scope of this right looks in relation to those?

I’m not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked

146. *Id.* at 3–4.

147. Transcript of Oral Argument at 40, *Heller I*, 554 U.S. 570 (No. 07-290).

148. *Id.* at 43–44; cf. Linda Greenhouse, *Court Weighs Right to Guns, and Its Limits*, N.Y. TIMES (Mar. 19, 2008), <https://www.nytimes.com/2008/03/19/washington/19scotus.html> [<https://perma.cc/MHB6-ETMH>] (“In accordance with the brief he filed for the government, [Solicitor General Paul D.] Clement supported the individual-rights view and took no position on the statute’s constitutionality. But he criticized the lower court as having approached the issue too categorically. And he cautioned the court against writing an opinion so broad as to jeopardize federal gun regulations.”).

149. Transcript of Oral Argument, *supra* note 147, at 21–23.

150. *Id.* at 23.

151. *Id.* at 46.

up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?¹⁵²

Ultimately, the *Heller* Court declined to adopt a means-end scrutiny framework, instead focusing on the meaning of the Second Amendment. Accordingly, the Court held that the Second Amendment protected an individual right to keep and bear arms.¹⁵³ Responding to the concerns raised in the amicus briefs, the Court also noted, in dicta: “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”¹⁵⁴

Following *Heller*, these dicta became the subject of immediate academic criticism.¹⁵⁵ Some speculated that this list was added as “compromise language designed to secure Justice Kennedy’s vote.”¹⁵⁶ These dicta were used to reach a variety of conclusions about the proper framework for Second Amendment challenges. Then-Judge Kavanaugh took the Court’s use of the term “longstanding” to mean that the Court “established that the scope of the Second Amendment right . . . is determined by reference to text, history, and tradition,” rather than by means-end scrutiny.¹⁵⁷

152. *Id.* at 44.

153. *Heller I*, 554 U.S. 570, 625–26 (2008).

154. *Id.* at 626–27. In a footnote, the Court added: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26.

155. See, e.g., Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371 (2009); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); see also Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 HASTINGS L.J. 717, 724 (2019) [hereinafter Johnson, *Power Side*] (“Critics have argued that *Heller* is poor originalism. Some of the sharpest criticisms have focused on *Heller*’s validation of most modern federal gun regulation as presumptively lawful without even a hint of historical analysis.”); David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE-NOVO 99, 100 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524103 [<https://perma.cc/CF9D-2RZ9>] (“[T]here are living Constitution elements in *Heller*. The *Heller* list of presumptively constitutional gun controls that were not practiced in the Founding Era cannot reasonably be derived from the controls that were practiced.”).

156. Larson, *supra* note 155, at 1372; Johnson, *Power Side, supra* note 155, at 724 (“Some cynics have dubbed this the ‘Kennedy paragraph,’ speculating that these concessions were a blunt capitulation necessary to gain the vote of Justice Anthony Kennedy.”). This view seems to have been corroborated by Justice Stevens. See JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS* 485–87 (2019). Justice Stevens disclosed that he circulated his dissenting opinion to the members of the Court on April 28, 2008, five weeks before Justice Scalia circulated a draft of the majority opinion, with the intention of persuading either Justice Kennedy or Justice Thomas to change his vote. *Id.* at 485–86. Justice Stevens noted:

In the end, of course, beating Nino [Scalia] to the punch did not change the result, but I do think it forced him to significantly revise his opinion to respond to the points I raised in my dissent. And although I failed to persuade Tony [Kennedy] to change his vote, I think our talks may have contributed to *his insisting on some important changes* before signing on to the Court’s Opinion.

Id. at 487 (emphasis added).

157. *Heller II*, 670 F.3d 1244, 1272–73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“*Heller* affirmatively approved a slew of gun laws—machine gun bans, concealed-carry laws, felon-in-possession laws, and the like—without analyzing them under strict scrutiny. The Court approved them based on a

Professor Carlton F.W. Larson reasoned that, given that felon-in-possession laws “significantly postdate both the Second Amendment and the Fourteenth Amendment,” and would be “inexplicable under strict scrutiny,” the Court’s approval of this exception indicates that it “is applying some lower standard of scrutiny.”¹⁵⁸ The Seventh Circuit understood *Heller*’s use of the term “presumptively lawful” to mean that “there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge.”¹⁵⁹ For whatever confusion that may have initially resulted from these dicta, lower courts reached rather consistent results in applying it.¹⁶⁰ In the first seven months following the decision in *Heller*, lower federal courts ruled in more than sixty cases on various gun control laws. These cases addressed “laws banning possession of firearms by felons, drug addicts, illegal aliens, and individuals convicted of domestic violence misdemeanors.”¹⁶¹ In every single one of those cases, the courts upheld the laws in question.¹⁶²

