

WHY CAN'T MARTHA STEWART HAVE A GUN?

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INTRODUCTION

In 2004, domestic diva Martha Stewart was convicted of obstruction of justice, making false statements, and two counts of conspiracy in connection with dubious stock transactions. Although sentenced to only five months in jail plus a period of supervised release, she risked a much harsher punishment. Because she was convicted of a crime punishable by more than a year in prison, federal law bans her from having any gun.¹ Her ban is for life, unless the Attorney General lifts the disability—a

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1. 18 U.S.C. § 922(g) (2006).

decision in his discretion and that he effectively cannot make because Congress regularly bars the Bureau of Alcohol, Tobacco, Firearms, and Explosives from spending any money to review petitions to lift firearms disabilities.²

Is the public safer now that Martha Stewart is completely and permanently disarmed? More to the point, how could such a ban be constitutional, now that the Supreme Court, in *District of Columbia v. Heller*,³ not only has confirmed that the Second Amendment secures a personal right to keep and bear arms, but also has emphasized its historical tie to the right of self-defense?

The Court, in dicta, told everyone to move along. It asserted, without citation, that “prohibitions on the possession of firearms by felons” were “longstanding” and declared them “presumptively lawful.”⁴ The D.C. Circuit decision below, which *Heller* affirmed, similarly offered that bans on felons keeping and bearing arms “promote the government’s interest in public safety consistent with our common law tradition” and “do not impair the core conduct upon which the right was premised,” primarily self-defense.⁵ But it cited only Supreme Court dicta from 1980,⁶ which *Heller* subsequently disparaged.⁷ The Fifth Circuit in *United States v. Emerson*,⁸ the first decision of a circuit court to adopt an individual-right interpretation, stated that a ban on possession by felons “is in no way inconsistent with an individual rights model,” citing an older Supreme Court dictum stating that bans on *carrying* concealed weapons do not violate the Second Amendment and a handful of law review articles contending that Founding-era England and America excluded felons from the right to have arms.⁹ *Emerson’s* holding, like *Heller’s*, did not involve disarming a felon, although the court did uphold a related federal disability applied to a

2. 18 U.S.C. § 925(c) (2006).

3. 128 S. Ct. 2783 (2008).

4. *Id.* at 2816–17 & n.26.

5. *Parker v. District of Columbia*, 478 F.3d 370, 399–400 (D.C. Cir. 2007).

6. *Id.* at 399 (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)).

7. *Heller*, 128 S. Ct. at 2816 n.25.

8. 270 F.3d 203 (5th Cir. 2001).

9. *Id.* at 226 n.21.

man subject to a restraining order that included a finding that he was a threat to his wife's physical safety.¹⁰

The only problem with these politically understandable yet poorly briefed and supported assurances in dicta is that, as explained below in Parts I and II, a lifetime ban on any felon possessing any firearm is not "longstanding" in America. Nor, as Part III shows, is it supported by the common law or the English right to have arms at the time of the Founding. Moreover, it does impair the "core conduct" of self-defense in the home—at least for a felon who has completed his sentence, or someone who shares his household. Similarly, the reasoning of recent state court cases upholding bans on felon possession under state constitutional arms rights is little better than the federal dicta, relying on the same thin claims as *Emerson*.¹¹ And earlier state cases upholding various felon arms disabilities after World War II tended breezily to invoke the "police power,"¹² which begs the question and amounts to the minimal "rational basis" review that *Heller* rejected as making a constitutional arms right superfluous with other protections.¹³

Whatever the correct constitutional rule, then, the subject cries out for a serious and fresh look—the first serious look since the 1920s, and arguably the first ever in light of the historical right. The need is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.¹⁴

10. *Id.* at 261.

11. For the two fairly serious recent state court efforts, see *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), particularly the concurrence, *id.* at 181 (Roach, J., concurring), and *State v. Hirsch*, 34 P.3d 1209 (Or. Ct. App. 2001), notwithstanding its reliance on the since-discredited scholar Michael Bellesiles.

12. See *Hirsch*, 34 P.3d. at 1210 (noting that Oregon has repented of its "police power" dependency).

13. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.27 (2008).

14. The *Posey* dissent compiled a sampling of such felonies in Kentucky, including bigamy, violating campaign-finance restrictions, digging for artifacts on public lands, and falsifying the purchase price in a deed. 185 S.W.3d at 187 & n.5 (Scott, J., concurring in part and dissenting in part).

This Article aims to start that necessary reexamination. As explained below, *Emerson* was on the right track, but not because there is anything magical about being a “felon” (a peculiarly indeterminate term historically) that vaporizes one’s Second Amendment rights. Rather, actual “longstanding” precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that—somewhat like the *holding* in *Emerson*, yet unlike with the hapless Martha Stewart—its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger. In particular, for the reasons offered below in Part IV, (1) stripping a person of his right to keep and bear arms for a “felony” conviction is constitutionally dubious unless the conviction was for a “crime of violence,” a term having a longstanding yet flexible meaning specially developed for arms regulations; and (2) although some disability is plainly justified for persons convicted of crimes of violence, a lifetime ban on all keeping of firearms by such felons is also constitutionally dubious.

I. FELON DISARMAMENT IN THE UNITED STATES: NOT SO
“LONGSTANDING” OR BROAD

The federal “felon” disability—barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm—is less than fifty years old. A disability from all such persons’ receiving any firearm in interstate commerce dates to a 1961 amendment of the Federal Firearms Act of 1938 (“FFA”).¹⁵ Congress in 1968, using the same standard, banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce.¹⁶ This history does not make disarmament of all felons

15. An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

16. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 925, 82 Stat. 197, 233–34; *id.* tit. VII, § 1202, 82 Stat. at 236; Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, sec. 102, 82 Stat. 1213, 1220–21; *id.* tit. III, sec. 301, 82 Stat. at 1236 (all codified at 18 U.S.C. § 922(g) (1986)). Some business-related crimes are exempted. 18 U.S.C. § 921(a)(20) (2006). Regarding the interstate-commerce aspect, see *Tot v. United States*, 319 U.S. 463 (1943), and *Barrett v. United States*, 423 U.S. 212 (1976). The Navy and Marines apparently had no statutory

an infant, but it is hardly “longstanding.”¹⁷ Further, the temper of those times—well after the collective-right view of the Second Amendment had overrun academia and the courts—hardly encouraged regard for the Second Amendment.

For the quarter century before 1961, the original FFA had a narrower basis for a disability, limited to those convicted of a “crime of violence.”¹⁸ The statute defined “crime of violence” as “murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking,” and certain forms of aggravated assault—“assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.”¹⁹ During floor debate, two Senators asked about the FFA’s compatibility with the Second Amendment and received brief assurances that it presented no conflict.²⁰ The Senate committee that initiated the bill stated in a two-page report that it would “eliminate the gun from the crooks’ hands, while interfering as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living conditions unbearable in the past decade.”²¹

When the First and Third Circuits upheld the original FFA’s “crime of violence” disability in 1942, they invoked neither history nor precedent but rather the collective-right view of the Second Amendment that *Heller* rejected.²² The First Circuit in *Cases v. United States* resolved the case on the broad ground that a person has no right under the Second Amendment

restriction on felon enlistment until 1967, when Congress extended the law for the Army and Air Force that barred felons but still allowed the secretary of each service to authorize exceptions, an authority that the services continue to use. See 10 U.S.C. § 504(a) (2006); 1967 U.S.C.A.N. 2635, 2638–39.

17. It is unclear exactly what Justice Scalia meant by that unexplained term in the *Heller* opinion.

18. Federal Firearms Act, ch. 850, § 1(6), 52 Stat. 1250, 1250 (1938) [hereinafter FFA].

19. *Id.*

20. For discussions on the Senate floor, including the sponsor’s invocation of the Second Amendment’s preamble, see 79 Cong. Rec. 11943, 11973–74 (1935), and 81 Cong. Rec. 1518, 1527 (1937).

21. S. Rep. No. 74-997, at 2 (1935); see S. Rep. No. 75-82, at 2 (1937) (same).

22. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942).

unless he is “a member of a[]military organization” or uses his weapon “in preparation for a military career,” thus “contributing to the efficiency of the well regulated militia.”²³ The Third Circuit in *United States v. Tot* did allude to decisions under state constitutions upholding regulation of the *carrying* of arms and assert that a lifetime ban on *possession* was of the “general type.”²⁴ But it ultimately depended on its view that the Second Amendment “was not adopted with individual rights in mind” and that the FFA “does not infringe upon the preservation of the well regulated militia protected by the Second Amendment.”²⁵ The court in *Tot* neither cited nor referred to any case upholding a felon disability under a state arms right, nor did any of the three law review articles it cited.²⁶ From an individual-right perspective, the closest thing to relevant reasoning was the court’s analogy, without citation, to “a mental patient of the maniac type” and “a child of immature years,” neither of whom one could “argue seriously” suffered a constitutional violation from “a limitation upon the privilege of possessing weapons,” and a description of the “crime of violence” disability as affecting “persons who have previously, by due process of law, been shown to be aggressors against society.”²⁷

Although one wouldn’t know it from the circuit courts’ thin and casual reasoning, the “crime of violence” disability in the original FFA had roots that the later across-the-board disability lacked. It built on the Uniform Firearms Act (“UFA” or “Act”), which the National Conference of Commissioners on Uniform State Laws had promulgated in 1926 and again in 1930.²⁸

23. *Cases*, 131 F.2d at 923.

24. *Tot*, 131 F.2d at 266.

25. *Id.* at 266–67.

26. *Id.* at 266 n.13. Of the three law review articles that *Tot* cited, only one mentioned a felon disability. That article cited a case involving a disability in California—whose constitution did not secure any arms right—that was enacted in 1923 and only prohibited possessing pistols. See Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 144 & n.30 (1928) (citing *People v. McCloskey*, 244 P. 930 (Cal. Dist. Ct. App. 1926)); see also *id.* at 138 n.5 (noting California’s lack of an arms right); *People v. Camperlingo*, 231 P. 601, 603 (Cal. Dist. Ct. App. 1924) (upholding felon disability regarding pistols and noting that the legislature was “entirely free to deal with the subject” of keeping and bearing arms).

27. *Tot*, 131 F.2d at 266 & n.19.

