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"What's Brewin' with Bruen?" Why, and How, We Must Permit Certain Felons to Possess Firearms

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Samuel Roos*

ABSTRACT

In the summer of 2022, the U.S. Supreme Court decided *New York Rifle & Pistol Association v. Bruen*, outlining a new test for the constitutionality of statutes regulating firearm possession. The result has been chaos. In less than a year, U.S.C. § 922(n) and § 922(g)(8), which criminalize possession by specific people involved in the criminal justice system, have been held unconstitutional. Challenges to other federal firearm regulations are flooding the courts.

Notably, § 922(g)(1), which criminalizes possession of a firearm by any person with a felony in their criminal history, has been vigorously challenged. Few courts have yet agreed with these challengers, relying in large part on specific dicta from *District of Columbia v. Heller* to reject them. That dicta held out certain "longstanding prohibitions" on firearm possession from the scrutiny applied to other gun regulations. However, the dicta is uncited and *Bruen* did nothing to explain the authority justifying the hold outs. As firearm regulations continue to fall under *Bruen*'s scythe, questions around § 922(g)(1) will continue to swirl until the law is changed to something more certain. Already, the Third Circuit has held the statute unconstitutional as applied to one defendant, and the District Court for the Northern District of Illinois has held the statute facially unconstitutional.

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So how to fill the gap currently band-aided over by *Heller*'s dicta? Two primary schools of thought are considered herein. One says that the founding fathers desired to disarm "unvirtuous" people, and that all felons are rightly disarmed because they lack virtue, as evinced by their felonious past. The other says that the authors of our constitution believed in disarming "dangerous" people, and that statutes such as § 922(g)(1) should be construed by that standard. This Comment analyzes both potential standards and finds that the "dangerous" standard is better supported by history as well as being the more practical and logical choice.

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INTRODUCTION

In the summer of 2022, the U.S. Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*.[1] The majority opinion by Justice THOMAS built on the jurisprudence in *District of Columbia v. Heller*,[2] which held that the right to bear arms was not connected to militia membership.[3] *Bruen* laid out a new test for determining if a law that regulates private firearm ownership violates the Constitution.[4] *Bruen*'s plain text appears to implicate many federal firearm regulations.[5] The result has been chaos in the lower courts as challenges to almost every federal firearm statute have exploded in number.[6] The primary legal saving grace for these regulations has been a single piece of dicta from *Heller*.[7] Thus far, two statutes, 18 U.S.C. § 922(n)[8] and § 922(g)(8),[9] have been held unconstitutional under *Bruen*, the latter by the Fifth Circuit Court of Appeals.[10]

Against this backdrop, this Comment will consider the future of 18 U.S.C. § 922(g)(1).[11] This statute, which criminalizes possession of a firearm by any person previously convicted of a crime with a year or more of potential imprisonment,[12] is one of the most popular convictions in the federal system, but, on its face, appears to be unconstitutional under *Bruen*.[13] While *Heller*'s dicta has thus far protected § 922(g)(1) from being held unconstitutional, this Comment posits the dicta is a poor dam against the flood of litigation. Instead, the law should be changed, on grounds of both statutory interpretation and good public policy, to disarm only *dangerous* felons. This adjustment would make the law comport with the new rule of *Bruen* without

1. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).
2. District of Columbia v. Heller, 554 U.S. 570 (2008).
3. *See id.* at 584.
4. *See Bruen*, 142 S. Ct. at 2129–30 (2022).
5. *See id.*
6. *See infra* notes 61–64.
7. *See* discussion *infra* Section II.A.2.
8. 18 U.S.C. § 922(n) (2022) (making it illegal for a person under indictment for a crime punishable by one year or more of prison time to possess a firearm).
9. 18 U.S.C. § 922(g)(8) (2022) (making it illegal for a person under court order related to domestic violence or threat thereof to possess a firearm).
10. *See* United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) (abrogating § 922(n) for failing to comport with *Bruen*); United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (abrogating § 922(g)(8) for failing to comport with *Bruen*).
11. 18 U.S.C. § 922(g)(1) (2022) (making it illegal for a person previously convicted of a crime punishable by a year or more of imprisonment to possess a firearm).
12. While this typically means felonies are the disarming conviction at issue, and so felons are the primary group under discussion in this Comment, it is worth noting that the statute applies with equal force for the rare misdemeanor conviction that carries a year or more of potential imprisonment.
13. *See* discussion *infra* Sections I.D–E, II.A.1.

relying on uncited dicta. Further, the suggested change represents a more common-sense rule that advances state interests without needlessly impinging on the constitutional rights of non-dangerous felons.

I. BACKGROUND

A. The Second Amendment

The Second Amendment is part of the Bill of Rights, a set of amendments to the U.S. Constitution passed at the second Constitutional Convention in 1791.[14] It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[15]

Prior to *District of Columbia v. Heller*, the unanimous understanding was that the Second Amendment protected certain gun ownership rights, but that the overall goal of the amendment was empowering the states to raise and keep a militia.[16] Between 1971 and 2001 every circuit court produced a holding supporting this reading of the Second Amendment.[17] The Supreme Court had also made such a holding in *United States v. Miller*.[18] *Miller* reversed a district court decision that held a section of the National Firearms Act as violative of the Second Amendment.[19] In this reversal, the Court explained that the Second Amendment relates specifically to militias and did not guarantee a right to keep and bear individual arms.[20]

B. District of Columbia v. Heller

Heller dramatically re-interpreted the Second Amendment. It read *Miller* to mean only that certain types of weapons were prohibited under the Second Amendment and instead found that the Second Amendment *did* confer an individual right to Americans to

14. *The Bill of Rights: A Brief History*, ACLU (Mar. 4, 2002), https://tinyurl.com/2u8eb56n [https://perma.cc/53ZU-TQCV].

15. U.S. CONST. amend. II.

16. *See, e.g.*, United States v. Haney, 264 F.3d 1161, 1164–66 (10th Cir. 2001).

17. *See, e.g.*, United States v. Napier, 233 F.3d 394, 402–04 (6th Cir. 2000); Gillespie v. Indianapolis, 185 F.3d 693, 710–11 (7th Cir. 1999); United States v. Scanio, No. 97–1584, 1998 WL 802060, at *2 (2d Cir. Nov. 12, 1998); United States v. Wright, 117 F.3d 1265, 1271–74 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 285–86 (3d Cir. 1996); Hickman v. Block, 81 F.3d 98, 100–03 (9th Cir. 1996); United States v. Hale, 978 F.2d 1016, 1018–20 (8th Cir. 1992); Thomas v. City Council of Portland, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971); Sandidge v. United States, 520 A.2d 1057, 1058–59 (D.C. Cir. 1987).

18. United States v. Miller, 307 U.S. 174 (1939).

19. *Id.* at 175, 183.

20. *Id.* at 178.

keep and bear arms.[21] Despite that seismic shift, the Court did not designate a specific level of scrutiny for evaluating future Second Amendment restrictions.[22] The Court explained that because this was the first time the right was being acknowledged, it was not the time for such a standard to be identified.[23] Justice Breyer suggested in dissent that the standard of review should be interest-balancing.[24] The majority disagreed, finding that approach was incorrect, as the Second Amendment is itself "the very *product* of an interest balancing by the people."[25]

Instead of identifying a specific test to be applied to Second Amendment restrictions, the Court in *Heller* focused on establishing bright line rules for the doctrine's outer limits.[26] The Court was clear that the Second Amendment confers "not a right to keep and carry any weapon whatsoever in any manner whatsoever."[27] At the same time, the Court was careful to establish that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms."[28] The Court clarified in a footnote (that would come to hold great importance) that these "presumptively lawful regulatory measures" were not intended as an exhaustive list, but as "examples" of the kinds of restrictions still permitted by the new reading of the Second Amendment.[29] Furthermore, the Court specifically held that "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home."[30]

These apparent exceptions are dicta, not central to *Heller*'s holding and citing to no caselaw, statute, treatise, historical examples, or any other primary or secondary source. Yet they have been profoundly impactful dicta, preventing this new right to bear and keep arms from reaching all of "The People."[31] This Comment will revisit

21. District of Columbia v. Heller, 554 U.S. 570, 623 (2008) (interpreting *Miller* to stand for the idea that the Second Amendment only extends to certain types of firearms).

22. *See id.*

23. *Id.* at 634.

24. *Id.* at 689 (Breyer, J., dissenting).

25. *Id.* at 634–35 (majority opinion).

26. *See id.*

27. *Id.* at 626.

28. *Id.* at 626–27.

29. *Id.* at 627 n.26.

30. *Id.* at 635 (emphasis added).

31. *See* United States v. Barton, 633 F.3d 168, 171 (3d Cir. 2011); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); United States v. Rozier, 598 F.3d 768,

this critical dicta at length. For now, it is sufficient to understand that *Heller* established the individual right to keep and bear arms and relied upon dicta to keep the right from being extended to certain groups, including felons.