In *United States v. Marzzarella*, the Third Circuit created a two-step framework for facial Second Amendment challenges.¹⁶³ First, did the law “impose[] a burden on conduct falling within the scope of the Second Amendment’s guarantee,”¹⁶⁴ and, second, if it did not, the court would apply “means-end” scrutiny to the law’s constitutionality.¹⁶⁵ In *United States v. Barton*, the court applied this framework to the disarmament of a defendant previously convicted of felony possession of cocaine with intent to distribute and felony receipt of a stolen firearm.¹⁶⁶ Writing for the court, Judge Hardiman rejected the facial challenge, noting that “[t]he Supreme Court has twice stated that felon gun dispossession statutes are ‘presumptively lawful,’” ending the *Marzzarella* inquiry at the first step.¹⁶⁷ As applied to the defendant, however, the court asserted the Second Amendment did not protect those who were “likely to commit violent offenses.”¹⁶⁸ Accordingly, the court held that to prevail in an as-applied challenge, a defendant must “distinguish his circumstances from those of persons historically barred from Second Amendment protections.”¹⁶⁹

history- and tradition-based test, not strict scrutiny. Indeed, these laws might not have passed muster under a strict scrutiny analysis.”)

158. Larson, *supra* note 155, at 1372–73, 1376.

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

160. See Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/the-new-second-amendment_b_154783 [<https://perma.cc/43KQ-99D4>].

161. *Id.*

162. *Id.*

163. 614 F.3d 85, 89 (3d Cir. 2010).

164. *Id.*

165. *Id.*

166. 633 F.3d 168, 169–70 (3d Cir. 2011).

167. *Id.* at 172 (quoting *Heller I*, 554 U.S. 570, 626–27, 626 n.26 (2008)); see also *id.* at 171 (“We agree with the Second and Ninth Circuits that *Heller*’s list of ‘presumptively lawful’ regulations is not dicta.”).

168. *Id.* at 173, 175.

169. *Id.* at 174; see also *id.* at 175 (“The federal felon gun dispossession statute . . . does not depend on how or for what reason the right is exercised. Rather it focuses upon whom the right was intended to protect.”).

In *Binderup v. Attorney General*, the Third Circuit, sitting en banc, addressed the constitutionality of the federal felon-in-possession law as applied to two individuals previously convicted of state misdemeanors.¹⁷⁰ Stating that they were applying *Marzzarella*'s two-step framework, the majority first concluded that a person who demonstrates a lack of "virtue" is historically not protected by the Second Amendment.¹⁷¹ The majority then held that defendants must demonstrate that their previous convictions did not place them in this "unvirtuous" category.¹⁷² Three judges concluded that the challengers had demonstrated their previous offenses were not sufficiently "unvirtuous."¹⁷³ Those three judges then moved on to step two of the original *Marrzarella* framework, concluding that under intermediate scrutiny, the federal felon-in-possession law was unconstitutional as applied to the challengers.¹⁷⁴

In a concurring opinion, Judge Hardiman, joined by four other judges, rejected the conclusion that "virtue" conferred Second Amendment protection, instead holding that "the time-honored principle [is] that the right to keep and bear arms does not extend to those likely to commit *violent* offenses."¹⁷⁵ Applying *Barton*'s one-step framework, Judge Hardiman argued that the challengers had sufficiently "distinguish[ed] themselves and their circumstances."¹⁷⁶

Dissenting in *Kanter v. Barr*, then-Judge Barrett echoed Judge Hardiman's opinion in *Binderup*, stating that "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."¹⁷⁷ In support of this proposition, then-Judge Barrett cited constitutional proposals from the New Hampshire, Massachusetts, and Pennsylvania ratifying conventions.¹⁷⁸ Then-Judge Barrett also discussed that British officers of the Crown could disarm anyone "dangerous to the peace of the Kingdom," that a Protestant

170. 836 F.3d 336, 340–41 (3d Cir. 2016). One individual was convicted of corrupting a minor, which carried a potential five-year prison sentence. *Id.* at 340. The other individual was convicted of unlawfully carrying a handgun without a license, which carried a potential three-year prison sentence. *Id.* Neither individual served any prison time. *Id.*

171. *Id.* at 347–49.