28. UNIF. ACT TO REGULATE THE SALE & POSSESSION OF FIREARMS (Second Tentative Draft 1926) [hereinafter 1926 UFA]; UNIF. FIRE ARMS ACT (1930) [hereinafter 1930 UFA]. The 1926 UFA text and explanatory materials are readily available in the

The Conference had developed the UFA beginning in 1923 based on a proposal it received. This effort was part of a blossoming of firearms regulation after World War I, fed by, among other things, growing crime after Prohibition began in 1920 (the Senate report denouncing “the outlaws who have rendered living conditions unbearable in the past decade” was issued in 1935),²⁹ fears of immigrants,³⁰ and encouragement from a 1920 British law that licensed all firearms possession—licenses being issued only to those the police deemed not “unfitted to be entrusted with firearms.”³¹ New state-side legislation, however, proved more restrained, remaining faithful to “the rule in America” of only regulating “firearms which may be concealed on the person,” commonly “defined as firearms having a barrel less than 12 inches in length.”³² Concern over such arms grew as automobile use—including in crime—expanded, prompting debate on how to apply or modify restrictions on carrying concealed weapons.

The 1926 Act provided that a person convicted of a “crime of violence” could not “own or have in his possession or under his control, a pistol or revolver,” defined as “any firearm with barrel less than twelve inches in length.”³³ “Crime of violence,” in turn, was defined as committing or attempting to commit “murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking.”³⁴ The drafting committee explained that the definition sought “to cover such crimes as are ordinarily committed with

Report of the Standing Committee on Uniform State Laws, REPORT OF THE FORTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 527, 559 (1926).

29. S. Rep. No. 74-997, at 2 (1935). The chairman of the UFA’s drafting committee believed that licensing of the purchasing or possession of firearms could not be enforced and “would no doubt be followed by an era of pistol bootlegging similar to the liquor bootlegging which followed Prohibition.” Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 768 (1926).

30. See J.P. Chamberlain, *Legislatures and the Pistol Problem*, 11 A.B.A. J. 596, 598 (1925) (noting new laws restricting alien arms rights); *For a Better Enforcement of the Law*, 8 A.B.A. J. 588, 589 (1922) (criticizing character of recent immigrants).

31. Firearms Act, 1920, 10 & 11 Geo. 5, c. 43, § 1(2)(a). See generally Chamberlain, *supra* note 30, at 597. The British Firearms Act ended a 200-year English legacy of essentially unregulated gun ownership (discussed further in Part III), and passage was won only after fifty years of governmental agitation, the end of World War I providing the opportune moment. JOYCE LEE MALCOLM, *GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE* 141 (2002).

32. Chamberlain, *supra* note 30, at 597.

33. 1926 UFA §§ 1, 4.

34. *Id.* § 1. Larceny apparently was bracketed as borderline.

the aid of firearms” and that the disability “has numerous precedents in existing state legislation”—apparently referring to enactments in seven States since 1923.³⁵ Of these, three States—Indiana, Oregon, and Michigan, which had passed such laws in 1925—had constitutional arms protections.³⁶ The committee adopted provisions it considered “consonant with legislative precedent and practical experience” and rejected “minority views,” such as those favoring registration of small arms and licensing to purchase or possess them. It believed that the Act presented “no constitutional objections” and would “constitute no drastic changes in the law of any jurisdiction.”³⁷

The “crime of violence” concept, connected to the use of concealable firearms in crime, had appeared earlier. A 1922 report of a special Committee on Law Enforcement of the American Bar Association had distinguished between “crimes of violence against the person and property,” in which the United States had a “regrettable eminence,” and “crimes which indicate the dishonesty of the people,” of which the United States had fewer than other nations.³⁸ In the former category, the report emphasized murder, burglary, and robbery, which “will seldom be attempted unless the criminal is armed.”³⁹ It claimed that over 90% of murders were committed with a pistol.⁴⁰ In the latter category, it mentioned “larceny, extortion, counterfeiting, forgery, fraud, and other crimes of swindling.”⁴¹ A contemporaneous article claimed that, in 1922, “[g]uns and stolen automobiles were used in most all of” the 2007 robberies committed in Chicago.⁴² And the 1923 proposal to the Conference began

35. *Id.* §§ 1, 4 cmts.; see also Third Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING 571, 582 (1926) [hereinafter 1926 HANDBOOK].

36. For a litany of contemporaneous state constitutional provisions, see McKenna, *supra* note 26, at 138 n.5.

37. 1926 HANDBOOK, *supra* note 35, at 580; see Imlay, *supra* note 29, at 767–69 (generally discussing the 1926 Act and recent state legislation).

38. *For a Better Enforcement of the Law*, *supra* note 30, at 590.

39. *Id.*

40. *Id.* at 591.

41. *Id.* at 590.

42. Notes and Abstracts, *Motor Cars and Crime*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 147, 149 (1923).

by noting “[t]he increase in the number of crimes of violence, in which pistols and revolvers have figured.”⁴³

Notwithstanding the drafting committee’s confidence in the 1926 Act’s reasonableness, and its approval by both the Conference and the ABA, the Act faced heavy fire, centered in New York, which had no constitutional arms right and whose Sullivan Law had been singular since 1911 in requiring a license even to possess a concealable firearm in any town.⁴⁴ Particularly vocal was the Police Commissioner of New York City. Others attacked it as too drastic, including the Governor of Arizona, who vetoed it in early 1927.⁴⁵ So the Conference withdrew the Act in 1927⁴⁶ and spent three years reconsidering it.⁴⁷ Critics such as the Police Commissioner, who favored the new British approach, focused on the lack of licensing to purchase or possess, but they also contended (as the committee’s former chairman recounted) that the sale of pistols “should be interdicted to all who have committed any crime,” not just a crime of violence.⁴⁸ The committee in its initial response in 1927 pointed out that the basis of the disability had prompted “much discussion” by the whole Conference in considering the first draft in 1925, which had led to a decision “to limit the prohibition, rather

43. Report of Committee On A Uniform Act To Regulate The Sale And Possession Of Firearms, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 711, 716 (1924).

44. See Report of Firearms Committee of National Conference of Commissioners on Uniform State Laws, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL MEETING 866, 867–69, 872 (1927) [hereinafter 1927 HANDBOOK]; see also 1911 N.Y. Laws 442; Charles V. Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799, 800 (1930).

45. See 1927 HANDBOOK, *supra* note 44, at 877; see also Imlay, *supra* note 44, at 801.

46. 1927 HANDBOOK, *supra* note 44, at 866.

47. See Explanatory Statement Regarding Uniform Firearms Act, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTIETH ANNUAL CONFERENCE, 568, 568–69 (1930) [hereinafter 1930 HANDBOOK].

48. Imlay, *supra* note 44, at 800; see also Letter from G. V. McLaughlin to Charles S. Whitman (Dec. 24, 1926), in 1927 HANDBOOK, *supra* note 44, at 867–68.

than to extend it to those who had committed crimes unrelated to firearms."⁴⁹

The Conference reaffirmed the UFA in 1930, again with ABA approval, and with only minor changes such as treating any carrying of arms in automobiles the same as concealed carrying.⁵⁰ The Act not only continued to reject registration and licensing to purchase or possess, but also stood by the measured "crime of violence" disability.⁵¹ The committee's former chairman explained that it had done the latter "on the theory that the pistol has a legitimate use to a householder and should not be prohibited to him without sufficient cause."⁵² Overall, the committee had "sought to find a middle ground that would be consistent with traditional forms of regulation in use in this country."⁵³

The 1930 UFA's only relevant changes were to add one bracketed (apparently borderline) crime to the definition of "crime of violence" (breaking-and-entering), to bracket "house-breaking," and to note that the enumerated crimes should be "modified to suit local definitions."⁵⁴ The committee pointed out that the 1926 Act had gained approval even while with-

49. 1927 HANDBOOK, *supra* note 44, at 870; *see also* Imlay, *supra* note 44, at 801. The first draft had followed the 1923 proposal by barring pistols from anyone "convicted of a felony against the person or property of another or against the Government of the United States or of any State or subdivision thereof." UNIFORM ACT TO REGULATE THE SALE & POSSESSION OF FIREARMS § 4 (First Tentative Draft 1925). Neither the phrase nor "felony" was defined. In California, the two cases reported by 1926 had applied it to burglary. *People v. McCloskey*, 244 P. 930, 930 (Cal. Dist. Ct. App. 1926); *People v. Camperlingo*, 231 P. 601, 603 (Cal. Dist. Ct. App. 1924). The laws enacted based on the 1923 proposal, before the 1926 Act's promulgation, in the three States that had constitutional arms rights did not face judicial scrutiny at the time. As explained below, Indiana and apparently Michigan soon switched to the "crime of violence" approach. Oregon may also have. *Compare* Imlay, *supra* note 44, at 800 (reporting that Oregon had adopted "a law modeled closely on the Uniform Act"), *with* *State v. Robinson*, 343 P.2d 886 (Or. 1959) (upholding disability tracking language of the 1923 proposal). The primary author of the 1923 proposal advised the committee throughout and did not contest the "crime of violence" formulation on which the Conference settled. *See* 1926 HANDBOOK, *supra* note 35, at 573; 1927 HANDBOOK, *supra* note 44, at 873; *To Regulate Commerce in Firearms: Hearing on S.3 Before the S. Comm. on Commerce*, 74th Cong. 6-8, 27 (1935).

50. Imlay, *supra* note 44, at 799-800.

51. *Id.* at 800.

52. *Id.*

53. *Id.* at 801.

54. 1930 UFA § 1.

drawn, and it expounded the “crime of violence” disability as before: the term was “defined to cover such crimes as are ordinarily committed with the aid of firearms,” and the disability had “numerous precedents in existing state legislation and is useful in keeping firearms out of the hands of criminals.”⁵⁵

The concept continued to catch on: the Conference’s 1932 Uniform Machine Gun Act employed essentially the same definition of “crime of violence” as the 1930 UFA, restricting possession by those convicted of such a crime.⁵⁶ The same year, Congress enacted the 1930 Act for the District of Columbia, with only minor changes in the definition of “crime of violence” — primarily omitting robbery and breaking-and-entering (as would the FFA), and replacing “assault to do great bodily harm” with a list of aggravated assaults similar to the FFA’s definition (including assault with intent to rob).⁵⁷ By the time that the FFA in 1938 made the “crime of violence” disability a standard for federal law, as a restriction on interstate commerce, the 1930 UFA had been enacted in eleven jurisdictions,⁵⁸ five of which (Alabama, Indiana, Pennsylvania, Rhode Island, and Washington) were States that had individual arms rights and two of which (the District and Hawaii) were federal jurisdictions subject to the Second Amendment.⁵⁹ In addition, Michigan, which also had an individual arms right, had adopted “[m]uch” of the 1926 Act’s text, as had Massachusetts,

55. 1930 HANDBOOK, *supra* note 47, at 568–69, 572 (Explanatory Statement).