C. McDonald v. City of Chicago

McDonald v. City of Chicago[32] did not reverberate through history the same way that *Heller* has, but it is a critical part of the journey that Second Amendment jurisprudence has taken in the 14 years since *Heller*. *McDonald* clarified and expanded *Heller*, holding that the Second Amendment applies to the states via the Fourteenth Amendment.[33] The *McDonald* Court affirmed *Heller*'s dicta that prohibitions on possession by felons remains a permissible constitutional regulatory measure, but once again, this was dicta, and the Court did not cite any sources in support of this claim.[34]

There is additional dicta within *McDonald* which, while not central to the holding, is relevant to the discussion of felons being disarmed. *McDonald* suggests that the Second Amendment is a remedy for persons living in high-crime areas, such as certain Chicago neighborhoods.[35] The logical implication of this argument conflicts with the Court's dicta from *Heller* that the Second Amendment can tolerate a prohibition on felons possessing firearms.[36] This is because it is likely that felons end up residing in high-crime neighborhoods.[37]

The question of where felons live upon release is not easily answered, in part because U.S. prison systems generally do not track what happens to prisoners once they are released.[38] While the specific number is therefore uncertain, it is undoubtedly a significant number of people, as studies suggest *eight percent* of Americans have a felony conviction.[39]

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771 n.6 (11th Cir. 2010) (citing to *Heller*'s dicta as grounds to hold firearm regulations constitutional).

32. McDonald v. City of Chicago, 561 U.S. 742 (2010).

33. *Id.* at 750.

34. *Id.* at 786.

35. *Id.* at 789.

36. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

37. *See* Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1568 (2009) (discussing how people with felony convictions are "likely to live in dangerous neighborhoods with disproportionately high numbers of armed criminals . . . [and] therefore might need the ability to defend themselves with guns more than the average person").

38. *See, e.g.*, Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017) https://tinyurl.com/yc7wz5e6 [https://perma.cc/7G2Y-5DVN] ("[T]he U.S. does not maintain a registry of data on people with felony convictions.").

39. *Id.*

A study on incarceration and homelessness observed that tightening rental markets in urban areas puts released felons into competition for rental stock against families and individuals without criminal records, groups most landlords prefer.[40] Subsidized housing would seem a good option for recently released felons, but many public housing programs specifically forbid felons from applying.[41] Even moving in with a family member who is living in subsidized housing is often not an option, as the former-felon's presence there puts the leaseholder at risk of eviction.[42] Some jurisdictions have gone even further, passing laws that restrict some felons (most commonly, sex offenders) from living in certain areas.[43] These systems contribute to an ecosystem that puts many former inmates on a path to homelessness.[44]

While some prison systems do have "reentry programs" that attempt to assist prisoners with these challenges, one study suggested that as little as 13 percent of incarcerated persons are being reached by these programs.[45] Further, 45 percent of those programs did not cover finding a place to live, and amongst those that did, only 39 percent provided specific referral information.[46] If those numbers are true across the justice system, then somewhere around four percent of prisoners are getting specific referrals to post-imprisonment housing options. These statistics admittedly have limited force, given they mostly derive from studies focused on individual states.[47] Still, they support the common-sense proposition that released felons have a high chance of being homeless, or of living in a low income, high crime neighborhood. These are the same neighborhoods considered by Justice ALITO in *Bruen* as places where "people reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other

40. Stephen Metraux et al., *Incarceration and Homelessness*, *in* TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 9-1, 9-7 (Deborah Dennis et al. eds., 2008).

41. LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY 13 (2004), https://tinyurl.com/2wpu9mwd [https://perma.cc/R4YP-TT67].

42. Metraux et al., *supra* note 40, at 9-9.

43. *Id*. at 9-9 to -10.

44. *Id.*

45. NANCY G. LA VIGNE ET AL., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS 34 (Urban Inst. 2003), https://tinyurl.com/y6ry5fur [https://perma.cc/R6N7-EXDS].

46. Metraux et al., *supra* note 40, at 9-8.

47. *See generally* James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, *in* 3 CRIME POLICY REPORT, (Urban Inst. 2001), https://tinyurl.com/ruxy95n8 [https://perma.cc/RJ6G-5FEZ].

serious injury."[48] It follows logically that former felons frequently have a high likelihood of needing to exercise their Second Amendment rights.

D. New York Rifle & Pistol Association v. Bruen

Heller and *McDonald* set the stage for *New York State Rifle and Pistol Association v. Bruen,* where the U.S. Supreme Court heard arguments pertaining to a New York state law which restricted open carry privileges to those who could demonstrate "proper cause."[49] The Court held that the statute was an unconstitutional restriction on New Yorkers' Second Amendment rights.[50] In its analysis, the Court returned to its unfinished business from *Heller* and endeavored to establish a test for Second Amendment regulation.[51] The Court explained the rule is now that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[52]

The Court specified that determining if a given regulation comports with the nation's historical tradition requires a two-step test: "[F]irst, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified."[53] Despite the phrase "modern and historical regulations" seemingly coupling those two time periods, the Court did not weigh regulations from the two eras equally.[54] Modern regulations are only impactful if they can be shown to be comparable with a historical regulation.[55] Even "historical" is used here in a particular way, referring only to restrictions present at the time of ratification of the Second and Fourteenth Amendments.[56] The Court specifically marked evidence of restrictions from the late-nineteenth and twentieth centuries as irrelevant.[57] The Court did acknowledge that a modern restriction need not be a "dead ringer"

48. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2158 (2022) (ALITO, J. concurring).
49. *Id*. at 2122 (majority opinion).
50. *Id.*
51. *Id.* at 2131.
52. *Id.* at 2129–30.
53. *Id.* at 2128.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 2119–21 n.28 (holding that evidence presented by respondent from the eras surrounding the ratification of the Second and Fourteenth Amendments are appropriate but unconvincing, that evidence from the late 19th century "cannot

for its historical analogue.[58] Despite that flexibility, the Court held that any modern restriction must still have such a historical analogue to compare to.[59] A lack of historical analogue should be taken as a negative precedent that the modern regulation runs afoul of.[60]

Several firearms restrictions taken more or less for granted in modern society are susceptible to attack under *Bruen*'s test. These challenges have already begun. In September 2022, a district court held 18 U.S.C. § 922(n) facially unconstitutional, citing *Bruen* as the binding precedent requiring abrogation.[61] That statute criminalized possession of a firearm by a person under indictment for a crime punishable by one year or more of imprisonment.[62] In March of 2023, the Fifth Circuit found that § 922(g)(8) was also unconstitutional, also citing *Bruen* as demanding such a finding.[63]

Blanket prohibition on the general class of "felons" from possessing firearms is being actively litigated around the country, with post-*Bruen* challenges to § 922(g)(1) coming in front of district courts in at least 11 federal circuits; all but D.C. and the Federal circuit.[64] Most decisions have upheld it, largely relying on the dicta from *Heller*.[65] Such challenges are likely to persist, devouring judicial resources in the process, until more binding authority prevents them. As suggested above, there is no longer unanimity on the issue: a few

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provide much insight . . . where it contradicts earlier evidence," and specifically mentioning in footnote 28 that 20th century evidence runs into the same problem).

58. *Bruen*, 142 S. Ct. at 2118.

59. *Id.*

60. *Id*. at 2118–19 (holding that, because the challenged regulation in this case attempts to name the island of Manhattan a "sensitive space," which has no historical basis, the regulation is unconstitutional).

61. United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) (holding that 18 U.S.C. § 922(n) is not consistent with the nation's historical traditions and must therefore be held unconstitutional under *Bruen*).

62. 18 U.S.C. § 922(n).

63. United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) (abrogating 18 U.S.C. § 922(g)(8) for failing to comport with *Bruen*).

64. *See* United States v. Trinidad, No. 21-CR-398, 2022 WL 10067519 (D.P.R. Oct. 17, 2022); United States v. Rowson, 652 F. Supp. 3d 436 (S.D.N.Y. 2023); Range v. Att'y Gen., 53 F.4th 262 (3d Cir. 2022) (en banc); United States v. Tucker, No. 2:22-cr-00017, 2023 WL 14388 (S.D. W. Va. Jan. 17, 2023); United States v. Barber, No. 4:20-CR-384, 2023 WL 27648 (E.D. Tex. Jan. 27, 2023); United States v. Goins, No. 5:22-cr-00091, 2023 WL 20890 (E.D. Ky. Jan. 23, 2023); United States v. Rush, No. 22-cr-40008, 2023 WL 24513 (S.D. Ill. Jan. 25, 2023); Battles v. United States, No. 4:23-cv-00063, 2023 WL 19261 (E.D. Mo. Jan. 20, 2023); Doe v. Bonta, 650 F. Supp. 3d 1062 (S.D. 2023); United States v. Lewis, 650 F. Supp. 3d 1235 (W.D. Okla. 2023); United States v. Kirby, No. 3:22-cr-26-TJC-LLL, 2023 WL 1781685 (M.D. Fl. Feb. 6, 2023) (all cases in which § 922(g)(1) was challenged, all declining to abrogate, all citing to *Heller*).