172. *Id.* at 349–50.

173. *Id.* at 351–53 (plurality opinion).

174. *Id.* at 353–56.

175. *Id.* at 367 (Hardiman, J., concurring in part and concurring in the judgments) (emphasis added).

176. *Id.* at 374–80.

177. 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) ("In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. But neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons.")

178. *Id.* at 454. The New Hampshire proposal provided that: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." *Id.* at 454 (emphasis omitted) (citing 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1891)). The Pennsylvania proposal provided that: "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." *Id.* at 455 (emphasis omitted) (citing 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665 (1971)). The Massachusetts proposal stated that the Constitution should not be construed "to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." *Id.* at 454 (emphasis omitted) (citing SCHWARTZ, *supra*, at 675, 681).

Parliament disarmed Catholics, and that early American colonies disarmed slaves and Native Americans.¹⁷⁹

In a 2020 article, Joseph G.S. Greenlee, noting that “*Heller* expressly stated that its list of presumptively lawful regulatory measures—including prohibitions on firearm possession by felons—have ‘historical justifications,’”¹⁸⁰ argued that “[v]iolent and other dangerous persons have historically been banned from keeping firearms 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.”¹⁸¹

In *New York State Rifle & Pistol Ass’n v. Bruen*, the Supreme Court held that “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense *outside* the home.”¹⁸² The *Bruen* Court addressed whether New York’s “Sullivan Law” handgun licensing regime, which “issue[d] public-carry licenses only when an applicant demonstrates a *special need* for self-defense,” violated the Constitution.¹⁸³ Before addressing the validity of the provision, the Court made “the standard for applying the Second Amendment” explicit:

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”¹⁸⁴

Turning to the text of the Second Amendment, the Court initially noted that the challengers, two American citizens, “are part of ‘the people’ whom the Second Amendment protects.”¹⁸⁵ Next, the Court concluded that that the challengers’ “proposed course of conduct—carrying handguns publicly for self-defense”—is protected by the plain text of the Second Amendment, additionally noting that New

179. *Id.* at 454–58 (first citing the Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13; then citing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 18–19 (1994) (explaining that Protestants feared revolt, massacre, and counter-revolution from Catholics); then citing C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 723 (2009) (“In short, the stated principle supporting the disability was cause to fear that a person, although technically an English subject, was because of his beliefs effectively a resident enemy alien liable to violence against the king.”); then citing ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA* 22 (2001) (“Although the colonial demand for such discriminatory controls sprang from circumstances different from those in England, as in applying them against Indians and blacks, colonists usually followed home-country practices of excluding other distrusted people from ownership.”); and then citing Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 157 (2007)). American colonials were not above disarming Catholics as well but based on “allegiance” rather than faith tradition. Churchill, *supra*, at 157.

180. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 255, 285 (2020).

181. *Id.*

182. 142 S. Ct. 2111, 2122 (2022) (emphasis added).

183. *Id.* (emphasis added).

184. *Id.* at 2129–30 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961)).

185. *Id.* at 2134 (citing *Heller I*, 554 U.S. 570, 580 (2008)).

York “do[es] not dispute this. . . [n]or could they.”¹⁸⁶ New York instead argued that the Second Amendment “permits a State to condition handgun carrying in areas ‘frequented by the general public’ on a showing of a nonspeculative need for armed-self-defense in those areas.”¹⁸⁷ After analyzing historical evidence presented by New York, the Court rejected this argument, stating, “Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.”¹⁸⁸

Almost a year after *Bruen*, in *Range v. Attorney General*, the Third Circuit, sitting en banc, addressed the constitutionality of Section 922(g)(1) as applied to a man who was convicted of welfare fraud in 1995.¹⁸⁹ Writing for an 11-4 majority, Judge Hardiman first addressed the district court’s holding, that because the challenger’s 1995 conviction made him an “unvirtuous citizen,” he fell outside the scope of persons within “the people” protected by the Second Amendment.¹⁹⁰ Noting that *Bruen* had abrogated the Third Circuit standard for assessing Section 922(g)(1) challenges, the court turned to apply *Bruen*’s Second Amendment framework to the facts of the case.¹⁹¹