56. UNIF. MACHINE GUN ACT § 1 (1932).

57. Act of July 8, 1932, ch. 465, § 1, 47 Stat. 650, 650 (1932). This act predated the completion of the Uniform Machine Gun Act and went beyond it by banning anyone from possessing a machine gun (or sawed-off shotgun), albeit with a litany of exceptions—for the military, National Guard, organized reserves, post office, law enforcement, banks, and others. *Id.* § 14, 47 Stat. at 654. The first state regulation of machine guns was in 1927, incited by the spread during Prohibition of the recently developed Thompson submachine gun, favorite of bootleggers and law enforcement alike. *See* Report of the Firearms Committee, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING, 419, 420 (1928); Notes to Uniform Machine Gun Act, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-SECOND ANNUAL CONFERENCE 427, 427–28 (1932) (listing several States’ anti-machine gun laws, all passed in 1927 or thereafter).

58. List of Acts Showing the States Wherein Adopted, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL CONFERENCE 484, 486 (1938).

59. McKenna, *supra* note 26, at 138 n.5.

whose constitution provided that “[t]he people have a right to keep and bear arms for the common defence.”⁶⁰ (Rhode Island also had initially adopted “[m]uch” of the 1926 Act’s text, and Hawaii had initially adopted it “to a very great extent.”⁶¹) At some point thereafter even Arizona came around.⁶²

The FFA did innovate in one key respect, by extending the crime-of-violence disability to *all* firearms—abrogating the longstanding “rule in America” of only regulating concealable weapons by including previously sacrosanct rifles and shot-guns.⁶³ The concept of only a “crime of violence” disability, however, was established by the time Congress acted—including among legislators in jurisdictions subject to individual rights to keep and bear arms—even if no court in such a jurisdiction had yet passed on any such disability.

Congress’s innovation aroused no serious opposition, even from interests that had overwhelmed Members with protests in response to more ambitious proposals in the first two New Deal Congresses, such as for registering pistols and revolvers. The change of sentiment was much noted in the primary hearing in 1935. The Second Amendment received no specific mention. But the Executive Vice President of the National Rifle Association, who had helped draft the bill at the request of the sponsoring Senator, said he was “absolutely in favor of [the bill]” and pronounced himself untroubled by restrictions that prevent “crooks” and members of the underworld from receiving any arms in interstate commerce.⁶⁴ He did suggest it would

60. 1930 HANDBOOK, *supra* note 47, at 569; MASS. DECLARATION OF RIGHTS art. 17 (1780). Regarding the “common defence” phrase in some state constitutions, which caused courts in the 1800s, while still protecting a robust individual right to “keep” arms, to give “bear” and “arms” narrower scope, see *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel, pt. III.B.2, at 58–59, and pt. IV.B, at 87, 91–98 (2004) [hereinafter *OLC Op.*], available at <http://www.usdoj.gov/olc/opinions.htm>. The leading such case was *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

61. 1930 HANDBOOK, *supra* note 47, at 569.

62. See *State v. Noel*, 414 P.2d 162 (Ariz. App. 1966). In 1932, the Governor of New York (Franklin Roosevelt) vetoed the 1930 Act as too permissive—which it was if one’s standard was the fringe Sullivan Law. See *Legislation: the Uniform Firearms Act*, 18 VA. L. REV. 904, 904 (1932).

63. FFA, ch. 850, § 1(3), 52 Stat. 1250, 1250 (1938); Chamberlain, *supra* note 30, at 597.

64. *To Regulate Commerce in Firearms: Hearing on S. 3 Before the S. Comm. on Commerce*, 74th Cong. 43–46, 54–57 (1935) (statement of Maj. Gen. M. A. Reckord).

be “very satisfactory” if the bill only applied to firearms with “a barrel length less than 18 inches,” but did not condition his support on this.⁶⁵ The NRA’s President—a gold medalist pistol shooter at the 1920 Olympics who in another capacity had pushed the 1923 proposal to the Conference and then advised it in developing the UFA⁶⁶—testified separately. He declared that the bill “represents a very satisfactory approach to the subject” and was “rather . . . distinguished,” pronounced the “crime of violence” disability “quite all right,” and also noted the novelty of reaching beyond concealable weapons but did not object because the bill was “focused on the criminal.”⁶⁷ These sentiments were shared by a representative of hunting organizations and by the former chairman of the UFA’s drafting committee, who blessed the bill as “entirely consonant and consistent with what [the committee had] attempted to do.”⁶⁸

II. AMERICAN PRECEDENT—OR NOT—BEFORE WORLD WAR I

Before the fertile inter-war period, the overwhelming focus of gun regulation in the States (there was none from the Federal Government) was on *carrying* weapons, particularly through laws against carrying them concealed; state courts had essentially unanimously upheld such laws since they appeared in the early 1800s. States avoided the more extreme approach of banning *possession*. They had leeway in regulating carrying, but not keeping, of firearms. They also, as noted, avoided regulation of long guns. But the few relevant indications from the Founding nevertheless suggest that those who hammered out the Uniform Firearms Acts in the 1920s ended up at least close to the original understanding of permissible limitations on the

65. *Id.* at 44. The year before, the National Firearms Act, the first federal regulation of private firearms possession, had required registration and taxed transfers of rifles and shotguns with barrels under 18 inches, other firearms “capable of being concealed” (“except a pistol or revolver”), and machine guns. Pub. L. No. 474, § 1, 48 Stat. 1236, 1236 (1934).

66. *See supra* notes 43 & 49.

67. *To Regulate Commerce in Firearms*, *supra* note 64, at 9–10, 17 (statement of Karl T. Frederick).

68. *Id.* at 26 (statement of Charles V. Imlay); *see id.* at 49–51 (statement of Seth Gordon, President, Am. Game Ass’n).

right to keep arms—even though apparently without having directly considered the question.

Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I. That is true even of disabilities limited, as under the UFA, to convictions for crimes ordinarily committed with the aid of a firearm and to concealable weapons.⁶⁹ The Conference's compilation of laws in mid-1925 indicated that no State banned possession of long guns based on a prior conviction; that only six banned possession of concealable weapons on such basis; that, except for New York, whose Sullivan Law licensed all possession of a concealable weapon in a town, and since 1917 had automatically revoked one's license upon a felony conviction, even those laws dated from 1923 or later; and that no State with a constitutional arms right had enacted such a law until 1925.⁷⁰ And it appears that no state court case considered any law of this type under a constitutional protection of arms until 1939, a century and a half after the Second Amendment's adoption and a year after the FFA's enactment. The Washington Supreme Court that year in *State v. Tully* upheld the 1930 UFA's "crime of violence" disability for concealable weapons, along with its ban on carrying weapons concealed without a license.⁷¹ It offered only three sentences of discussion, which lumped the two questions together (the answer to the second being easy under precedent, as explained below), and identified only one arguably on-point

69. Convicts of course had no arms right while in, or escaped from, prison. *Tolbert v. State*, 14 So. 462, 463 (Miss. 1893).

70. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 862–63 (1925) [hereinafter 1925 HANDBOOK]. A 1919 law of Illinois (which had no arms right) was described as providing that a "person previously convicted of certain felonies shall be guilty of a felony if he carries concealed weapons," thus apparently not restricting possession. *Id.* at 862. The Sullivan Law is reprinted in the 1925 HANDBOOK, *supra*, at 895; *see id.* at 897–98 (automatic revocation); *see also To Regulate Commerce in Firearms: Hearing on S. 3 Before the S. Comm. on Commerce*, 74th Cong. 7–8, 29, 34, 47–48, 55 (1935) (discussions of Sullivan Law at 1935 Senate hearing on FFA, generally criticizing it as both draconian and ineffective against crime). For the 1917 revision of the Sullivan Law making license revocation mandatory upon a felony conviction, *see* 1917 N.Y. Laws 1643.

71. 89 P.2d 517 (Wash. 1939).

case, from 1926 in California.⁷² Even that case was not really on point, however, because California lacked a constitutional arms right.⁷³

Yet one of the law review articles on which *United States v. Emerson* relied⁷⁴ regarding felon disarmament claimed deeper roots—that “Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons” from the right to keep and bear arms.⁷⁵ It cited only the 1903 edition of Thomas Cooley’s authoritative *Treatise on the Constitutional Limitations*.⁷⁶ 1903 is a good year for a retrospective, only two before the onset of the collective-right view in *City of Salina v. Blaksley*.⁷⁷ The cited discussion in Cooley, however, concerns classes excluded from voting.⁷⁸ These included women and the property-less—both being citizens and protected by arms rights. When Cooley does address the right to keep and bear arms, one finds this: “[H]ow far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been, nor, we may hope, is likely to be, much occasion for the exami-

72. *Id.* at 518 (citing *People v. McCloskey*, 224 P. 930 (Cal. Dist. Ct. App. 1926)).

73. See McKenna, *supra* note 26, at 138 n.5; *People v. Camperlingo*, 231 P. 601, 603 (Cal. Dist. Ct. App. 1924).

74. 270 F.3d 203, 226 n.21 (5th Cir. 2001).

75. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983).

76. *Id.* at 65, 96 & n.147 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 57 (Victor H. Lane ed., 7th ed. 1903)). The article also cited three antebellum state constitutions limiting the arms right to “free white men.” Dowlut, *supra* note 75, at 96 n.147 (internal quotation marks omitted). This would have been a dubious citation even before the Fourteenth Amendment, as such a limitation does not appear in the Second Amendment and arose even in those States only a half-century after the Founding, the first apparently being Tennessee, which so revised its 1796 constitution—protecting all “freemen”—in 1834. See *OLC Op.*, *supra* note 60, pt. IV.B.2, at 91, 96 (discussing the Tennessee and Arkansas constitutions). If anything, adding the express limitation suggests that arms rights otherwise did extend to free blacks along with other citizens.

77. 83 P. 619 (Kan. 1905). In 1927, an article later cited in *United States v. Tot*, 131 F.2d 261, 266 n.13 (3d Cir. 1942), described *Blaksley* as a “leading case,” even while recognizing subsequent cases enforcing a robust individual right. See McKenna, *supra* note 26, at 145 (discussing *Blaksley*), 146–47 (discussing *State v. Kerner*, 107 S.E. 222 (N.C. 1921), and *People v. Zerillo*, 189 N.W. 927 (Mich. 1922)). Cf. *Strickland v. State*, 72 S.E. 260, 262 (Ga. 1911) (describing *Blaksley* as having gone “further than any other case”).