65. *See supra* note 64.

district courts have upheld as-applied challenges, and one has upheld a facial challenge, discussed in detail *supra*.[66]

The Court has been explicit in their desire to continue these "longstanding prohibitions," such as § 922(g)(1).[67] A change in law would allow such prohibitions to comport with *Bruen* without resting on *Heller*'s dicta.[68] As this Comment will discuss, there is legal and historical precedent to add a "dangerousness" element to the statute, so that only felons properly classified as "dangerous" are prevented from owning firearms. But first, let's consider the statute as written.

E. 18 U.S.C § 922(g)(1)

18 U.S.C. § 922(g)(1) criminalizes possession of a firearm by anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."[69] From 2017 to 2021, roughly 35,000 convictions were made under § 922(g)(1), 97 percent of which resulted in incarceration, for an average sentence of 60 months.[70] For context, in 2019, 9.52 percent of all federal convictions were § 922(g)(1) convictions (7,454 out of 78,256 convictions) and the median sentence of 60 months for a § 922(g)(1) offense is double that year's overall median felony sentence of 30 months.[71] As these statistics show, § 922(g)(1) is amongst the most common statutes of conviction in the federal system.[72] Since *Heller*, § 922(g)(1) has been the most challenged statute under the Second Amendment.[73]

The genesis of § 922(g)(1) is particularly relevant to analysis under *Bruen*, because its test requires identifying the statute's analogue in the historical record.[74] The statute has its roots in the Uniform Firearms Act of 1926 ("UFA").[75] That UFA disarmed people who had been convicted of a "crime of violence."[76] Congress debated the issue of disarming felons but ultimately rejected the idea.[77] In

66. *See* discussion *infra* Sections II.B.4–5.

67. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133–34 (2022).

68. *Id.*

69. 18 U.S.C. § 922(g)(1).

70. U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1–2 (2021), https://tinyurl.com/mpvrtue2 [https://perma.cc/48E6-UW48].

71. *Id.* at 1; MARK MOTIVANS, U.S. DEP'T OF JUST., NCJ NO. 301158, FEDERAL JUSTICE STATISTICS, 2019, at 11 (2021), https://tinyurl.com/yrfpv56f [https://perma.cc/5N3G-ER3G].

72. *See generally* U.S. SENT'G COMM'N, *supra* note 70; MOTIVANS, *supra* note 71.

73. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 252–53 n.16 (2020).

74. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2118 (2022).

75. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009).

76. *Id.* at 699.

77. *Id.* at 700.

1930, when the UFA was ultimately passed, it retained the "crime of violence" language and did not mandate the disarming of all persons convicted of a felony.[78] In 1938, the UFA was recodified, but the substance, disarming only those convicted of a crime of violence, remained unchanged.[79] The law was undisturbed until 1968, when Congress, spurred by the assassinations of Dr. Martin Luther King Jr. and President John F. Kennedy, passed the Gun Control Act of 1968.[80] Amongst its dramatic changes to American gun law, Congress adjusted the § 922(g)(1) disarming language to the current prohibition.[81] This legislative history is exclusive to the 20th century, and so on its own is insufficient to justify § 922(g)(1) under *Bruen*'s "history and tradition" test.[82]

II. Analysis

A. Can § 922(g)(1) Survive Bruen*?*

1. Historical Support for § 922(g)(1) is Insufficient to Comport with Bruen

Bruen has so dramatically shifted the landscape of Second Amendment jurisprudence that decades-old laws cannot survive the change. Specifically, the prohibition against possession of firearms by a felon codified at 18 U.S.C. § 922(g)(1) can only pass *Bruen*'s test by relying on the unsupported dicta from *Heller* and *Bruen*.

a. Popular Arguments Suggesting Felon Disarmament was Considered at Ratification Are Weak

Applying the *Bruen* test requires looking to the historical record to find a comparable statute from specific time periods.[83] However, § 922(g)(1) has no analogue in the historical record prior to 1920.[84] As Second Amendment and constitutional scholar Carlton F.W. Larson bluntly summarized, "no colonial or state law in 18th-century

78. *Id.*
79. *Id*. at 699, 706.
80. *See MLK and the Gun Control Act of 1968*, Brady United (Jan. 21, 2019) https://tinyurl.com/mr3xa2v7 [https://perma.cc/C9DB-QAWS]; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1220 (1968).
81. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1220 (1968).
82. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2135 (2022).
83. *Id.* at 2119–21; *see* discussion *supra* Section I.D
84. *See* Marshall, *supra* note 75, at 697.

America formally restricted the ability of felons to own firearms."[85] That assessment is shared by other scholars.[86]

Scholars who disagree cannot do so by pointing to any pre-20th-century statute disarming felons, because there are none. Instead, they can only point to historical evidence such as disarming statutes in English law and argue their existence shows that disarmament of felons, generally, has a historical basis.[87] Many authors have focused on colonial governments, who sometimes disarmed citizens pursuant to their police powers.[88] While some arguments are novel to certain scholars, three rejected amendments, considered either at the federal constitutional convention or the ensuing state ratifying conventions, recur across these texts: an amendment offered by Samuel Adams in the Massachusetts ratifying convention, an amendment offered by the New Hampshire delegates at their ratifying convention, and a proposal brought forth by Pennsylvania Anti-Federalists at the second federal constitutional convention.[89] Scholars both before and after *Heller* have repeatedly identified these three historical moments as textual basis for a historical restriction on gun ownership by felons.[90]

Amongst Samuel Adams's proposals at the Massachusetts ratifying convention was one that any laws that "prevent the people of the United States, who are peaceable citizens, from keeping their own arms" be invalidated.[91] The inclusion of the phrase "peaceable

85. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374 (2009).

86. *See, e.g.*, Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 142 (2007) ("[A]t no time between 1607 and 1815 did the colonial or state governments . . . restrict the ownership of guns by members of the body politic. In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens.").

87. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT, 135–65 (Harv. Univ. Press 1994) (discussing the right to keep and bear arms as an individual one, as well as various regulations occurring in both England and the American Colonies).

88. *See generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004) (arguing that both early Colonial and state governments applied English precedent to disarm some citizens); Michael Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 585 (1998).

89. Churchill, *supra* note 86, at 168–70.

90. *See* Larson, *supra* note 85, at 1374–75; Cornell & DeDino, *supra* note 88, at 487–89; Bellesiles, *supra* note 88, at 585; MALCOLM, *supra* note 87, at 135–65; David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms'*, 22 LAW & HIST. REV. 119 (2004) (all embracing one or more of the three aforementioned theories of historical proof for felon disarmament).

91. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 181–82 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

citizens" is the critical language here, relied upon for an implicit rejection of "non-peaceable" citizens' unfettered access to the same rights.[92] There are several issues with relying on this source, identified clearly here:

> There are at least three reasons to question this source as supporting the felon exception. First, as a failed amendment offered by an Anti-Federalist, it has no direct link with the Second Amendment that was actually adopted. Second, the critical words "peaceable citizens" do not appear in the text of the Second Amendment itself, which refers broadly to "the people." Third, "peaceable citizens" might mean "non-felons," but that reading is neither obvious nor required. Nonviolent criminals such as forgers, for example, might well be considered "peaceable." [93]

Adams's proposed amendment and the Second Amendment diverge on critical language. That such ideas were formally proposed and not ultimately included is strong circumstantial evidence that the Founders did *not* endorse the idea of disarming felons.[94]

The second popular citation is an amendment considered at the New Hampshire ratifying convention by the state's delegates.[95] It proposed that the Second Amendment specify that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[96] The text did not make it into the final draft of the Second Amendment or anywhere else in the Constitution.[97]

It is a strain to read this proposal as disarming all felons. The first clause suggests an extreme reticence to disarm, and the second clause identifies a specific crime that would justify such actions, implying that other crimes would *not* have that effect.[98] This proposal demonstrates that some Second Amendment restrictions were considered as early as 1792. But the fact that it was not included in the text of the Constitution, and so was rejected by a majority of the Constitution's ratifiers, suggests that, like the Adams amendment, it is weak evidence for a pervasive desire to disarm felons.[99]

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92. Churchill, *supra* note 86, at 169.

93. Larson, *supra* note 85, at 1374.

94. *Id*.

95. JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 326 (2d ed., 1891).

96. *Id*.

97. *Id*.

98. *See* Larson, *supra* note 85; THE COMPLETE BILL OF RIGHTS, *supra* note 91, at 183.