At step one, the court rejected the government’s argument that the challenger is not protected by the Second Amendment because “[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens.”¹⁹² The court noted that, while *Heller* did use the language “law-abiding citizens” to refer to persons protected by the Second Amendment, this was dicta, and moreover, *Heller* explained that “‘the people’ as used throughout the Constitution ‘unambiguously refers to all members of the political community, not an unspecified subset.’”¹⁹³ After holding that the challenger is one of “the people” protected by the Second Amendment, the court addressed whether the federal felon-in-possession law regulates the challenger’s proposed course of conduct—“to possess a rifle to hunt and a shotgun to defend himself at home.”¹⁹⁴ The court easily found that it did, citing *Heller* for the proposition that the “Second Amendment extends, prima facie, to all instruments that constitute bearable arms.”¹⁹⁵

Having held that “the Constitution presumptively protects” the challenger and his conduct, the court moved on to step two, addressing whether the government had met its burden to demonstrate that the federal felon-in-possession law as applied to the challenger was “consistent with the Nation’s historical tradition of firearm

186. *Id.* at 2134–35 (“The definition of ‘bear’ naturally encompasses public carry. . . . To confine the right to ‘bear’ arms to the home would nullify half of the Second Amendment’s operative protections.”).

187. *Id.* at 2135.

188. *Id.* at 2156.

189. 69 F.4th 96, 98–99 (3d Cir. 2023).

190. *Id.* at 99.

191. *Id.* at 100–01.

192. *Id.* at 101.

193. *Id.* (quoting *Heller I*, 554 U.S. 570, 580 (2008)).

194. *Id.* at 103.

195. *Id.* (quoting *Heller I*, 554 U.S. at 582).

regulation.”¹⁹⁶ The court first rejected the government’s argument that a 1961 federal law prohibiting persons convicted of crimes punishable by more than one year of imprisonment from possessing firearms was relevant to the case, noting, “[W]e are confident that a law passed in 1961—some 170 years after the Second Amendment’s ratification and nearly a century after the Fourteenth Amendment’s ratification—falls well short of ‘longstanding’ for purposes of demarcating the scope of a constitutional right.”¹⁹⁷ The court also noted that the first state and local felon-in-possession laws, dating back to the early 1920’s, were similarly irrelevant, as “20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.”¹⁹⁸

The court next rejected the government’s logic that the challenger does not have a right to keep and bear arms because founding-era governments disarmed “Loyalists, Native Americans, Quakers, Catholics, and Blacks.”¹⁹⁹ The court noted that, apart from the fact that restrictions based on race and religion would be illegal under the First and Fourteenth Amendments, any analogy between those groups and the challenger “would be ‘far too broad.’”²⁰⁰

The court also rejected the government’s assertion that the challenger does not have a right to keep and bear arms because some felons were punished with death during the founding era.²⁰¹ The court explained that the fact that some felons were punished with death during the founding era says nothing about whether “lifetime disarmament . . . is rooted in our Nation’s history and tradition.”²⁰²

The court further explained that during the founding era, felons were free to purchase firearms after their sentences were completed.²⁰³ Accordingly, the court held, “Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like [the challenger] of their firearms,” it “cannot constitutionally strip him of his Second Amendment rights.”²⁰⁴

III. DISCUSSION

Bruen held that, where only one state in 121 years following the ratification of the Second Amendment had conditioned the right to publicly carry a firearm on a showing of “good cause,” a New York law first enacted in 1913 doing the same fell outside the “American tradition” necessary for firearm regulation.²⁰⁵ Arguably, this proposition alone suffices to settle the issue of whether a law prohibiting a person convicted of a felony from possessing a firearm is constitutional. The first law to expressly deny

196. *Id.* (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126, 2130 (2022)).

197. *Id.* at 104.

198. *Id.* at 104 n.8 (omission in original) (quoting *Bruen*, 142 S. Ct. at 2154 n.28).

199. *Id.* at 104–05.

200. *Id.* (alteration omitted) (quoting *Bruen*, 142 S. Ct. at 2134).

201. *Id.* at 105.

202. *Id.*

203. *Id.*

204. *Id.* at 106.

205. *See Bruen*, 142 S. Ct. at 2153, 2156.

persons convicted of *any crime* the right to keep or bear arms was enacted ten years after New York's Sullivan Law, which was at issue in *Bruen*.²⁰⁶ *Bruen* stands for the proposition that this law appeared too late in time to be considered reflective of the scope of the Second Amendment, thus a modern law rooted in even *later* history is unconstitutional.