78. COOLEY, *supra* note 76, at 57–58.

nation of that question by the courts.”⁷⁹ Cooley’s happy claim was less true in 1903 than when he wrote the first edition in 1868, but the editor’s footnote of decisions identified none involving a ban on possession by convicts.⁸⁰ Even *Blaksley* only held that the Kansas legislature could authorize city councils to outlaw the carrying, not possession, of weapons.⁸¹ Likewise, a cursory collective-right law review article in 1915 only asserted justifications for a “legislature to restrict and even forbid carrying weapons by individuals, *however powerless it may be as to the simple possessing or keeping weapons.*”⁸² Yet the Third Circuit in 1942 cited this article in support of the FFA’s “crime of violence” disability on receiving a firearm.⁸³

Indeed, as Cooley’s footnote indicates, essentially every case in the first century after the Second Amendment’s adoption concerned just a regulation of the manner of carrying arms, and most just restricted carrying weapons concealed.⁸⁴ There was thus good reason that the U.S. Supreme Court in 1897, in offering examples of “well-recognized exceptions” to the rights “inherited from our English ancestors” and codified in the Bill of Rights, mentioned regarding the Second Amendment only that it “is not infringed by laws prohibiting the carrying of concealed weapons.”⁸⁵

The closest thing to a case considering a felon disability, in 1878, struck down a regulation of pistol carrying to the extent that it required forfeiting the offending pistol upon a conviction.⁸⁶ The law did not ban the offender from obtain-

79. *Id.* at 499 (citations omitted).

80. *Id.* at 499 n.2.

81. *Blaksley*, 83 P. at 620.

82. Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) (emphasis added).

83. *United States v. Tot*, 131 F.2d 261, 263, 266 n.13 (3d Cir. 1942).

84. The only case in the 1800s disrupting the consensus allowing concealed-carry restrictions was also the first, the 2-1 decision in *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), applying the 1792 state constitution. It was overturned by Kentucky’s 1850 constitution, art. XIII, § 25.

85. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). As to speech and press, it offered that the First Amendment “does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.” *Id.* at 281. For a comprehensive treatment of the cases and commentary before the Civil War, plus discussion of some of the cases immediately after, and of Cooley and *Robertson*, see *OLC Op.*, *supra* note 60, pt. IV, at 78–105.

86. *Jennings v. State*, 5 Tex. Ct. App. 298, 300 (1878).

ing a new pistol. Yet the court reasoned that, although the legislature could regulate the wearing of arms (the Texas Constitution's arms right recognized this expressly), "it has not the power by legislation to take a citizen's arms away from him," his right "of having arms for his own defence and that of the State" being "one of the surest safeguards of liberty and self-preservation."⁸⁷

The first decision concerning an arms regulation that depended on the *condition* of a person—rather than directly regulating his *manner* of carrying—was not until 1886. The Supreme Court of Missouri in *State v. Shelby* upheld under the state constitution a ban on carrying a deadly weapon (openly or concealed) while intoxicated.⁸⁸ If the legislature could regulate "the manner in which arms may be borne," the court reasoned, there was "no good reason" why it "may not do the same thing with reference to the condition of the person who carries such weapons. The mischief to be apprehended from an intoxicated person going abroad with fire-arms upon his person is equally as great as that to be feared from one who goes into an assemblage of persons with" a deadly weapon.⁸⁹ No court since has rejected *Shelby's* logical step, and the North Carolina Supreme Court in 1921 endorsed it in a careful overview of the law.⁹⁰ In addition, in 1900 the Ohio Supreme Court in *State v. Hogan* approved in dicta, as consistent with the state arms right, a ban on carrying a firearm by "a tramp"—a man, not in "the county in which he usually lives or has his home, found going about begging and asking subsistence by charity."⁹¹ *Hogan* did not cite *Shelby* but instead relied directly on the common-law rule discussed below in Part III, explaining that the right "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others."⁹² Both decisions thus involved conditions that the courts thought indicated a present danger of misconduct against another if one carried a firearm.

87. *Id.* at 300–01. See also *Leatherwood v. State*, 6 Tex. Ct. App. 244 (1879) (reaffirming *Jennings*).

88. 2 S.W. 468 (Mo. 1886).

89. *Id.* at 469.

90. *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

91. 58 N.E. 572, 572, 575–76 (Ohio 1900).

92. *Id.* at 575.

Neither of them involved or endorsed restrictions on keeping arms based on condition.

Restrictions regarding the condition of being a minor, although apparently arising after *Shelby*, predated World War I somewhat, but these were usually framed as bans on transferring arms to them rather than on possession, and focused on concealable weapons. In addition, minority is a temporary condition (even if not as temporary as intoxication or “trampness”), and a minor’s need for self-defense is presumably mitigated by the protection of parents who can keep and bear arms; some of the laws excepted transfers by the minor’s parents or guardians, or with their consent. Laws banning aliens from keeping guns seem to have been, like restrictions on keeping by convicts, a post-World War I phenomenon—and one that received a mixed reception at the time from state courts enforcing arms rights.⁹³

For relevant authority before World War I for disabling felons from *keeping* firearms, then, one is reduced to three proposals emerging from the ratification of the Constitution. Most of the delegates to Pennsylvania’s convention who dissented from ratification (about a third) proposed in December 1787 that the Constitution protect the right to “bear arms” and also provide that “no law shall be passed for disarming the people or any of them unless for crimes committed, or real

93. The Conference in 1925 identified laws in twenty States, eight of which had a constitutional arms right, against selling or giving weapons to minors. The only one clearly predating the twentieth century was an 1883 Michigan law against selling or giving a pistol to a child under the age of 13. 1925 HANDBOOK, *supra* note 70, at 874–77. The 1892 congressional law for the District of Columbia barred selling or giving a concealable weapon to anyone under the age of 21. Act of July 13, 1892, 27 Stat. 116, 177. An 1897 Texas law, omitted from the compilation, barred transferring a pistol to a minor without parental consent. *Doucette v. State*, 317 S.W.2d 200, 201 (Tex. Ct. App. 1958) (Davidson, J., dissenting). As to aliens, see *People v. Nakamura*, 62 P.2d 246 (Col. 1936) (striking down a 1921 law banning aliens from owning or possessing any firearm at all), *People v. Zerillo*, 189 N.W. 927 (Mich. 1922) (striking down part of a 1921 law banning aliens from owning or possessing any firearm without a permit), and Chamberlain, *supra* note 30, at 598 (noting rise of laws denying aliens the right to carry pistols). There was no issue in *Zerillo* or *Nakamura* of the alien’s residence being illegal. Both the 1926 and the 1930 UFA omitted any alien disability but banned transferring pistols or revolvers to minors. 1926 HANDBOOK, *supra* note 35, at 581; 1926 UFA § 8; 1930 UFA § 8.

danger of public injury from individuals.”⁹⁴ Two months later, Samuel Adams and other delegates unsuccessfully urged the Massachusetts convention to recommend a provision that the Constitution “be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms.”⁹⁵ (Nineteen years before, Adams had been probably the first person in the colonies publicly to invoke the exposition of the English arms right in William Blackstone’s new *Commentaries on the Law of England*, in newspaper articles denouncing British abuses in Boston.)⁹⁶ Four months after that, the New Hampshire convention proposed that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.”⁹⁷

None of these three varying formulations made it into the Second Amendment, and only one came with authority. Yet, they do indicate some common if imprecise understanding at the Founding regarding the boundaries of a right to keep and bear arms. Two bits of evidence from the time of Congress’s drafting of the Bill of Rights in 1789 also suggest more directly that the Second Amendment was viewed as consistent with at least the proposals from Pennsylvania and Massachusetts.⁹⁸ As further discussed below, however, after an explanation of relevant aspects of the English right at the Founding, these three formulations do not support a lifetime ban on any “felon” possessing any arms. They instead suggest something like the approach of the UFA.

III. ENGLISH ANTECEDENTS, REAL AND ALLEGED

Setting aside, then, Thomas Cooley’s off-point discussion of voting restrictions and (for the moment) the three proposals

94. 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971); *OLC Op.*, *supra* note 60, pt. III.C.1, at 63–64.

95. *OLC Op.*, *supra* note 60, pt. III.C.1, at 64–65; *see also* SCHWARTZ, *supra* note 94, at 674–75.

96. Brief of the Cato Institute and History Professor Joyce Lee Malcolm as *Amici Curiae* in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter *Amicus Br.*], at 21–23; *OLC Op.*, *supra* note 60, pt. III.B.1., at 50.

97. SCHWARTZ, *supra* note 94, at 761; *OLC Op.*, *supra* note 60, pt. III.C.1, at 65.

98. *See OLC Op.*, *supra* note 60, pt. III.C.2, at 73 (quoting both a letter from the Speaker of the House to a fellow Federalist and an article from Boston).

from ratification conventions, the remaining purported basis for disarming felons is the common law. As stated without citation in a law review article that *Emerson* cited:⁹⁹ “Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death.”¹⁰⁰ As shown below, the second sentence, to the extent it is accurate, does not establish the first; and the first is inaccurate, or at least imprecise.

Three aspects of the English arms right of the 1700s are relevant, however: the common law’s rule regulating *carrying* of weapons, including its means of preventing violations; the game laws’ punishments for illegal hunting; and the arms restrictions imposed on certain Roman Catholics in the name of protecting the government. Only the third provided an explicit ground for barring someone from keeping arms; even then, the law left both an exception for self-defense and a means of regaining the right. Moreover, only the first applied in America by the Founding; the principle underlying the third applied, at best, only in a narrower, revised form. Thus, much like the American authorities for a century and a half after the Second Amendment’s adoption, the actual English antecedents point against lifetime total disarmament of all “felons,” but do support lesser limitations.

A. “Forfeiture of All Goods”

The English right to have arms for self-defense that developed after being announced in the 1689 Declaration of Rights did not specifically exclude “felons.” Nor does the general English criminal law of the 1700s, which the law review article invoked, support a claim that felons were excluded indirectly. The relevant issue is not whether one *forfeited* “all goods”—implicitly including one’s guns—upon a felony conviction. One did at common law forfeit personal property (“goods and chattels”) upon conviction for any “of the higher kinds of offense”: treason, “felonies of all sorts whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the . . . offences of striking, &c.

99. *United States v. Emerson*, 270 F.3d 203, 226 n.21 (5th Cir. 2001).

100. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

in Westminster-hall.”¹⁰¹ But it did not follow that one could not thereafter purchase and hold new personal property—including a gun.