99. Larson, *supra* note 85, at 1374.

The third entry in this triology of proposed constitutional language comes from the Pennsylvania Anti-Federalists, who also proposed an amendment to the Constitution suggesting they favored disarming felons.[100] That the proposal was specifically adopted and advocated for by a distinct political group makes this arguably the strongest of these three sources.[101] The relevant part of the proposed amendment reads, "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."[102] The Amendment's text arguably "suggests a broad power of disarmament for categories of persons deemed dangerous."[103]

Aside from the "danger" language, this proposal is similar to the others discussed above. Like the Adams and New Hampshire propositions, this disarming was suggested by opponents of the Constitution, and, as ratified, the idea is absent from the text. As historical evidence, the failure to include such language in the Second Amendment is arguably evidence *against* the Founders' belief in disarming felons, not for it. It is a burden on logic to read that proposed language as proof of the Founders' intent to disable felons from firearm ownership. As Larson quips, "[t]he best one can say is that at least some people in Pennsylvania felt criminals could be disarmed."[104] That does not appear to reach the "history and tradition" standard desired by *Bruen*.

b. Historical Firearm Restrictions Were Common, but Did Not Reach Possession by Felons

There is a bevy of historical evidence indicating that restrictions were common before and during America's founding. English common law, colonial law, and early American law all have a clear tradition of imposing restrictions on firearms.[105] The presence of those restrictions further highlights the omission of restrictions on felons.

As early as the 13th century, England was promulgating rules and regulations related to the training, arming, and keeping of arms

100. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971) (citing NATHANIEL BREADING, THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS (Philadelphia, Eleazer Oswald 1787), https://tinyurl.com/568rvban [https://perma.cc/FX8T-MV3Q]).

101. Greenlee, *supra* note 73, at 250.

102. SCHWARTZ, *supra* note 100, at 665.

103. Larson, *supra* note 85, at 1375.

104. *Id*.

105. *See* discussion *infra* Sections II.A.2–B.2.

amongst the militias of its various colonies.[106] An act published by King Charles I in 1662 laid out many standards for the militias, most notably, that those who *kept* the militia's arms (property owners of a certain wealth) were distinct from those who actually would *bear* arms if needed, the first of many regulations of firearms belonging to the militia.[107] This division of labor continued in many English colonies, but not the American colonies, and by the 18th century, militia membership was made compulsory for *all* able-bodied free white men between the ages of 16 and 60.[108] Public officers, clergy, and certain other specific professionals were exempted from mandatory military training but were still required to possess guns and turn out for service in an emergency.[109] This break in tradition of colonial militia signals not only the beginning of the American practice of providing broad access to firearm rights, but the beginning of state restrictions on those rights. Included in these same documents cited above are myriad state-specific restrictions. Rhode Island let their citizens skip the training at age 50, not 60; Pennsylvania rejected the militia concept entirely until the Revolution; and Maryland empowered their county officers to pick the individuals to undergo training so that those officers could avoid Catholics, to name just a few.[110] Notably absent from *any* of these charters is any discussion of felons or criminals, much less an exception to their mandate to join the militia and keep arms.[111]

Unsurprisingly, the high density of colonial gun ownership is reflected in the laws of the original colonies. New Jersey imposed fines on persons who were "deficient in keeping the arms and stores"

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106. *See* Clayton E. Cramer, *The Statute of Northampton (1328) and Prohibitions on the Carrying of Arms*, SOC. SCI. RSCH. NETWORK (Sept. 19, 2015), https://tinyurl.com/5atfzr5m [https://perma.cc/5NB3-FLRK].

107. *See* An Act for Ordering the Forces in the Several Counties of this Kingdom §§ XIII, XIV (1662), https://tinyurl.com/59vbp43m [https://perma.cc/CY7C-B7JY].

108. Churchill, *supra* note 86, at 145 (finding the militia statutes from all 13 colonies enforced this standard).

109. *See* An Act for the Better Ordering of the Militia Forces in the Several Counties of That Part of Great Britain Called England, 30 Geo. II c. 25 (1757).

110. *See* Churchill, *supra* note 86, at 146.

111. While there were some distinctions in usage, the term "felon" would have been known to these lawmakers in broadly the same sense we know it today. English law had distinguished felonies as crimes punishable by forfeiture or death, and more serious than misdemeanors. *See* Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 464–65 (2009) (explaining the evolving meaning of the term in the twelfth century as based on an understanding of felony as "a serious crime punishable by death"). Additionally, noted jurist Sir William Blackstone wrote on the term's nature and meaning, finding felonies similar to, but not synonymous with, capital offenses. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOLUME 4: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 94–101 (Univ. of Chicago Press 2019).

related to militia membership.[112] South Carolina, Georgia, New York, Delaware, Connecticut, and Virginia all had laws on their colonial books regulating the arms and ammunition that their laws demanded their militias keep and bear.[113]

These historical colonial restrictions are important for two reasons. First, the presence of regulations coupled with the absence of regulations relating to criminal history implies the latter was not thought to be a proper or desirable regulation during the lead up to the American Revolution. Second, the use of the phrase "keeping arms," quoted above in the New Jersey Act and appearing throughout the laws discussed above, is clearly and repeatedly separated from the practice of militia service, supporting the individual right to bear arms separate from militia membership, the critical holding of *Heller* extended by *McDonald*, and *Bruen*.[114] This is significant in that it confirms the core holdings of those three cases while simultaneously suggesting that disarming of felons is not part of the history and tradition those cases find to be determinative.

Starting as early as 1775, American states fighting for their independence from England began passing new laws separate from their colonial overlord's.[115] Pennsylvania, with its high Quaker population, offers a clear example of how the body politic was redefined from a group that certain persons were automatically included in (i.e., white, property-owning men) to a self-selecting group comprised of those willing to swear an oath of allegiance to the Commonwealth.[116] Those who refused such an oath were ordered disarmed.[117] It became a standard practice in most of the revolutionary-era states to disarm these non-associators.[118] These sources show that during the revolutionary period, American authorities took the time to forbid certain groups from firearm possession yet apparently did not see cause to include felons or criminals amongst those groups. This further demonstrates that the attitude at the time was *not* that those groups ought to be automatically disarmed.

Additionally, plenty of laws regulating the use of firearms were put onto colonial books pre-revolution. New Hampshire, Connecticut, and Georgia all had restrictions on shooting after

112. BLACKSTONE, *supra* note 111, at 148.
113. *Id.*
114. District of Columbia v. Heller, 554 U.S. 570, 616 (2008).
115. Greenlee, *supra* note 73, at 264.
116. Churchill, *supra* note 86, at 159–60.
117. *Id.*
118. *Id.* at 160.

sundown.[119] North Carolina banned hunting at night.[120] Pennsylvania prohibited shooting off guns to celebrate the new year, and Virginia cracked down on firing to celebrate marriages and funerals (as well as firing on the Sabbath).[121] Philadelphia, New York City, and Boston prohibited shooting within their borders, and Pennsylvania and New York state extended that to all other towns or boroughs.[122] Delaware restricted firing in built-up areas, with an exception for holidays, while New Jersey, Massachusetts, and Rhode Island had restrictions designed to protect the public highways from errant gunfire.[123]

This section is not meant to represent an exhaustive collection of early American firearm regulations, but rather to demonstrate that the subject was widely regulated before, during, and after the American revolution.[124] Early State governments also regulated hunting with regularity.[125] In an ecosystem in which firearm regulations were familiar historically and at the present day, *nowhere* were felons a class thought to be appropriate to disarm.[126] The logical implication of this history is that there is no historically analogous statute that can save § 922(g)(1) from *Bruen*'s axe.

There is, however, a critical piece of modern jurisprudence that has thus-far prevented the above argument from wiping § 922(g)(1) and statutes like it off the books. That saving grace comes from a single piece of dicta from *Heller*. The dicta explained that while the decision in *Heller* facially implicated certain firearm restrictions familiar to most Americans, the Court did not intend to disturb them:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[127]

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119. *Id.* at 162.
120. *Id*. at 262.
121. *Id.* at 162.
122. *Id.*
123. *Id.*
124. Other historians have attempted more comprehensive collections of such laws and have turned up nothing that can be said to look even similar to a felon-disarming statute. *See, e.g.*, Mark Frassetto, *Firearms and Weapons Legislation up to the Early 20th Century*, SOC. SCI. RSCH. NETWORK (Jan. 15, 2013), https://tinyurl.com/yc72rjk2 [https://perma.cc/WU9D-S277].
125. Greenlee, *supra* note 73, at 261.
126. Churchill, *supra* note 86, at 162.
127. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (emphasis added).