A. *Applying Bruen's Framework*

Let's apply *Bruen's* framework to a hypothetical convicted felon. Assume the following scenario: a U.S. citizen ("Person X") possesses a handgun for the purpose of self-defense and has a previous violent crime conviction that was punishable by over one year imprisonment.²⁰⁷ The sole issue in this hypothetical is whether the government can prohibit Person X from possessing a handgun for self-defense on the basis of this prior conviction.

As both *Bruen* and *Heller* tell us, the Second Amendment right is "guaranteed to 'all Americans.'"²⁰⁸ And just as "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms," nothing in the Second Amendment's text draws a felon/non-felon distinction either.²⁰⁹ It is therefore "undisputed" that Person X, an American citizen, is "part of 'the people' whom the Second Amendment protects."²¹⁰

Per *Bruen* and *Heller*, Person X's firearm of choice, a handgun, is also protected under the Second Amendment, as handguns are "'in common use' today for self-defense."²¹¹ Therefore, the Second Amendment is implicated by a law restricting such a person from possessing such a firearm, and a *Bruen* analysis is appropriate.

Like the conduct at issue in *Heller* and *Bruen*, Person X's proposed conduct is to *possess* a handgun for self-defense.²¹² Whether the possession takes place inside one's home or in public, this course of conduct is protected by the Second Amendment.²¹³ Therefore, "[t]he Second Amendment's plain text thus presumptively guarantees" Person X a right to possess a handgun.²¹⁴

Bruen tells us that when the Second Amendment "presumptively protects" a person's proposed conduct, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."²¹⁵ *Bruen* describes two categories of inquiry that may occur in this sort of

206. See Kopel, *The First Century*, *supra* note 60, at 154.

207. To simplify the issue, assume that Person X is over the age of eighteen and does not suffer from any mental illness nor would not be otherwise "disqualified" from possessing a handgun.

208. *Bruen*, 142 S. Ct. at 2156 (quoting *Heller I*, 554 U.S. 570, 581 (2008)).

209. *Id.* at 2134.

210. *Id.*

211. *Id.*

212. *See id.*

213. *See id.* at 2156.

214. *Id.* at 2135.

215. *Id.* at 2130.

historical analysis: (1) straightforward and (2) nuanced.²¹⁶ If the “societal problem” that is being addressed by the regulation in question “has persisted since the 18th century,” the straightforward analysis, which looks to past regulations addressing the same problem, controls.²¹⁷ Both *Heller* and *Bruen* “exemplif[y] this . . . straightforward historical inquiry.”²¹⁸ Both concern “the same alleged societal problem . . . ‘handgun violence,’ primarily in ‘urban area[s].’”²¹⁹ In the case of Person X, the “societal problem” may be framed as *handgun violence by persons convicted of a felony*.²²⁰ And because both handgun violence and felons were not “unimaginable at the founding,” it follows that handgun violence by felons was also not “unimaginable.”²²¹ Therefore, for a law prohibiting felons from possessing firearms to survive Second Amendment scrutiny, the government must show that “‘historical precedent’ from before, during, and . . . after the founding evinces a comparable tradition of regulation.”²²²

And this is where the analysis ends. “[N]o scholar has been able to identify a single colonial or state law in seventeenth, eighteenth, or nineteenth-century America that prohibited a person from possessing any firearm merely because that person engaged in conduct that a legislature has labeled as felonious.”²²³ The first laws to do so were enacted in 1923, ten years after the Sullivan Law provision held unconstitutional in *Bruen* was enacted.²²⁴ Moreover, the first felon-in-possession law was enacted as a *reaction* to that Sullivan Law provision.²²⁵ Accordingly, given the complete absence of a historical tradition of prohibiting felons who have completed their sentence from possessing firearms, under *Bruen*, felon-in-possession charges are unconstitutional as applied to Person X.

B. *The Dangerous Person Theory Is Wrong*

Does it make a difference if the crime that the felon was convicted of was “dangerous?” Under *Bruen*, to answer that question, one must look to history.²²⁶ And of course, because *no* felon was prohibited from possessing and carrying firearms after incarceration, *no* felon who committed a “dangerous” crime was prohibited either.

The “dangerous person” theory proponents may not be convinced. Their claim is that there is a tradition of prohibiting dangerous persons from possessing firearms.²²⁷ According to the these proponents, “dangerous persons” included slaves, free persons

216. *Id.* at 2130–31.

217. *Id.* at 2131.