The disability that the common law did impose regarding future property ownership was a consequence of not just a conviction of felony or treason but also a judgment of death. The judgment of death made one “attainted”; attainder forfeited one’s real property and worked “corruption of blood”; and corruption of blood barred one from inheriting, retaining, or transmitting by descent any “lands or other hereditaments.”¹⁰² No death sentence meant no property disability. Yet the question of felon arms disabilities does not concern those on death row (or imprisoned for life). And for many felony convictions one might invoke the benefit of clergy to avoid a sentence of death and attainder. One aspect of attainder was “civil death,” but this involved only disability from performing legal functions such as being a witness or suing.¹⁰³ One could still enter into a contract, for example, although not enforce it.¹⁰⁴

More broadly, these doctrines did not carry over to the United States in their strict English form. As St. George Tucker wrote in 1803, annotating William Blackstone’s discussion, “[c]onfiscations, forfeitures, and corruption of blood, do not follow in case of conviction or attainder for any treason or felony either in the commonwealth of Virginia, or under the federal government.”¹⁰⁵ Thus, this aspect of the English criminal

101. 5 WILLIAM BLACKSTONE, COMMENTARIES *386–87 (St. George Tucker ed., 1803) (1767) [hereinafter Tucker’s BLACKSTONE].

102. *Id.* at *380, *388.

103. *See Avery v. Everett*, 18 N.E. 148, 150 (N.Y. 1888). Moreover, one attainted often could continue to hold, buy, and sell real property. *See id.* at 151–52. *Cf. Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 621–22 (1813) (describing the similar rights of an alien with his property).

104. *See Avery*, 18 N.E. at 151.

105. 5 Tucker’s BLACKSTONE, *supra* note 101, at *377 n.8. For further evidence of early American attitudes concerning attainder and forfeitures, see generally U.S. CONST. art. III, § 3, cl. 2 (“[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”); *Austin v. United States*, 509 U.S. 602, 611–13 (1993) (noting only statutory forfeiture of “offending objects” took hold in the United States; wholesale forfeiture for felony or treason did not, nor did “deodand” forfeiture of objects causing accidental death); 5 Tucker’s BLACKSTONE, *supra* note 101, at *389 n.15 (further noting limitations on forfeiture and corruption of blood in American law); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 512 (O.W. Holmes, Jr., ed., Boston, Little, Brown, & Co. 1873) (1826) (“[T]he

law does not bear on the ability of a convict (if alive and released) to possess a firearm.

B. Common Law

The actual common-law regulation of arms, however, did carry across the Atlantic. English law in the 1700s depended on just one common-law rule for the regulation of arms: a prohibition against going about armed so as to terrify the people.¹⁰⁶

Related was the medieval Statute of Northampton, which on its face provided that no one could “go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.”¹⁰⁷ Those hostile to an individual-right view of the Second Amendment long have invoked Northampton casually to claim that there was no real English right to have arms, or at least not much of one. But such invocations overlook that, by the time of the Declaration of Rights, the statute was rarely if ever enforced. More important, courts long had reduced the statute’s prohibition to the common-law offense.¹⁰⁸ As a result, “[a] man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business.”¹⁰⁹ To violate the common law (and thus also Northampton), one had to go or ride armed “*malo animo*,” or “in such a manner as will naturally cause a terror to the people,” by arousing “suspicion of an intention to commit any act of violence or disturbance of the peace.”¹¹⁰ Northampton, how-

tendency of public opinion has been to condemn forfeiture of property, a[t] least in cases of felony, as being an unnecessary and hard punishment of the felon’s posterity.”).

106. *Amicus Br.*, *supra* note 96, at 15–16 (setting out English law in detail).

107. Statute of Northampton, 2 Edw. 3, c. 3 (1328).

108. By the 1600s, the statute “does not appear to have been enforced,” except that men “were occasionally indicted for carrying arms to terrorize their neighbours.” JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104, 184 n.36 (1994); *see id.* at 191–92 n.32. The fullest early discussion of this common law in the United States is in *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843); *see also Amicus Br.*, *supra* note 96, at 29–34 (summarizing early American authorities).

109. *R v. Dewhurst*, 1 St. Tr. 529, 601–02 (Lancaster Assize 1820).

110. *R v. Knight*, (1686) 90 Eng. Rep. 330, 330 (K.B.); WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS* ch. 63, §§ 4, 9 (Leach ed. 1788) (1716).

ever, though “almost gone in desuetudinem,”¹¹¹ did set the punishment for the common-law offense: forfeiting one’s “[a]rmour” and being imprisoned “at the King’s pleasure.”¹¹² It did not ban buying new “armour” if the king in his pleasure released you.¹¹³

The common law imposed no arms disability for a conviction of carrying arms to the terror of the people, even though it did otherwise provide for preventing a violation. One means of conserving the peace, apart from prosecuting those who breached it, was to order persons who posed particular risks to provide sureties of the peace. Blackstone explained England’s method of “preventive justice” as “obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges and securities for keeping the peace, or for their good behaviour.”¹¹⁴ “Probable ground” was primarily anticipatory, like a restraining order, but a surety also could be demanded after a conviction as a precaution added to other punishments. In either case, one circumstance justifying a surety of the peace was if someone “shall go about with unusual weapons or attendants, to the terror of the people.”¹¹⁵

William Rawle, a leading early commentator on the Constitution, used this English authority when discussing the Second Amendment. He explained that not only was “[a]n assemblage of persons with arms, for an unlawful purpose,” indictable, but “even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable to imprisonment.”¹¹⁶

111. *Knight*, 90 Eng. Rep. at 330.

112. Statute of Northampton, 2 Edw. 3, c. 3 (1328).

113. *See id.*

114. 5 Tucker’s BLACKSTONE, *supra* note 101, at *251.

115. HAWKINS, *supra* note 110, ch. 60, § 1; *see* 5 Tucker’s BLACKSTONE, *supra* note 101, at *255.

116. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (2d ed. Phila., Philip H. Sickles 1829) (1825) (citing Hawkins and Coke). For authorization of this process under early federal and Virginia law, *see* 5 Tucker’s BLACKSTONE, *supra* note 101, at *254 n.1.

A justice of the peace could issue a warrant requiring sureties of the peace upon someone's complaint under oath that he feared death or bodily harm from a person, or upon witnessing belligerent behavior.¹¹⁷ The terms of the "recognizance" (obligation) he could impose were broad, as English commentator William Hawkins explained: "[I]t seems that it may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time, for which the party shall be bound."¹¹⁸ If a justice failed to specify a period, the recognizance could even be "for life."¹¹⁹ But "the safest way," and ordinary practice, was "to bind the party to appear at the next sessions of the peace," which were usually quarterly, "and in the mean time to keep the peace as to the king, and all his liege people, especially as to the party."¹²⁰ In any event, the recognizance would be certified to a court, such as the quarter sessions, which could either discharge or continue it. While the recognizance was in force, any violence to the person of another (particularly murder, manslaughter, rape, robbery, and unlawful imprisonment), as well as treason, unlawful assembly to the terror of the people, or even words "directly tending to a breach of the peace," would forfeit it and expose one to imprisonment.¹²¹ Yet to use force against the person of another in reasonable defense of oneself or a member of one's household would not.¹²²

Although a justice of the peace had wide discretion in setting the "the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time," this process imposed a general obligation to keep the peace, rather than particular restraints, such as a restriction against having or carrying arms. On the other hand, it is not unimaginable that, if one were particularly untrustworthy, one's sureties might demand such things as a condition for putting up large sums on one's behalf. Or one could imagine a justice of the

117. HAWKINS, *supra* note 110, ch. 60, §§ 1, 6.

118. HAWKINS, *supra* note 110, ch. 60, § 15.

119. *Id.*

120. *Id.* ch. 60, § 16.

121. *Id.* ch. 60, §§ 20, 21.

122. *Id.* ch. 60, § 23. See generally 5 Tucker's BLACKSTONE, *supra* note 101, at *251-56; *Hyde v. Greuch*, 62 Md. 577, 582 (1884).

peace, seeking “full assurance” of peaceable behavior (as Blackstone put it), conditioning the terms he directly controlled on compliance with additional restrictions. In any event, the common law avoided direct arms disabilities even while giving courts a large stick with which to reduce the risks to society from a free person who nevertheless posed a threat of breaching the peace with arms.

C. *Game Laws*

By “the early 1700s, English subjects of all classes possessed a broad individual right to have arms.”¹²³ The core was their right to “keep”—to own and possess—firearms to defend their homes and families. Securing this right after the 1689 Declaration of Rights enshrined it required revising a 1671 game law providing that anyone not among the few rich “qualified” to hunt game was not allowed to have any guns.¹²⁴ This change was accomplished by game laws in 1693 and particularly 1706, and by the repeal or desuetude of other related laws.¹²⁵ It remained illegal, however, to *use* one’s guns to hunt game if one was not qualified. As the Court of Common Pleas put it in 1744, “a man may keep a gun for the defence of his house and family,” and “must use the gun to kill game before he can incur any penalty.”¹²⁶ In 1752, the King’s Bench similarly remarked that “it is not to be imagined” that Parliament in the game laws had intended “to disarm all the people of England.”¹²⁷

What matters for present purposes is the consequences of such illegal use: a fine and the possible search for and seizure of one’s guns by the local lord’s gamekeeper (upon a warrant from a justice of the peace), but—as with the common law—no bar on future gun ownership.¹²⁸ Rawle, favorably comparing

123. *Amicus Br.*, *supra* note 96, at 9.

124. 22 & 23 Car. 2, c. 25, § 3 (1670 & 1671) (Eng.).

125. *See Amicus Br.*, *supra* note 96, at 7–9.

126. *Mallock v. Eastly*, (1744) 87 Eng. Rep. 1370, 1374 (C.P.).

127. *Wingfield v. Stratford*, (1752) 96 Eng. Rep. 787, 787 (K.B.).

128. *See An Act for the better Preservation of the Game*, 5 Ann., c. 14, § 4 (1706) (Eng.); P.B. MUNSCHÉ, *GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671–1831*, at 79–82 (1981) (discussing evolving law and enforcement in the 1700s and noting that although seizure still was permitted, there is “little evidence that Englishmen as a whole were ‘disarmed’ by the game laws”). *Wingfield* held that a gamekeeper’s defense in a suit for conversion of a gun was inadequate because he failed to plead that the seized gun had been used for killing game. 96 Eng. Rep. at 787.

the Second Amendment to the right to bear arms in England, explained simply that, in England, “a gun or other instrument, used for [killing game] by an unqualified person, may be seized and forfeited.”¹²⁹ The fine, from 1706 on, was a “relatively mild” five pounds.¹³⁰

Hunting wild animals with a gun may seem a small thing when evaluating bans on felons possessing arms, as it does not threaten force against any person. Moreover, in early America, free of England’s feudal heritage, such game laws were unknown and denounced, including by the early constitutional commentators (such as Rawle), who praised the Second Amendment for not allowing such things.¹³¹ The old pretext for disarming the disfavored was eventually transplanted, however, and bloomed in the 1920s in state laws banning aliens from hunting and, “to that end,” also from having firearms.¹³²

The game laws are nonetheless useful in discerning the boundary of limitations on an arms right, even in the United States. In America, the uniform hostility to these laws shows the strength of the right to keep arms. In England, their evolution and leniency show the same. This evolution and leniency was particularly remarkable given that the game laws were a mainstay of the English aristocracy throughout the 1700s, and thus important to the ruling class; that gangs of armed poachers could produce violence, particularly at night;¹³³ and that, as with the common-law rule, a violation did directly involve the misuse of guns. The game laws also are instructive because they, like sureties of the peace, were preventive. They not only prohibited hunting by the unqualified, but also prohibited

129. RAWLE, *supra* note 116, at 126.

130. An Act for the better Preservation of the Game, 5 Ann., c. 14, § 4 (1706) (Eng.) (amount); MUNSCH, *supra* note 128, at 21 (“relatively mild”); *id.* at 159–60 (noting that, in one county, three-fourths of those convicted could pay, and fine was “positively tame” compared to other criminal laws, including death for deer stealing at night, deer not being “game”). Additional laws aimed at poaching, beginning in the 1770s, employed fines, with prison and whipping for subsequent offenses. *Id.* at 24–25, 160.