2. The Heller *Dicta is Unsupported and Fails to Save § 922(g)(1)*

The above quote from *Heller* has become a critical citation in the onslaught of challenges to § 922(g)(1) post-*Bruen*. Of the 11 circuits who have heard such challenges, courts dismissing that challenge have *all* cited to the "longstanding prohibitions" passage as binding authority supplementing the historical analyses required by *Bruen*.[128] However, there is reason to doubt that this holding is grounded in sufficient law to be doing such heavy lifting in defense of § 922(g)(1). Suspicion of this approach came concurrently with its announcement, in the *Heller* dissent by Justice Breyer (joined by Justices Souter and Ginsburg). In dissent, Justice Breyer dedicated a passage to this dicta's confusing presence in the opinion:

> I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. . . . Why these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count?[129]

Justice Breyer is not alone in his confusion. Scholars have doubled down on this criticism in the years since the decision, frustrated that "*Heller* does not cite a single source to support these exceptions. Not one. So much for sticking to history and restricting the personal value choices of the judge."[130]

The vagueness of that critical dicta could be forgiven had the Court found time to later finish up its work. In fact, in *Heller*, the court essentially promised to do so, writing: "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[131] Despite that statement, the Court has never attempted to expound. In *McDonald*, the Court arguably had such an opportunity. *Heller* was two years behind them, and the facts of *McDonald* implicated the "sensitive spaces" doctrine, one of the five explicitly saved prohibitions in the *Heller* dicta.[132] But the majority did not fill

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128. Range v. Att'y Gen., 53 F.4th 262, 266 (3d Cir. 2022) (en banc) (in which this precise quote appears in the opinion's first paragraph); *see, e.g.*, Doe v. Bonta, 650 F. Supp. 3d 1062, 1069 (S.D. Cal. 2023); United States v. Barber, No. 4:20-CR-384, 2023 WL 27648, at *3 (E.D. Tex. Jan. 27, 2023).

129. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting).

130. Winkler, *supra* note 37, at 1561.

131. *Heller*, 554 U.S. at 635.

132. McDonald v. City of Chicago, 561 U.S. 742, 784 (2010).

the gap here, and instead merely quoted *Heller*'s dicta and repeated its uncited proposition.[133] The Court assured that "[d]espite [respondents'] doomsday proclamations, incorporation does not imperil every law regulating firearms."[134] While this quote is literally true, the laws referenced in the dicta have been in peril constantly; since the opinion in *Heller* through the year 2020, § 922(g)(1) was amongst the most challenged statutes in the federal system—even before the wave of challenges inspired by *Bruen*.[135]

Despite this gap lingering for almost 15 years, the Court did not meaningfully fill it in *Bruen* either. The court addresses the *Heller* dicta only once in *Bruen* and does little to clarify the dicta's legal backing.[136] The Court conceded that, regarding the sensitive places doctrine, there were "relatively few" analogues for that doctrine in 18th and 19th-century laws.[137] However, this was not fatal to the sensitive places doctrine, in part because the Court claimed it was aware of "no disputes regarding the lawfulness of such prohibitions."[138] This conclusion is itself uncertain, but considering the number of challenges to § 922(g)(1) both before and after *Bruen*, it is difficult to imagine the Court saying the same about the felon-in-possession prohibition with a straight face.

In both of the Court's meaningful post-*Heller* decisions, with years to ponder the issue, it has declined to "expound upon the historical justifications" besides highlighting the sensitive places doctrine's uncontroversial status as guiding.[139] It is one thing for a piece of dicta to influence a nascent body of law, as in the days immediately following *Heller*, but that is no longer an accurate description of the situation, as a search through one legal database reveals 3,420 decisions citing *Heller*, many of them specifically citing the dicta.[140] Further, the dicta is not even especially declarative as the footnote labels these regulations as "presumptively" lawful.[141] Black's Law Dictionary defines "presumptively" as having the effect of shifting the burden of proof onto the challenger, suggesting these "presumptions" could be

133. *Id.* at 786 ("We repeat those assurances here.").
134. *Id.*
135. Greenlee, *supra* note 73, at 252 n.16.
136. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022).
137. *Id.*
138. *Id*.
139. District of Columbia v. Heller, 554 U.S. 570, 635 (2010); *see Bruen*, 142 S.Ct. at 2133.
140. *See Citing References – District of Columbia v. Heller,* THOMSON REUTERS WESTLAW PRECISION, https://tinyurl.com/2d5sydw7 [https://perma.cc/2VHN-KBYW] (last visited Nov. 27, 2023).
141. *Heller*, 554 U.S. at 627 n.26.

rebutted.[142] The pointed lack of gap-filling on the topic suggests the presumption may in fact be erroneous, and given that *Heller*'s dicta is now holding up the weight of thousands of decisions across all circuits, at a certain point, the bill must come due.

There is little historical evidence for such a strict restriction of Second Amendment rights to felons specifically, but that has not stopped scholars from presenting arguments in favor of their disarmament.[143] In the next section, we will consider the popular argument that "unvirtuous" citizens (a group putatively including felons) were citizens the Founders thought fit to disarm. This argument, like *Heller*'s dicta, has been accepted too uncritically by courts, as its backing in historical fact is uncertain.

B. Virtuousness v. Dangerousness: Debating a New Standard

Since *Heller*, Second Amendment jurisprudence has become fertile ground for legal scholarship. Two theories in particular attempt to explain the grounds for *Heller*'s dicta by looking to historical evidence of the nation's attitudes on firearm restrictions before, during, and just after the American Revolution. The first sees evidence in the historical record precedent for disarming "unvirtuous" persons, a class that they say includes felons.[144] The other sees in the historical record a tradition of disarmament that identifies "dangerous" persons as the group to disarm, a class that would include some, but not all, felons.[145] If the virtuousness argument is accepted, that could be sufficient under *Bruen* to save § 922(g)(1), if that history is held to be "analogous enough."[146] While that might be the most straightforward way to resolve the controversy around § 922(g)(1), it is not the most sensible.

As the following analysis will show, the "unvirtuous" argument is not well-supported by history. The "dangerous" argument, by contrast, has a robust backing in English, colonial, Revolutionary-era,

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142. *Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019).

143. *See* discussion *infra* Section II.B.1.

144. *See generally* Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002); Cornell & DeDino, *supra* note 88; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000).

145. *See generally* Churchill, *supra* note 86; Greenlee, *supra* note 73; Larson, *supra* note 85; Marshall, *supra* note 75; Winkler, *supra* note 37.

146. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022).

and modern American law, making it the better standard for reforming § 922(g)(1).[147] By grafting a "dangerous" requirement onto the statute, the Court (or Congress) could connect § 922(g)(1) to the "history and tradition" of our nation, making it comport with both *Bruen* and common sense.

1. The Argument for Virtuousness is Not Supported by History

Scholars have been discussing the "unvirtuous" theory of disarmament well before *Heller*.[148] This theory has been used to argue, specifically, that felons do not "seem" to be included in the common law right to bear arms at the time of ratification.[149] The most cited pieces of historical evidence for this theory are the ratifying convention proposals by Samuel Adams, New Hampshire, and the Pennsylvania Anti-Federalists.[150] As discussed, it is unclear that these proposals establish felons as outside the common law right to bear arms, and it is possible to read them as establishing just the opposite.[151] Despite this apparent weakness, these proposals have become bedrock to this line of scholarship, built up in a cycle of self-referential citations into something that appears more credible and certain than the actual evidence would suggest.[152]

Some scholars also cite to revolutionary-era philosophical trends emphasizing the importance of civic virtue.[153] Specifically, their argument goes something like: "Historians have long recognized that the Second Amendment was strongly connected to the republican ideologies of the founding era, particularly the notion of civic virtue."[154] But checking the citations illuminates the weakness of this proposition. The quote above cites to an article asserting that the Founders

147. *See* discussion *supra* Section II.B.3.

148. *See, e.g.*, Cornell, *supra* note 144, at 679.

149. *See* Kates, *Handgun Prohibition*, *supra* note 144, at 266.

150. *Id.*

151. *See* discussion *supra* Section II.A.1.a.

152. *See, e.g.*, Reynolds, *supra* note 144, at 470 ("[F]elons, children, and the insane were excluded from the right to arms."). The authority Reynolds cites for this statement is Don Kates's 1986 article, which cites back to Professor Kates's 1983 article, which cites back to the failed ratification proposals of Samuel Adams, New Hampshire, and the Pennsylvania Anti-Federalists. *See also* Cornell, *supra* note 144, at 680 (arguing that the Anti-Federalists accepted the notion of gun restrictions that "far exceed[]" modern regulations, citing his own previous work for that proposition, which cites only the Pennsylvania Anti-Federalist proposal and the Pennsylvania Constitution, which outlines gun ownership as an individual right but is silent on virtue, crime, or danger).

153. *See* Reynolds, *supra* note 144, at 470.

154. Cornell & DeDino, *supra* note 88, at 492; *see* Kates, *Handgun Prohibition*, *supra* note 144, at 230–35.

found civic virtue to *come from* an individual right to bear arms.[155] The logic employed here is circular: it clearly can't be that the right to bear arms depends on virtuousness, if virtuousness is bestowed by that very right.[156] It also strains logic to attribute these attitudes to the Founders; the paper cited above establishes the connection between arms and virtue as originating with Machiavelli (who was Italian and died in 1532) and merging into English philosophical thought through James Harrington, an English libertarian who died in 1677.[157] Given both men were dead a century or two before the American Revolution, it does not seem appropriate to credit either scholar's ideas as representative of founding-era American politicians.