218. *Id.*

219. *Id.* (alteration in original) (quoting *Heller I*, 554 U.S. 570, 634 (2008)).

220. *Id.*

221. *Id.* at 2132.

222. *Id.* at 2131–32.

223. *United States v. Harrison*, No. CR-22-00328, 2023 WL 1771138, at *12 (W.D. Okla. Feb. 3, 2023).

224. *See* Kopel, *The First Century*, *supra* note 60, at 154.

225. *Id.*

226. *Bruen*, 142 S. Ct. at 2129–30.

227. Greenlee, *supra* note 180, at 285.

of color, Catholics, drunks, tramps, and Native Americans.²²⁸ The argument goes that, because laws existed that prohibited these people from possessing firearms, and these people were considered dangerous at the time, legislatures currently have the power to prohibit dangerous persons from possessing firearms.²²⁹

The first objection to make to this argument is that it confuses a normative motivation for a legal power. Assuming “dangerousness” was the normative motivation for disarming certain groups, this alone does not tell one anything about what the legal basis was. But even assuming that a legislative determination of “dangerous” is a sufficient legal basis, what are the contours of this determination? A criminal conviction is not a necessary condition—none of the historically disarmed groups received that treatment on the basis of a conviction.²³⁰ Given this, why could the District of Columbia not have argued that it considered all of its residents to be dangerous, thus justifying the handgun ban at issue in *Heller*? Or why could New York not have argued the same in *Bruen*? How can one sort a legitimate from an illegitimate determination of “dangerousness” on the basis of history?

Moreover, why could a legislature not enact the same race-based prohibitions today? The “dangerous person” proponents will say that this is because the Fourteenth Amendment prohibits it. But why would the Second Amendment not prohibit it? Why can the “unqualified command” of the Second Amendment²³¹ be overridden by a legislative determination of dangerousness, but not the Equal Protection Clause, which is in fact subject to “means-end” scrutiny?

Even assuming that dangerousness must be limited to criminal convictions, which ones are sufficiently dangerous? Given that there is no historical answer to this question, either the legislature has plenary authority to decide, or courts must use “means-ends” scrutiny.

And why would the Second Amendment be subject to different rules than the First or Fourth Amendments? A criminal conviction does not strip an American citizen or resident alien of the protections of those provisions. “That is not how the First Amendment works when it comes to” convicted sex offenders’ right to access social media websites.²³² “That is not how the [Fourth] Amendment works when it comes to” unconstitutional searches of felons possessing firearms.²³³ It is no objection to say that history makes the difference here—the very same groups who were deprived of Second Amendment rights were also deprived of First and Fourth Amendment rights.²³⁴

In nineteenth century cases about firearms prohibitions, courts made it clear what the legality of the laws rested on. In *Dred Scott*, Chief Justice Taney could not have

228. See *Kanter v. Barr*, 919 F.3d 437, 457–58 (7th Cir. 2019) (Barrett, J., dissenting).

229. Greenlee, *supra* note 180, at 285.

230. See *United States v. Harrison*, No. CR-22-00328, 2023 WL 1771138, at *12 (W.D. Okla. Feb. 3, 2023).

231. *Bruen*, 142 S. Ct. at 2130 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961)).

232. *Cf. id.* at 2156; see also *Packingham v. North Carolina*, 582 U.S. 98, 107–08 (2017).

233. *Cf. Bruen*, 142 S. Ct. at 2156; see also *supra* note 1 (collecting cases).

234. See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

been more clear in stating that if free persons of color were *citizens*, then they necessarily would have the right “to keep and carry arms wherever they went.”²³⁵ For Chief Justice Taney, *that* would have been “dangerous,” and, thus, he held that they could not be citizens.²³⁶ The court in *Hogan* explained, “A man may carry a gun for *any lawful purpose*, for business or amusement, but he cannot go about with that or any other dangerous weapon *to terrify and alarm a peaceful people*. And statutes punishing such offenses are constitutional.”²³⁷ To the *Hogan* court, to justify disarmament, a person must be *currently* acting in a dangerous manner.