131. See *Amicus Br.*, *supra* note 96, at pts. II.A (quoting denunciations of game laws by Thomas Paine and a Pennsylvania newspaper article, and Noah Webster’s explanation of absence of such laws in America), II.B.1 (quoting St. George Tucker, William Rawle, Joseph Story, and Henry Tucker contrasting Second Amendment with game laws).

132. See *People v. Nakamura*, 62 P.2d 246, 246 (Colo. 1936); *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922).

133. MUNSCH, *supra* note 128, at 25, 78, 106.

them from even possessing hunting equipment, such as dogs and nets.¹³⁴ Guns were most useful for this purpose, and so were listed among the “engines” banned in 1671.¹³⁵ The arms right in the Declaration seems to have recognized this restriction, securing from the king the right of subjects to “have Arms for their Defence suitable to their Conditions and as allowed by Law.”¹³⁶ Nevertheless, Parliament and the courts in the early 1700s exempted guns from this preventive scheme, and they did not substitute a prohibition of keeping guns upon a conviction for having hunted illegally. Moreover, this change occurred even while English criminal law was otherwise becoming harsher, most notoriously in the “Black Act,” which in 1723 added innumerable felonies.¹³⁷

D. *“A Subversion of the Civil Government”*

The English Declaration in 1689 recognized an arms right only for Protestant subjects.¹³⁸ Like the game laws, the English exclusion of subjects based on religion has no place within the Second Amendment, as early commentators also celebrated. But the exclusion is instructive as the closest thing in the historical record, before World War I, to direct support for disarming felons.

The original granting of the arms right to Protestant subjects was connected to the deposed King James II’s having disarmed Protestants while arming and (contrary to law) “employing” Roman Catholics, as the Declaration of Rights recited.¹³⁹ Upon the accession of the Protestants William and Mary to the throne, being Roman Catholic was equated with supporting James II and thus with presumptive treason. Supporters of James II and his son moved to regain the throne as late as 1745. Thus, a law contemporaneous with the Declaration generally

134. *Id.* at 12.

135. *Id.*

136. An Act declaring the Rights and Liberties of the Subject and Setleing the Succession of the Crowne, 1 W. & M., Sess. 2, c. 2, § 1 (1688) (Eng.).

137. See MALCOLM, *supra* note 31, at 64–70; 5 TUCKER’S BLACKSTONE, *supra* note 101, at *3–4, *18–19, *244–46.

138. An Act declaring the Rights and Liberties of the Subject and Setleing the Succession of the Crowne, 1 W. & M., Sess. 2, c. 2, § 1 (1688) (Eng.).

139. *See id.*

disarmed Roman Catholics—"for the better securing their Majesty's Persons and Government."¹⁴⁰

Blackstone, writing in the mid-1760s, omitted the religious restriction from his general discussion of the arms right, addressing it instead along with a litany of other limitations on Roman Catholics, which (not unlike attainder) included severe restrictions on property ownership, office holding, and court access.¹⁴¹ He explained that tolerance toward non-Anglican Protestants—to whom the arms right of the Declaration extended by its terms—would be equally open to Roman Catholics provided that "their separation" from the established church "was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government."¹⁴² But so long as "they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects."¹⁴³ Blackstone added that "if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe" then "probably" it would not "be amiss to review and soften these rigorous edicts; at least till the *civil* principles of the Roman Catholics called again upon the legislature to renew them."¹⁴⁴

Despite these fears, the 1689 statute that disarmed Roman Catholics also recognized that not all of them were prepared to live out their "civil principles" and that they had a claim to self-defense.¹⁴⁵ The arms disability applied only after a person had refused a request from two justices of the peace to subscribe a statutory "declaration against popery."¹⁴⁶

140. An Act for the better securing the Government by disarming Papists and reputed Papists, 1 W. & M., Sess. 2, c. 15, § 4 (1688) (Eng.).

141. See 5 Tucker's BLACKSTONE, *supra* note 101, at *54–56; 2 *id.* at *143–44.

142. 5 *id.* at *54.

143. *Id.* at *54–55.

144. *Id.* at *57.

145. See An Act for the better securing the Government by disarming Papists and reputed Papists, 1 W. & M., Sess. 1, c. 15, § 4 (1688) (Eng.).

146. 5 Tucker's BLACKSTONE, *supra* note 101, at *56; see 1 W. & M., Sess. 1, c. 15, § 2 (1688) (Eng.).

Even after refusing to do so, a Roman Catholic still could “have or keep . . . such necessary weapons, as shall be allowed to him by order of the justices of the peace, at their generall quarter sessions, for the defence of his house or person.”¹⁴⁷ Such “necessary Weapons” for self-defense were distinguished from the home arsenals that seem to have been the real concern.¹⁴⁸ He could escape the arms disability at any time by appearing before the quarter sessions to subscribe the declaration and take oaths swearing allegiance to the king, denouncing “that damnable doctrine and position, That princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects or any other whatsoever,” and declaring that no foreign person had any jurisdiction in England.¹⁴⁹ 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. The disability applied only after a judicial determination, allowed a limited exception for self-defense, and could be removed entirely upon a required showing.

E. *“Notoriously Disaffected”*

A similar approach, without the religious overlay, appeared during the heat of the American Revolution. It involved the same rationale as the English disability, but, as with the English disability itself in America, had little if any force by the time of the Second Amendment’s adoption.

In March of 1776, the Continental Congress recommended that nascent local authorities “cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and

147. An Act for the better secureing the Government by disarming Papists and reputed Papists, 1 W. & M., Sess.1, c. 15, § 4 (1688) (Eng.).

148. See MALCOLM, *supra* note 108, at 11.

149. An Act for removeing and Preventing all Questions and Disputes concerning the Assembling and Sitting of this present Parlyament, 1 W. & M., Sess. 1, c. 1, §§ 6, 7 (1688) (Eng.); see also An Act for the better secureing the Government by disarming Papists and reputed Papists, 1 W. & M., Sess.1, c. 15, § 8 (1688) (Eng.).

armies.”¹⁵⁰ Those disarmed were to be compensated, and seized arms were to go to the Continental Army, the colony’s troops, and “the associators” (local militias).¹⁵¹

At least Massachusetts, Virginia, and Pennsylvania took up the first part of this suggestion early in the war.¹⁵² Pennsylvania enacted its law in June 1777, and it merits particular note because the State’s first constitution, adopted in late 1776, included a strong individual arms right.¹⁵³ The laws did not depend on individualized suspicion but instead required all free men of military age to subscribe a loyalty oath; local militia officials disarmed those who refused. The laws also did not technically prohibit recusants from acquiring new arms (they read more like forfeiture laws than disabilities).¹⁵⁴

Notwithstanding these differences from England’s arms disability on Roman Catholics, the Revolutionary statutes seem to share the same principle. As with the English disability, the disarmament was part of a wholesale stripping of rights and privileges. Under Pennsylvania’s law, for example, recusants not only were disarmed but also were, much as with an attainder, made “incapable of holding any office or place of trust in this state, serving on juries, suing for any debts, electing or being elected, buying, selling or transferring any lands, tenements or hereditaments.”¹⁵⁵ Also as with the English disability, the loyalty oath was effectively a naturalization oath—renouncing all allegiance to the now-foreign sovereign George III in addition to

150. 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 205 (Washington Chauncey Ford ed., 1906).

151. *Id.*

152. See Brief Supporting Petitioners of *Amici Curiae* American Jewish Committee et al., App. B., at 15–19a, 28–32a, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (excerpting laws from these three States). The amicus brief claims that Maryland had a similar law but does not quote it. *Id.* at 23 n.6. For Pennsylvania, it excerpts portions of a 1778 law, but the disability reached back at least to the Act of June 13, 1777, ch. 756, in STATUTES AT LARGE OF PENNSYLVANIA, FROM 1682 TO 1801, at 110–14 (1903), discussed below. For the Virginia law, see Act of May 5, 1777, ch. 3, in 9 HENING’S STATUTES AT LARGE 281, 281–82 (1821). I have not verified the excerpt from the Massachusetts law, but the brief’s date appears erroneous, as it is the same as the congressional resolution, to which the law refers.

153. PA. CONST., Decl. of Rights, art. XIII (1776).

154. See, e.g., Pa. Act of June 13, 1777, §§ 1–3; Va. Act of May 5, 1777, §§ 1, 3. Virginia, however, required those disarmed to attend musters and exempted them from fines for appearing without arms. *Id.* § 4.

155. Pa. Act of June 13, 1777, § 3.

swearing allegiance to one's State. To refuse it was to declare oneself a resident alien of the new nation—and, given the war, a resident enemy alien. In echoes of Blackstone's explanation of the English disability, the preamble of Pennsylvania's law stated that "allegiance and protection are reciprocal, and those who will not bear the former are not nor ought not to be entitled to the benefits of the latter."¹⁵⁶

Yet one must proceed with caution in using these English and Revolutionary laws as evidence of the scope of the Second Amendment, even though the latter lacks the English religious taint. First, the arms disabilities cannot be isolated from their context as part of a wholesale stripping of a distrusted group's civil liberties. The American laws in particular were enacted in the darkest days of an existential domestic war—"hardly," as Leonard Levy put it in his work on the freedom of the press, "a propitious time for respecting, let alone nurturing, freedom of political expression or any civil liberties."¹⁵⁷ The harsh yet simple principle of the Revolution was that Tories "had no civil liberties."¹⁵⁸ The violations of what now would be considered basic First, Fourth, and Fifth Amendment rights were at least as widespread as was disarmament of Tories.¹⁵⁹ Moreover, the

156. *Id.*, pmb1. See generally DON HIGGINBOTHAM, *THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763–1789*, at 270 (1971) (By 1778, "every [State] boasted enactments in this area" of "civilian loyalty testing"; the oaths, "asking for the renunciation of a prior allegiance to Britain and calling for adherence to a new state, have much in common with naturalization oaths" and were connected to "the social contract doctrine embodied in the Declaration of Independence."); John Adams, *Thoughts on Government* (Apr. 1776), in 1 *THE FOUNDERS' CONSTITUTION* 107, 109 (Philip B. Kurland & Ralph Lerner eds. 1986) ("[B]y an act of Parliament we are put out of the royal protection, and consequently discharged from our allegiance; and it has become necessary to assume government for our immediate security."); cf. 8 U.S.C. § 1448(a) (2006) (current nationalization oath).

157. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 173 (1985).

158. *Id.* at 181; see also *id.* at 184 ("[Virginia's] free press clause, as noted, did not apply to Tory opinions, nor did its other constitutional protections, nor did those of other states."); *id.* at 185 (discussing Pennsylvania's suppression of Tories and Quakers).

159. See *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.) (in case involving 1782 bill of attainder by Georgia declaring persons guilty of treason, noting that there is "a material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous test now applied . . ."); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 47

disarmament depended on one's thoughts, not actions. Thomas Jefferson, who supported and enforced Virginia's loyalty oath, defined a Tory as "'a traitor in thought, but not in deed.'"¹⁶⁰

Second, and related, even if the Revolutionary and English precedents could be isolated from their contexts, there is good reason to consider them not to have survived through the Founding in anything like their original form as disarmament for thoughts that made one a de facto enemy alien. After the Revolution, the closest thing to comparable practice was slave States' prohibitions of gun ownership by free blacks, which arose especially after Nat Turner's 1831 slave revolt. As shown by Part II, this was the one area before World War I in which States restricted not only the carrying, but also the keeping of arms, and it is hardly more propitious as a precedent than the Revolution. The treatment of free blacks, like that of Tories and Roman Catholics, involved wholesale deprivation of civil liberties, so, if it justified an exception to the Second Amendment, it also would justify exceptions to other basic rights.¹⁶¹ Southern courts upholding these arms restrictions fell back on general notions of societal necessity, and considered free blacks to be non-citizens or, at best, second-class citizens.¹⁶² Some courts admitted that the restrictions

(2000) ("[I]t was after acts like the suppression of the Tory press, loyalty oaths, the searches of Quakers, and a Massachusetts legislative declaration finding certain persons guilty of treason, that Madison noted that one objection to a bill of rights was that state bills of rights had been repeatedly violated."). Pennsylvania repealed its loyalty oath law in March 1789. See 9 STATUTES AT LARGE OF PENNSYLVANIA 114 (editor's note to Act of June 13, 1777).

160. LEVY, *supra* note 157, at 178.

161. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335-38 (1991) (cataloguing restrictions); see also *id.* at 331 (noting relative lack of openly race-based restrictions at the Founding); *OLC Op.*, *supra* note 60, pt. III.B.1, at 49 & n.198; pt. IV.B.1, at 86 & n.349.

162. See, e.g., *State v. Newsom*, 27 N.C. (5 Ired.) 250, 254 (1844) (upholding law requiring free blacks to obtain licenses to wear, carry, or keep any firearm by observing that "[s]elf preservation is the first law of nations, as it is of individuals"; that "this class of people" long had been "subjected to various disabilities, from which the white population was exempt"; and that they "cannot be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them"). In *Dred Scott*, the United States Supreme Court notoriously warned that blacks would benefit from rights to keep and bear arms if they were considered citizens. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

were difficult to justify constitutionally.¹⁶³ And several southern States in the 1830s confessed doubt on the question by limiting their constitutional arms rights to whites. In 1834, for example, Tennessee changed “freemen” in its original 1796 constitution to “free white men.”¹⁶⁴

Moreover, in other post-Founding instances where the principle of the English and Revolutionary precedents might have been applied, it was not. Most notable is Congress’s concern for the arms rights of both sides in the South after the upheaval of the Civil War. As the southern States tried to disarm freed slaves, Congress responded with alarm and legislation. Yet in disbanding the southern militias (partly to prevent the terrorizing of freed slaves), Congress refused on Second Amendment grounds also to disarm them.¹⁶⁵ The Fourteenth Amendment similarly restricted former Confederates only in holding office. And the secessionist Tennessee government’s effort to disarm the populace (enforcement presumably focusing on unionists) earned the scorn of the Tennessee Supreme Court in 1866 as unprecedented in American history.¹⁶⁶ Later, and in contrast to one apparent purpose of the Continental Congress’s recommendation, a 1941 law authorizing requisitions of property for war use excluded firearms and cited the right of individuals to keep and bear arms.¹⁶⁷ Even the Alien Act of 1798 (of Alien and Sedition infamy), which during the Quasi-War with France delegated vast power to the President to deport any aliens he considered “dangerous to the peace and safety of the United States”—including licensing their continued residence upon a surety—did not provide for disarming anyone, and allowed deported aliens to take their personal property.¹⁶⁸

Thus, to the extent that one can distill any guidance from the English disability and the Revolutionary disarmament, it would seem at most to be that persons who by their actions—

163. See *OLC Op.*, *supra* note 60, pt. IV.B.1, at 86 (discussing *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447 (Gen. Ct. 1824)).

164. *Id.* at 91 (Tennessee); *id.* at 96 (Arkansas).

165. *Id.* at 99–101.

166. *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 217 (1866).

167. Act of Oct. 16, 1941, ch. 445, 55 Stat. 742.

168. Alien Act, ch. 58, §§ 1, 5, 1 Stat. 570, 571–72 (1798). See generally DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1798–1801*, at 255–57 (1997) (discussing the Alien Act).

not just their thoughts—betray a likelihood of violence against the state may be disarmed. One might generalize from this to say that any move to define a class and restrict its arms rights should rest not on general distaste or prejudice, but rather on credible grounds for fearing that a member of it would, if armed, pose a genuine present danger to others. The three proposals regarding disarmament from the ratification debates of 1787–88, noted at the end of Part II above and explained further below, may be viewed as recognizing such an understanding in a calmer period, and thus as both taming and generalizing the Revolutionary and English precedents.

IV. APPLICATION: DISARMING SOME FELONS, TO SOME EXTENT, FOR SOME TIME

In applying all of this history (or lack thereof) to arms disabilities for felons, the first line—between a justified and unjustified disability—should be between “crimes of violence” and other felonies. Such a distinction is not merely based on the UFAs, FFA, and related history from the 1920s and 1930s, although that history merits some weight for its own sake as the first time the question of felon disarmament was considered. Rather, the “crime of violence” concept developed then tracks, both historically and rationally, the basis on which a disability should proceed constitutionally: by focusing on convictions indicating that one actually poses some danger of physically harming others rather than simply being dishonest or otherwise unsavory.

Disabilities based on a conviction ought to rest on a justification sufficient to override or qualify the right of self-defense underlying the Second Amendment, and the “crime of violence” concept does so. As the former chairman of the UFA’s drafting committee explained, after the Conference had rejected arguments to bar small arms from all convicts, “the pistol has a legitimate use to a householder and should not be prohibited to him without sufficient cause.”¹⁶⁹ Accordingly, the principle the UFA used in both versions was to disarm a person only for “crimes of violence,” defined as “such crimes as are ordinarily committed with the aid of firearms,” in con-

169. Imlay, *supra* note 44, at 800.

trast to “crimes unrelated to firearms.”¹⁷⁰ As the UFA’s list of crimes indicated, this principle was not so narrow as to require that the use of a firearm have been an element of the crime, or otherwise proved in a conviction; instead, one could include a crime in the list based on an informed judgment about how criminals commonly operated, as the Conference and other commentators at the time did. In addition, and unsurprisingly given the principle, the listed crimes usually involved the use or threat of force.

This principle also tracks well the three proposals that emerged from the ratification debates: It focuses on persons proven to pose a “real danger of public injury” (Pennsylvania Minority) or not to be peaceable citizens (Sam Adams), and includes, although it extends beyond, those who “are or have been in Actual Rebellion” (New Hampshire).¹⁷¹ One might even say that a “crime of violence” disability—though worked out only in the 1920s, after almost a century and a half during which the States left all felons (if not executed or imprisoned for life) free to re-arm themselves after serving their sentence—was latent in the Founding-era proposals. The Pennsylvania Minority also referred to disarmament for “crimes committed.”¹⁷² But given the remainder of American and English history and the other two proposals (requiring one to be un-peaceable or rebellious), it seems best to read this phrase as contemplating disarmament not for *any* crime committed—wildly overbroad even by current standards—but for crimes demonstrating that a person poses a “real danger of public injury.” The “real danger” clause thus addresses disarmament absent a conviction of a crime; it is akin to allowing sureties of the peace in such case or perhaps disarmament for refusal to take the wartime loyalty oath. The proposal so read then covers two instances of the same principle.

Furthermore, the “crime of violence” concept both provides a clear rule and leaves flexibility, particularly for changing circumstances. The core crimes—common to both the 1926 and 1930 UFAs, the 1932 District of Columbia law, and (mostly) the

170. *See supra* notes 48, 54.

171. *See supra* Part II.

172. *Id.*

FFA—are well settled: murder, manslaughter, rape, mayhem, aggravated assault (particularly assault to murder, rape, rob, do great bodily harm, commit a felony, or with a deadly weapon), robbery,¹⁷³ burglary, housebreaking, and attempt to commit any of these crimes. Other crimes seem to have been borderline: kidnapping, larceny,¹⁷⁴ and breaking-and-entering. Which side of the line these fall on is not of great moment so long as one fairly pursues the principle. Similarly, one could readily add modern crimes to the category of “crimes of violence,” meriting inclusion because “ordinarily committed with the aid of firearms.” Drug trafficking crimes are leading candidates. In addition, treason—“levying War against” the United States or “adhering to their Enemies”¹⁷⁵—and similar crimes should be included. Perhaps the Conference, focused on local crime, did not consider this. Nonetheless, not only does disarmament for such crimes have the greatest historical support in both England (Roman Catholics) and early America (Tories and those in “Actual Rebellion”), but it also satisfies the principle behind the “crime of violence” concept. By similar logic, at least some terrorism should be included, not only because of its violence, but also because of its subversive political purpose.¹⁷⁶ More broadly, the general federal definition of “crime of violence,” which focuses on physical force as an element or substantial risk, may be a workable proxy, even though it was enacted in 1984 without any apparent regard for the phrase’s different earlier use in firearms regulations.¹⁷⁷

But absent conviction for some “crime of violence,” wherever exactly that line lies, it is difficult to see how the Second Amendment could allow a convict to be disabled from keeping or bearing arms. Historically, such a prohibition lacks support

173. The D.C. law and FFA omitted robbery from their lists, but included assault with intent to rob.

174. For the apparently earliest decision upholding the inclusion of larceny, under a generous police-power rationale, see *Jackson v. State*, 68 So. 2d 850 (Ala. Ct. App. 1953). See also *State v. Krantz*, 164 P.2d 453 (Wash. 1945) (rejecting under police-power reasoning challenges to 1930 UFA’s “crime of violence” definition as under- and over-inclusive).