Other scholars find support for the "virtuousness" theory in the Test Acts, wherein Catholics living in England were required to pledge oaths to the Crown and to Protestantism.[158] These types of statutes were common in the 17th and 18th century, both in England and the colonies, and better support a "dangerous" standard far more than a "virtuous" one.[159]

Of course, the scholars cited here do not comprise *all* the writings on the subject of "unvirtuousness" and the Second Amendment, but these texts are highlighted here because they have been cited in federal courts for the very propositions debunked above. In *Range v. Attorney General*,[160] the Third Circuit became the first post-*Bruen* circuit court to hold § 922(g)(1) unconstitutional under *Bruen* (albeit only "as applied" to the petitioner). In dissent, Judge Krause cited to the scholars and works mentioned above as reflecting "the understanding of the founding generation . . . that crimes committed justified disarmament."[161] That proposition is uncited, and this portion of the opinion is a scant 180 words. Judge Krause, apparently, believes that amendments that were proposed and unadopted somehow inform the analysis more than the plain language of the amendment. Logically, it would appear the opposite is just as (if not more) likely

155. Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 603 (1982) ("Civic virtue came to be defined as the freeholder bearing arms in defense of his property and his state.").

156. Greenlee, *supra* note 73, at 277.

157. Shalhope, *supra* note 155, at 602; *James Harrington*, ENCYCLOPEDIA.COM, https://tinyurl.com/mu7uwhfx [https://perma.cc/73EM-7RF3] (last visited Sep. 17, 2023).

158. Shalhope, *supra* note 155, at 602.

159. *See* discussion *infra* Section II.B.3.

160. Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2022) (en banc) (holding the nation's historical tradition of firearms regulation did not support disarming all persons with a felony conviction).

161. *Id.* at 126 (Krause, J., dissenting).

to be true: the disarming language was not included in the amendment's text because it was not supported by the majority.

This is not the only argument in Judge Krause's lengthy dissent. He also cites to pre-revolution English disarming statutes and colonial-era laws, which the following section will show more clearly support dangerous than unvirtuous disarming.[162] He raises one additional argument worth considering here: capital punishment. This argument says that the fact that, at the Founding, felonies often resulted in execution, "suggests that the Founding generation would have had no objection to imposing on felons the comparatively lenient penalty of disarmament."[163]

The logic of this argument leads to plainly absurd results. Given there is no harsher penalty than death, it suggests the founders would also have been fine with restricting a felon's right to free speech, or forced sterilization of felons, blasting centuries of established precedent into oblivion. Further, the argument perverts *Bruen*'s command to look to the "history and tradition" of our nation: just because there was arguably an implicit approval of a particular punishment doesn't make it a part of our *tradition* if it was never done. Judge Krause would apparently find there is a rich tradition of felons losing the right to be free from cruel and unusual punishment (since being, say, tarred and feathered is obviously a "comparatively lenient penalty" to execution). It's unclear why, in that context, the Founders would bother writing the Eighth Amendment at all.

The longer one looks at these arguments, the more this ouroboros of citations and logically unsound arguments begin to look unconvincing. They rest on minimal, and in some cases easily discredited, proof. The truth is that this nation's "history and tradition" *never* included an "unvirtuous" standard for disarming citizens.

2. The Historical Record Refutes the Argument for Unvirtuousness

There are specific colonial and founding era laws that are impossible to square with the suggestion that prevailing attitudes were to disarm the unvirtuous. One of the earliest, a 1692 Maryland statute, dealt with "press masters," persons responsible for commandeering private possessions for use in public service, typically as punishment for a crime.[164] The statute forbade press masters from seizing "any Armes [sic] or Ammunition of any kind whatsoever upon any

162. *Id*. at 120–21; *see* discussion *infra* Section II.B.1.
163. *Range*, 69 F.4th at 126–27 (Krause, J., dissenting).
164. Greenlee, *supra* note 73, at 283.

duty or Service, *or upon any account whatsoever*."[165] A steadfast refusal to disarm for any reason, at a time when some felons were routinely put to death, strongly suggests that virtue was not related to disarmament.[166]

Another relevant colonial statute is a 1705 Virginia law relating to militia service.[167] Specifically, it held that any arms that were necessary for service in the militia could not be "seized or taken by any manner of distress, attachment, or writ of execution" and that those who did so were liable to the aggrieved party and that "double damages shall be given upon a recovery."[168] Virginia passed other laws leading up to the revolution, in 1755 and 1757, which forbade the arrest altogether of persons "going to, attending at, or returning from muster."[169] So in colonial Virginia, being an unvirtuous person (i.e., a suspected criminal) wasn't sufficient grounds to conduct an arrest of a militiaman heading to muster.[170] Hard then to say that prevailing cultural attitudes demanded the same militiaman surrender his gun for life.

There is also a statute from post-revolution, pre-ratification Massachusetts that casts doubt on the "unvirtuous" theory.[171] It was passed in 1786, which means this law was on the books when Samuel Adams made his proposal at the Massachusetts ratifying convention.[172] The law related to tax collectors and sheriffs who stole taxes in the process of lawfully collecting them.[173] The statute punished these bad actors by requiring their estate be sold to recover the monies stolen, and if the estate sale failed to recoup the stolen funds in their entirety, the statute allowed for the imprisonment of the offender.[174] But what is notable is that the law forbade the taking of the "necessities of life," which explicitly included firearms, stating "in no case whatever, any distress shall be made or taken from any person, of his arms."[175] The statute plainly recognized arms as essential tools of

165. 13 ARCHIVES OF MARYLAND 557 (William Hand Browne ed., 1894) (emphasis added).

166. Greenlee, *supra* note 73, at 283.

167. 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 339 (1823).

168. *Id.*

169. 6 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 538 (1819); 7 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 100 (1820).

170. *See supra* note 169.

171. SCHWARTZ, *supra* note 100, at 675.

172. *Id.*

173. *See* An Act to Prevent Routs, Riots, and Tumultuous Assemblies, and the Evil Consequences Thereof, 1786 Mass. Sess. Laws 502.

174. *Id.*

175. *Id.*

life not to be taken and sold, even to cover a feloniously incurred debt. In other states with similar laws but without such an exception, there was still nothing to prevent a person disarmed by this process to go out and purchase replacements for any of these necessities of life, including arms.[176] It is with this law known to him that Samuel Adams called for a right to bear arms for "peaceable citizens," and in this context it is not sensible to jump to the conclusion that "peaceable" here meant "unvirtuous" rather than "dangerous." To argue otherwise would be implicitly labeling sheriffs who abscond with the state's tax revenue as "not unvirtuous."

A similarly compelling example is also available post-ratification: the second Federal Uniform Militia Act, a statute passed in May of 1792 (less than six months after the Second Amendment's ratification).[177] The Uniform Militia Act specified requirements of being in the militia, including the ownership of muskets by each member.[178] The text exempts these arms from "all suits, distresses, executions or sales, for debt or for the payment of taxes."[179] Again, it is difficult to reconcile this language with the alleged requirement of "civic virtue" for firearm ownership; if failure to pay one's taxes is not civically unvirtuous, and a tax collector stealing taxes is similarly not disqualifying, it is unclear what behavior *would* be labeled unvirtuous. Even if there were more support for this theory, the definition of unvirtuous is apparently inconsistent past the point of legal usefulness.

Finally, it must be noted that throughout American history, unvirtuous people everywhere were often armed. While it is undisputed that the Founders cared a great deal about virtue, and spoke on it often, it is indisputable that besides the tax cheats and estate sales referenced above, "[a]theists, adulterers, gamblers, liars, cheaters, lazy layabouts, and others viewed as unvirtuous in the founding era" were not denied their Second Amendment rights.[180] George Washington spoke publicly on the importance of virtue, and James Madison, Thomas Jefferson, John Adams, and Benjamin Franklin all wrote on it.[181] Yet none of them addressed virtue as a necessity for

176. Greenlee, *supra* note 73, at 284.

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

178. *Id*.

179. *Id.*

180. Greenlee, *supra* note 73, at 285.

181. *See* George Washington, Farewell Address (Sept. 17, 1796) ("[V]irtue . . . is a necessary spring of popular government."); 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 393 (Jonathan Elliot ed., 1828) (crediting John Adams as saying "[no] form of government will secure liberty or happiness without any virtue in the people"); Thomas Jefferson, *Letter from Thomas Jefferson to John Adams* (Dec. 10, 1819), *in* 7 THE

firearm ownership, suggesting that the link between the two is being forged from hindsight, and is in fact not part of the history and tradition of American law. The arguments for "dangerous" as a standard for disarmament are, in contrast, much stronger.