The fact that the “dangerous person” theory uses the City of London Militia Act of 1662 as persuasive authority is perhaps the clearest indication that the theory lacks an appropriate historical foundation. First, as *Bruen* notes, “English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution.”²³⁸ This is especially true in the case of English infringements on the right to keep and bear arms. Nineteenth-century constitutional commentators routinely “distinguished the broad American right to arms from its feeble English ancestor.”²³⁹ In 1891, Thomas Cooley described the Second Amendment as an “enlargement” of the English Bill of Rights that “stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease.”²⁴⁰ St. George Tucker noted that “[t]he right of the people to keep and to bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government.”²⁴¹ Commentaries also noted disapproval of pretextual disarmament in England.²⁴² Justice Story noted that “[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms,”²⁴³ and that “under various pretences the effect of [the English right to arms] has been greatly narrowed; and it is at present in England more nominal than real.”²⁴⁴ St. George Tucker noted that “[w]hoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England.”²⁴⁵

235. *Id.* at 417.

236. *Id.* at 418.

237. *State v. Hogan*, 58 N.E. 572, 575–76 (Ohio 1900) (emphasis added).

238. *Bruen*, 142 S. Ct. at 2136.

239. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1403 (1998).

240. THOMAS M. COOLEY & ALEXIS C. ANGELL, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 281–82 (2d ed. 1891).

241. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *143 n.40 (St. George Tucker, ed., 1803).

242. See JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 264 (1840).

243. *Id.*

244. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 747 (1833).

245. BLACKSTONE, *supra* note 241, at *144 n.41.

Moreover, it is absurd to think that the founding generation had *any* respect for the Militia Act. The relevant provision in the Militia Act authorized officers of the Crown to

from time to time by Warrant under their Hands and Seales to employ such Person or Persons as they shall thinke fitt . . . to search for and seize all Armes in the custody or possession of any person or persons whom [the officers] shall judge dangerous to the Peace of the Kingdome.²⁴⁶

This provision is otherwise known as a “general warrant.”²⁴⁷ As the Supreme Court has noted, “the purpose of the Fourth Amendment [was] to forbid” general warrants.²⁴⁸ The Court has explained that, in enacting the Bill of Rights, “[v]ivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.”²⁴⁹ John Adams once wrote that he was “ready to take arms against writs of assistance.”²⁵⁰ Colonial legislator James Otis described general warrants and writs of assistance as “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.”²⁵¹ To the founding generation, general warrants and writs of assistance were “instruments of oppression.”²⁵² As Chief Justice Roberts has explained, opposition to general warrants and writs of assistance “was in fact one of the driving forces behind the Revolution itself.”²⁵³

“During the American Revolution, Massachusetts and Pennsylvania disarmed loyalists to the Crown who refused to swear allegiance to the state or the United States”²⁵⁴ Significantly, as Judge Smith noted, “Pennsylvania disarmed dissident citizens while their state constitutions guaranteed a right to bear arms.”²⁵⁵ While Pennsylvania did disarm loyalists to the Crown, the very fact that those people were loyalists to the Crown, and not the state, suggests that they were not “citizens” in any meaningful rights-having sense. In 1776, loyalty to the Crown was considered “treason

246. City of London Militia Act, 13 & 14 Car. 2, c. 3 § 14 (1662).

247. See Founders Online, *Editorial Note*, NAT’L ARCHIVES n.9 (1965), <https://founders.archives.gov/documents/Adams/05-02-02-0006-0002-0001#LJA02d034n9> [<https://perma.cc/8S2D-KCWF>] (describing this provision as “a provision of the Militia Act that general warrants might issue to search for illegal arms”).

248. *Stanford v. Texas*, 379 U.S. 476, 480 (1965).

249. *Id.* at 481.

250. *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting letter from John Adams to William Tudor (Jan. 24, 1817), in 10 WORKS OF JOHN ADAMS 236, 248 (Charles Francis Adams ed., 1856)).

251. *Marron v. United States*, 275 U.S. 192, 195 (1927); see also William B. Allen & Jonathan Gienapp, *Historic Document: James Otis, Against Writs of Assistance (1761)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-otis-against-writs-of-assistance-february-24-1761> [<https://perma.cc/4U92-JK5P>] (last visited Jan. 28, 2024).

252. *Stanford*, 379 U.S. at 481.

253. *Riley*, 573 U.S. at 403; see also *People v. Diaz*, 122 N.E.3d 61, 68 (N.Y. 2019) (Wilson, J., dissenting) (quoting *Riley*, 573 U.S. at 403)).

254. *Folajtar v. Att’y Gen.*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting).