175. U.S. CONST. art. III, § 3, cl. 2.

176. Cf. 18 U.S.C. § 2331 (2006) (defining terrorism).

177. See *id.* § 16; see also *id.* § 924(c) (enhanced sentence for “drug trafficking crime” or “crime of violence” committed with a firearm, latter term being modified from § 16).

before the 1960s. Rationally, there does not seem to be even a legitimate state interest in disarming someone like Martha Stewart, apart from increasing her punishment; yet simple vindictiveness is hard to accept as sufficient ground for stripping someone of a constitutional right.

The permissible scope of disability for a person who has been convicted of a crime of violence is murkier, but if one works up by steps from the historical evidence, lines emerge. First, such a person may be stripped of any right or privilege of carrying a concealed weapon. If early American cases after the Founding establish any propositions regarding constitutional arms rights, it is that such rights do not protect concealed carrying, as explained above in Part II. The only imaginable issue would be whether a State could disallow a license to such a person while allowing it to others, but a proven tendency to violent crime obviously justifies the different treatment.

Second, such a person may be stripped of any right to “bear” arms—that is, to carry them openly off his premises. Both the common law and pre-World War I authority support this restriction. American precedent against a right to carry concealed weapons seems to have extended the common law into a *per se* preventive rule, based on an overwhelming factual consensus that, even though one could not terrify anyone merely by carrying a concealed weapon, any person doing so must be scheming to terrify, and, correspondingly, that carrying secretly did not serve self-defense.¹⁷⁸ By this logic, a *per se* rule prohibiting those convicted of crimes of violence from carrying *openly* would have at least as much force, particularly if one assumes that many who would encounter such a person carrying openly would know his status, which readily could inspire terror. In addition, the *Shelby*¹⁷⁹ and *Hogan*¹⁸⁰ decisions, discussed above in Part II, allowed prohibitions on any carrying of arms based on one’s condition, the former by extension of

178. See *Amicus Br.*, *supra* note 96, at 31–32; *State v. Reid*, 1 Ala. 612 (1840) (first opinion upholding ban on concealed carrying, and employing such reasoning); see also *State v. Bias*, 37 La. Ann. 259, 260 (1885) (“The constitutional right is to bear arms openly When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense.”).

179. *State v. Shelby*, 2 S.W. 468 (Mo. 1886).

180. *State v. Hogan*, 58 N.E. 572 (Ohio 1900).

American precedent allowing regulation of the manner of carrying and the latter by directly invoking the common law.

Third, such a person may be barred from “keeping” any short guns (those with less than a twelve-inch barrel). Although legislative precedent begins only in 1925 and lacks judicial blessing until 1939, it is directly on-point, was well considered and generally accepted as permissible, and predates federal courts’ throwing the Second Amendment overboard beginning with *Cases and Tot*. It also is a logical (albeit significant) extension from the focus of gun regulation before World War I on carrying short guns, particularly the longstanding hostility to concealed weapons. This focus justifies concern over dangerous persons keeping weapons that are readily concealed. The common law process for securing the peace against those who carried arms aggressively also may support such a ban, particularly given the special trouble in pre-Founding England with highway robberies, and that “at least one pistol” was part of the robbers’ “regular equipment.”¹⁸¹ Finally, the three proposals arising from the ratification debates, even though not reflected in judicial precedent or (apparently) on-point legislation at the Founding or in the 1800s, indicate openness to at least some disarmament upon an appropriate basis. One might view the UFAs as working out their logic when it comes to conviction as a basis.

Fourth, the case for barring those convicted of crimes of violence from keeping otherwise lawful long guns—even, by analogy to English precedent, “necessary weapons” for self-defense—seems weak. As set out in Parts I and II, “the rule in America” until the 1930s was to regulate only those firearms that could be concealed on the person and to use a twelve-inch barrel as the standard. Thus, the UFAs provide no support for stripping those convicted of crimes of violence of all weapons rather than just concealable ones. No support at all exists prior to the FFA in 1938, and even that is thin, because until 1968, the FFA only prevented receiving a firearm in interstate commerce, not possession and not buying a gun from a store in-state. (Al-

181. MALCOLM, *supra* note 108, at 81 (describing highway robberies and the “stricter enforcement of the law against the handgun”). There was no issue of whether to impose an arms disability on convicted highway robbers, because they were hanged. *Id.*

though it did make possession by a person convicted of a crime of violence “presumptive evidence” of such receipt, in 1943 the Supreme Court struck that down in *Tot* as violating due process, reversing the Third Circuit.)¹⁸² Highlighting the thinness of the FFA as historical support, at the primary hearing on it in 1935, the applicability of the FFA’s crime-of-violence disability to long guns aroused only cursory discussion rather than analysis, receiving support because it only affected “crooks.”¹⁸³ There also does not appear to be judicial authority under state arms rights before 1968 for a bar on keeping that extends to long guns.¹⁸⁴

Further considerations reinforce the argument from the historical evidence. As *Heller* emphasizes and as the English history, the American history through World War I, and the UFA drafting committee’s concern for the “householder” all confirm, the focus of the historical arms right is on the ability to “keep” them in order to defend one’s home and those in it.¹⁸⁵ As shown in Part III, the common law concerned itself only with carrying. Thus, for example, William Hawkins clarified that the law against going armed to the terror of the people left one free to “assembl[e] his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man’s house is as his castle.”¹⁸⁶ The judge of a prominent English trial in 1820, looking back to the Declaration, asked, “[A]re arms suitable to the condition of people in the ordinary class of life, and are they allowed by law?”¹⁸⁷ He answered that, indeed, “[a] man has a clear right to arms to protect himself in his house.”¹⁸⁸ To strip a person of

182. *Tot v. United States*, 319 U.S. 463 (1943).

183. See *supra* Part I.

184. See, e.g., *State v. Noel*, 414 P.2d 162, 163–64 (Ariz. App. 1966) (“The statute is obviously intended to protect the public from the potential danger incident to the possession of a pistol by a person . . . convicted of a crime of violence.”); *State v. Cartwright*, 418 P.2d 822, 830 (Or. 1966) (“It would have been perfectly legal, so far as the statute is concerned, for the defendant to have provided himself with a rifle or shotgun for the purpose of protection . . .”).

185. See also *Amicus Br.*, *supra* note 96, at 12–14.

186. HAWKINS, *supra* note 110, ch. 63, § 8; see *id.* ch. 65, § 10 (same in discussing unlawful assembly); see also *Payton v. New York*, 445 U.S. 573, 596 & n.44 (1980) (explaining rule).

187. *R v. Dewhurst*, (1820) 1 St. Tr. 529, 601 (Eng.).

188. *Id.*

the right to keep *any* arms strips him of the entire core of the right, notwithstanding that, at common law, even a person subject to a surety of the peace retained the right to use force in legitimate self-defense. It goes beyond even stripping the convict of the entire core of the right, by pressuring those who share his household to disarm themselves as well, to avoid the risk of the convict's being prosecuted for unlawful possession based on theories of joint or constructive possession. Such an impairment demands a high justification, which is far from apparent.

Indeed, without slogging into the gun-control debates of economists and statisticians, one can note from *Heller* that those troubled by gun ownership focus on handguns. The District of Columbia claimed that, from 1993 to 2001, 87 percent of guns used in crime were handguns and that, in 1974 (the eve of the District's handgun ban), "every rapist in the District who used a firearm to facilitate his crime used a handgun."¹⁸⁹ Such emphasis is an enduring echo of the 1920s, from which the primary precedent is the UFA—which continued the "rule in America" by applying only to small arms. Now, as then, the special concern with handguns is their concealability as compared to rifles and shotguns, and their corresponding ease of use for urban crime. The real issue, then, is not so much having guns in one's home, but rather readily carrying them out of the home for criminal purposes. A law prohibiting a crime-of-violence convict from keeping concealable guns furthers that purpose, but it is not clear how a law prohibiting his keeping of long guns does. A would-be recidivist always faces the deterrence of the punishment for his next underlying crime, including enhanced punishment if he uses a gun. If that does not deter him, he probably would not obey the preventive arms disability, so this issue is already at the margins. It is even more so when the issue is just the *keeping* of long guns.

A final consideration is the duration of a "crime of violence" disability. The UFAs and related laws did not set a time limit, but it does not seem that the question arose then. Since World

189. Brief for Petitioners at 4–5, 51, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). The other side, defending handguns, emphasized Gary Kleck & Marc Gertz, *Armed Resistance to Crime*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

War II, some States have employed time limits, keyed to the time since conviction or release from prison or parole, whichever comes later.¹⁹⁰ And the ordinary course under the common law was to avoid lifetime sureties of the peace. To put the issue simply, it is difficult to see the justification for disarming a 60 year old who was convicted of a crime of violence at age 20, and was not punished capitally or with life in prison (classes that present no issue for an arms disability), but instead was released at age 40, and has stayed clean for 20 years. An alternative to a firm time limit could be to modify the law governing petitions to restore gun rights so that, if one files a petition a certain number of years after completing his sentence, restoration is required rather than discretionary absent credible evidence of continuing danger. Under either approach, recidivism data ought to be the primary consideration, providing the basis for determining when a person, notwithstanding a "crime of violence" conviction, ordinarily ceases to present, as the common law put it, a "probable ground to suspect" or "just reason to fear" a breach of the peace.

CONCLUSION

Research and analysis need to replace dicta and assertions on this topic. Especially after *Heller*, there is much room for further thinking and discussion. Yet wherever the constitutional line may be, it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968. And among the various lines that the Second Amendment might draw, it is at least curious how Martha Stewart could merit anyone's concern.

190. See *People v. Blue*, 544 P.2d 385, 387 (Colo. 1975) (ten years); *People v. Swint*, 572 N.W.2d 666, 676 (Mich. App. 1997) (three to five years); *Long v. State*, 339 S.W.2d 215, 220 (Tex. Crim. App. 1960) (Davidson, J., dissenting) (five years).