3. Arguments for a "Dangerous" Standard for Disarming Are Supported by History

Where the argument for "unvirtuousness" falls short in statutory evidence, the case for disarming on a "dangerousness" basis thrives. The history of this tradition is so deep that it *pre-dates firearms* in the English tradition, reaching all the way back to A.D. 602 and the Laws of King Æthelbirht.[182] Amongst King Æthelbirht's commands was that it was unlawful to "furnish weapons to another where there is strife."[183] That this concept is so old should not be surprising; after all, keeping weapons away from dangerous people is perhaps best called common sense. Many centuries passed before England found cause to legislate in this area again, but the time did come, as a reaction to the Welsh Revolt of 1400, when rebels were disarmed by law.[184]

Under King Charles II, disarmament of dangerous persons became commonplace. In 1660, the King ordered that "disaffected persons" should be monitored closely and "have their arms seized."[185] He apparently found this approach effective, as he soon ordered the Commissioners of London to search the city for "*dangerous* and disaffected persons" and to "seize and secure their arms."[186] Two years later, a Militia Act was passed that allowed authorities to "seize all arms" owned by persons "*dangerous to the peace* of the kingdom."[187] Just a few months later, Charles II mandated that the authorities in

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WRITINGS OF THOMAS JEFFERSON 115 (1861) ("No government can continue good but under the control of the people . . . [who need] to be encouraged in the habits of virtue."); John Adams, *Letter from John Adams to Mercy Otis Warren* (Apr. 16, 1776), *in* 4 PAPERS OF JOHN ADAMS, 124 (Robert Joseph Taylor ed., 1979) ("[P]ublic virtue is the only Foundation of Republics."); Benjamin Franklin, *Letter from Benjamin Franklin to Messrs. the Abbes Chalut and Arnaud* (Apr. 17, 1787), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN, 569 (Albert Henry Smyth ed., 1907) ("[O]nly a virtuous people are capable of freedom.").

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

183. *Id.*

184. Brief for Firearms Pol'y Coal. & FPC Action Found. et al. as Amicus Curiae Supporting Petitioner at 4–5, Morin v. Lyver, 13 F.4th 101 (1st Cir. 2021) (No. 20-1280) [hereinafter *Morin* Amicus Brief].

185. 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1660–1661, at 150 (Mary Anne Everett Green ed., 1860).

186. 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 237 (Mary Anne Everett Green ed., 1895) (emphasis added).

187. 8 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II, TO THE LAST YEAR OF KING JAMES II 40 (1763) (emphasis added).

the town of Kent "disarm all factious and seditious spirits."[188] Then again in 1684, Charles II again ordered his lieutenants to seize the arms of "*dangerous* and disaffected persons."[189]

The tradition continued after Charles II. A 1695 Jacobite rebellion in Ireland led to constables searching for the arms of "dangerous" people.[190] In 1699–1701, the legislature became involved, as King William II and his House of Lords worked together to "charge all lieutenants . . . [to search] for arms in [the] possession of any person whom they judge *dangerous*."[191] It is apparent from these sources that England had centuries of precedent for disarming dangerous persons, a history that abuts the colonial America era.

That era, too, has specific statutory evidence of a tradition of concern around dangerous persons with guns. A 1656 New York law forbade allowing "Indians with a gun" into any home for fear of "murders and assassinations."[192] That the statute identifies a specific danger is notable, because if "unvirtuousness" was the preferred societal standard, surely the general racism and bias against American Indians would have been sufficient to find them unvirtuous and to disarm them on that ground. In another colonial era example, Virginia passed a law in 1736 allowing disarming of those who carried weapons "in [t]error of the [p]eople."[193] Again, the law implies that criminals generally were not expected to be disarmed, or else carving out this specific provision would be duplicative and unnecessary, as terrorizing people would have been a crime in and of itself.[194] These examples are in addition to the laws discussed earlier in this Comment.[195]

Both the French-Indian and Revolutionary wars also caused colonial lawmakers to carefully consider who could be trusted with a gun. During the former, Virginia and Maryland, both home to a significant population of French-Catholics, required those Catholics

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188. 2 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1661–1662, at 538 (Mary Anne Everett Green ed., 1861).

189. 27 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684–1685, at 26–27, 83–85, 102 (F.H. Blackburne Daniell & Francis Bickley eds., 1938) (emphasis added).

190. 5 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699–1700, at 79–80 (Edward Bateson ed., 1937).

191. 6 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1700–1702, at 234 (Edward Bateson ed., 1937) (emphasis added).

192. LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (E.B. O'Callaghan trans., Weed, Parsons & Co. 1868).

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

194. *Morin* Amicus Brief, *supra* note 184, at *7.

195. *See* discussion *supra* Section II.A.1.b.

to take an oath of allegiance upon penalty of disarmament.[196] Some authorities, including the Third Circuit in their pre-*Bruen* version of *Range,* read this singling out of a minority religious group as showing disarming on the grounds of virtue.[197] That conclusion requires a leap in logic not supported by the historical record.

The conclusion is difficult to reconcile with the Virginia law's language that "necessary weapons . . . for the defense of his house or person" would be left with Catholics even if they did not take the oath.[198] If Virginians were truly fearful that Catholics amongst them would not be faithful to English law, why allow them to keep certain firearms? The common-sense answer is that Catholics had remained peaceable.[199] Said differently, the subjects of these laws may have been seen as unvirtuous Catholics who took their orders from the Pope, but they weren't necessarily *dangerous*, and so could retain basic arms for self-defense.

With this picture of 18th-century America now clearly before us, let's return to Samuel Adams's proposed amendment. While the ultimate text of Mr. Adams's amendment did not make the Bill of Rights, there is historical evidence suggesting that his proposal was the basis for what ultimately *became* the Second Amendment.[200] To the extent that we can look to his proposed amendment as a seed that blossomed into the Second Amendment, the word that jumps off the page is "peaceable." If "peaceable" means "non-criminal," then Adams's amendment can perhaps be read as a tacit endorsement of the virtue theory. However, such a reading is not supported by any meaning of the word. Joseph Greenlee, in his amicus brief to the Third Circuit, consulted Samuel Johnson's 1773 dictionary, Thomas Sheridan's 1789 dictionary, and Noah Webster's 1828 dictionary.[201] All three pointed to the conclusion that "peaceable" in the time Adams used it would have been understood the same thing it means today: nonviolent.[202] There are, of course, many felonies that can be committed nonviolently.

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196. 7 HENING, *supra* note 169, at 35–37.

197. Range v. Att'y Gen., 53 F.4th 262, 268 (3d Cir. 2022) (en banc).

198. 7 HENING, *supra* note 169, at 36.

199. *Range*, 53 F. 4th at 277.

200. *Morin* Amicus Brief, *supra* note 184, at *11 (citing BOSTON INDEPENDENT CHRONICLE, Aug. 20, 1789, at 2, col. 2, for the proposition that the Bill of Rights ought to be published alongside Adams's proposed amendments to show that "every one of his intended alterations but one [referring to his desired proscription of standing armies]" were adopted); *see also* STEPHEN HALBROOK, THAT EVERY MAN BE ARMED 86 (rev. ed. 2013) ("[The Second Amendment] originated in part from Samuel Adams's proposal . . . that Congress could not disarm any peaceable citizens.").

201. *Morin* Amicus Brief, *supra* note 184, at *12.

202. *Id.*

Further, Adams's omission of "virtue" in his proposed amendment is notable, given that in other writings he specifically spoke on the importance of virtue. He wrote to his wife that "[i]t is the duty of every one to use his utmost exertions in promoting the cause of liberty and virtue."[203] That Adams and his peers could place so much importance on virtue, and yet fail to use that word in proposed or adopted language of the amendment, suggests that the Founders did *not* link the concept of the right to bear arms to virtue. Rather, the plain meaning of the word "peaceable" suggests that Adams wanted to prevent *violent* people from being armed.[204] In that way, the Adams proposal functions as circumstantial evidence that a "dangerousness" standard is closer to the Founders' actual attitudes regarding disarmament.

While *Bruen* emphasizes the founding era, the opinion does hold out that some 19th-century evidence can also be applicable, specifically because of *McDonald* and the Fourteenth Amendment's effect on Second Amendment rights.[205] The majority of disarming statutes from this period relate to slaves and freedmen.[206] While there is likely an argument here for the dangerousness standard (it is easy to imagine that 19th-century legislators, especially in eventual Confederate states, saw both slaves and freedmen as dangerous), there is a different, surprising group whose disarming for dangerousness is unambiguously shown in the text: tramps.

New Hampshire passed a law in 1878 imprisoning "tramps" (usually meaning male beggars from a foreign land) found carrying "any fire-arm or other *dangerous* weapon" or who "threaten[ed] to do any injury to any person."[207] Iowa, Massachusetts, Ohio, Rhode Island, and Wisconsin passed similar laws the very next year.[208] Pennsylvania's statute specifically prohibited tramps from carrying a weapon with intent to injure or intimidate.[209] Ohio's Supreme Court rebuked a challenge to their law, saying the law comported with the Constitution because "[t]he guaranty was never intended as

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203. Samuel Adams, *Letter from Samuel Adams to Elizabeth Adams* (Nov. 24, 1780), *in* 3 WILLIAM VINCENT WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 118 (1865).