255. *United States v. Daniels*, No. 22-60596, 2023 WL 5091317, at *13 (5th Cir. Aug. 9, 2023).

against the good people of this country.”²⁵⁶ In 1777, the Pennsylvania Test Act’s preamble explained why those loyal to the Crown did not have the protection of the Commonwealth’s laws: “[A]lliance and protection are reciprocal, and those who will not bear the former are not nor ought to be entitled to the benefits of the latter.”²⁵⁷ Here, it would seem that the *legal* basis for disarmament was that protections under the Pennsylvania Constitution during the Revolutionary War were *conditioned upon* sworn allegiance to the Commonwealth.

Moreover, “dangerousness” was not the sole reason for these disarmaments. A recent article by Professor Scott Paul Gordon takes issue with the notion that Revolutionary War disarmaments were done exclusively on the basis of dangerousness.²⁵⁸ As Professor Gordon explains, “Authorities justified these seizures not by describing those who owned arms as dangerous but by insisting that the troops urgently need the arms.”²⁵⁹ In other words, “*taking arms*” was necessary to “resolve arms shortages.”²⁶⁰ Nonetheless, none of this continued after the American Revolution.

C. Arrest and Incarceration

Dangerous felons may, in fact, be disarmed consistent with history and tradition—upon arrest and incarceration. While today, present incarceration does “not form a barrier separating prison inmates from the protections of the Constitution,”²⁶¹ this was not the case during the founding era and nineteenth century. As Justice Thomas stated, “For most of this Nation’s history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them.”²⁶² Justice Thomas has also offered a framework for addressing the constitutional rights of inmates for modern times: for Justice Thomas, when addressing a prisoner’s constitutional claim, the question a court must ask “is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by *ordinary, law-abiding persons*.”²⁶³ Put another way, “[w]hether a sentence encompasses the extinction of a constitutional right enjoyed by *free persons*.”²⁶⁴

256. 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 492–93 (James T. Mitchell and Henry Flanders eds., 1903). The Test Act required white males over the age of eighteen living in Pennsylvania to take an oath of loyalty to the new state. See Owen S. Ireland, *The Ethnic-Religious Dimension of Pennsylvania Politics, 1778-1779*, 30 WM. & MARY Q. 423, 429 & n.11 (1973).

257. THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 256, at 111.

258. Scott Paul Gordon, *A Moravian Rifle Goes to War: Disarming and Arming Pennsylvanians, 1975–1776*, 90 PA. HIST. J. MID-ATL. STUD. 155, 157–58 (2023).

259. *Id.* at 158.

260. *Id.* at 162.

261. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

262. *Johnson v. California*, 543 U.S. 499, 512 (2005) (Thomas, J., dissenting) (first citing *Shaw v. Murphy*, 532 U.S. 223, 228 (2001); and then citing *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871)).

263. *Overton v. Bazzetta*, 539 U.S. 126, 140 (2003) (Thomas, J., concurring) (emphasis added).

264. *Id.* (emphasis added).

In *Bruen*, Justice Thomas “characterized holders of the Second Amendment rights as ‘law-abiding’ citizens no fewer than fourteen times.”²⁶⁵ Thus, even though “[a] prisoner may not entirely surrender his constitutional rights at the prison gates,”²⁶⁶ it seems as if the *Bruen* Court went out of its way to make sure that the right to keep and bear arms remains one of the liberties a prisoner leaves behind.

IV. CONCLUSION

Prohibiting an individual from possessing a firearm simply because of a prior felony conviction is a distinctively modern phenomenon. Without firm basis in text, history, or tradition, the government will necessarily have to convince courts that felons are not *actually* deserving of constitutional rights. One would do well to keep in mind some of the warnings given by those who argued for a return of the original meaning of the Second Amendment during the late twentieth century. Those arguing for persons to lose constitutional rights on the basis of standardless assessments without basis in the Second Amendment²⁶⁷ “are courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.”²⁶⁸

265. *Range v. Att’y Gen.*, 53 F.4th 262, 271 (3d Cir. 2022) (first citing *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, *passim* (2022)); and then citing *Heller I*, 554 U.S. 570, 625, 635 (2008)), *rev’d on reh’g en banc*, 69 F.4th 96 (3d Cir. 2023).

266. *Johnson*, 543 U.S. at 529 n.3 (Thomas, J., dissenting).

267. See En Banc Brief for Appellees at 13, *Range*, 69 F.4th 96 (No. 21-2835).

268. Dan Gifford, *supra* note 114, at 789 (quoting telephone interviews with Professor Alan Dershowitz, Harv. Univ. (May 3–4, 1994)).