204. *Morin* Amicus Brief, *supra* note 184, at *12.

205. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2127–28 (2022) (holding that 19th-century evidence was relevant insomuch as it spoke to "the public understanding" of the right in question).

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

207. 1878 N.H. Laws 612, ch. 270 § 2 (emphasis added).

208. *Morin* Amicus Brief, *supra* note 184, at *16.

209. Greenlee, *supra* note 73, at 270.

a warrant for vicious persons to carry weapons with which to terrorize others."[210] This is precisely the kind of citation pondered by *Bruen* and plainly indicates that the understanding of the right in the late 19th century as one that could be denied to dangerous people.

Finally, there is evidence worth considering from the 20th century. True, *Bruen* finds modern evidence irrelevant, but that doesn't mean that we need to close our eyes to it when considering what the law ought to be.[211] The First Circuit found the "earliest incarnation" of § 922(g)(1) to be the Federal Firearms Act of 1938.[212] There, the court found that § 922(g)(1) applied to persons "convicted of a limited set of violent crimes such as murder, rape, kidnapping and burglary."[213] The expansion to all felons did not occur until 1961.[214] The concept of disarming all felons is therefore without any analogue more than 65 years old, and the very statute which is used to prohibit felons from exercising their Second Amendment rights was originally based on a standard very similar to "dangerousness."[215]

While this may not matter to the *Bruen* court, it highlights that the present scheme, banning felons generally, is without grounding in the history or tradition of this nation. To read history otherwise is to arrive to the question with that conclusion already in mind, and those who purport to present evidence of "virtuousness" being a standard for disarmament are squinting at history so intensely that they are missing the forest—over 1,400 years of disarming based on violence and danger—for the virtuous trees.

4. United States v. Bullock*: A District Court Puts Their Foot Down*

It is not merely law review articles (and comments) that find fault with the approach that District Courts have taken on this issue. In June 2023, Judge Reeves of the Southern District of Mississippi issued an opinion in *United States v. Bullock*,[216] in which the court held § 922(g)(1) unconstitutional as applied to that defendant. In the voluminous opinion, Judge Reeves attempts a comprehensive review of the landscape of judicial opinions in this area post-*Bruen*.[217] The Court identified four substantive concerns with the developing

210. State v. Hogan, 58 N.E. 572, 575 (Ohio 1900).
211. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2154 n.28 (2022).
212. United States v. Booker, 644 F.3d 12, 24 (1st Cir. 2011).
213. *Id.*
214. *Id*.
215. *Id.*
216. United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023).
217. *See id.* at *14–24.

jurisprudence: First, that far too much weight was being held up by *Heller*'s dicta, and that now is the time, promised in *Heller,* to decide this issue;[218] Second, that the reliance on the ratification proposals was misguided because not only were the amendments not adopted, but also that the *Bruen* court in dealing with their own historical record "doubt[ed] that three colonial regulations could suffice to show a tradition" of gun regulation;[219] Third, arguments saying that because felons were, at Founding, subject to the death penalty they were also subject to this lesser penalty are logically flawed;[220] and Fourth, that briefs and arguments made by the government in this area rely almost exclusively on law review articles written by lawyers, speculating on hidden historical implied meaning, relying largely on the arguments the court discredits in this opinion, rather than the hard historical evidence demanded by *Bruen*.[221]

Judge Reeves notes that the work demanded by *Bruen* is not legal, but historical, and that the government, bearing the burden of proof here, should be parading out historians who can point to specific statutes and standards to support gun regulation, and that absent that kind of citation, courts should more strictly reject regulations like § 922(g)(1).[222] This opinion frames the issue clearly: "In *Bruen*, the State of New York presented 700 years of history to try and defend its early 1900s-era gun licensing law. That was not enough. *Bruen* requires no less skepticism here, where the challenged law [§ 922(g)(1)] is even younger."[223] The truth is that the Government will never be able to meet its burden on this issue, because there simply is not a tradition of disarming felons in the United States before the 1960s. That courts have been hesitant to rule this way seems certain to be due to hesitation to release so many felons at once, or to arm so many potentially dangerous individuals. This is why the Supreme Court must create a dangerousness standard for disarming.

5. United States v. Prince*: Another District Court Joins the Chorus*

For as impactful as *Bullock* is on interpreting the future of § 922(g)(1), the Northern District of Illinois spoke even louder, holding that the statute is unconstitutional *facially*, meaning there are no circumstances under which the law can be found constitutional.[224]

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218. *Id.* at *18.
219. *Id.* at *22.
220. *Id.* at *23; *see also* discussion *supra* Section II.B.1.
221. *Bullock*, 2023 WL 4232309, at *24–25.
222. *See id.* at *2, *4.
223. *Id.*
224. United States v. Prince, No. 22-CR-240, 2023 WL 7220127 (N.D. Ill., E. Div. Nov. 2, 2023).

The court considered similar historical sources and argument as discussed in this Comment and also by the third circuit in *Range*.[225] The court found there was something similar to a 'dangerous' standard by which certain persons could be disarmed: "The record shows that the legislature has a longstanding tradition of justifying exclusion from the right to keep and bear arms based on its assessment of that group's risk to the rule of law, whether based on mental health, criminal record, loyalty, or character."[226]

The District Court quickly explained, however, that it did not want to create a need for individualized determination of disarmament for each defendant, and did not need to, as "across-the-board disqualifications from gun ownership are a part of this nation's traditional approach to gun regulation."[227] Despite that finding, the current text of § 922(g)(1) was held unconstitutional, specifically because of *Bruen*'s command that both the justification for the law's burden and the burden itself need to be comparable with the nation's tradition of regulation.[228] The fact that § 922(g)(1) imposes a *permanent* ban, "lifted only by expungement, federal pardon, or other method of restoring civil rights" creates a burden that does not comport with tradition.[229] In this way, the court essentially agreed with the holding from *Range*: that lifetime disarmament is without a historical analogue, and so cannot be allowed in a post-*Bruen* landscape.[230]

CONCLUSION

For all the historical research on the topic, this is ultimately an issue of common sense. There can be no doubt that Americans treasure our firearms; we lead the world in firearms per capita, averaging 120.5 civilian-owned guns per 100 people.[231] We have, according to the *Heller* court, codified our right to own firearms as the second item in our Bill of Rights.[232] Generally, we do not restrict the "essential

225. *Id.* at *7–8 (discussing the disarming of Catholics both in the United States and pre-American England, as well as the loyalty oath statutes, and the ratification debates, and finding all insufficient to pass *Bruen*'s test).

226. *Id.* at *8.

227. *Id.*

228. *Id.*

229. *Id*.

230. *See id.*; *see also* Range v. Att'y Gen., 69 F.4th 96, 105 (3d Cir. 2022) (en banc).

231. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (June 10, 2022, 9:00 AM), https://tinyurl.com/bddp7ayb [https://perma.cc/9X38-BKJS]. For comparison's sake: Canada is second at 34.7 guns per 100 civilians. *Id.*

232. *See* U.S. CONST. amend. II.

rights" without a very strong state interest.[233] There *is* a clear state interest in restricting gun ownership amongst *dangerous* felons: these persons have shown a propensity to disregard our laws in the most harmful way, and protecting all members of our society is one of the Government's plainest charges. But what state interest is served by disarming the tax cheat, the drunk driver, the marijuana possessor? One does not need to search through centuries of English statutes to see the inherent logical failing in disarming *all* people who commit *any* felony.

Felons are Americans too. If the eight percent figure cited *supra* is correct, the number of felons in this country is north of 25 million people, more than the population of every state besides Texas and California.[234] These Americans do not lose their right to free speech when they are found to be illegally owning an endangered animal.[235] They do not become obligated to give quarter to members of the military just because they are guilty of mislabeling a "Turkey Ham."[236] But we disarm them for the same offenses. There is neither logic nor fairness to it.

Bruen expands the Second Amendment by making it more difficult than ever for states to regulate firearms. In that light, there is no longer any excuse for the overbroad nature of § 922(g)(1). Trying to save the statute with the historically unfounded argument that the founders wanted to disarm the unvirtuous is difficult to square with logic, history, and the latest jurisprudence abrogating § 922(g)(8). If, as the Fifth Circuit has found, domestic abusers cannot be disarmed under § 922(g)(8), it cannot be plausibly argued that "virtue" is our nation's standard for firearm ownership. Even if the Court overturns that decision, that a circuit court could reach such a conclusion suggests that a "virtuous" standard is misplaced.

It is past time for a change. The law ought to reflect the reality of the age we live in. The government does not and should not restrict fundamental rights because of a 500-year-old Machiavellian conception of "virtue." Dangerous behavior, on the other hand, is well within the government's authority to regulate. Reading a historically implied "dangerousness" standard for applying § 922(g)(1) is within the Supreme Court's power.

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233. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

234. *See* Flurry, *supra* note 38.

235. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (criminalizing possession of animals on the endangered species list and enumerating penalties including imprisonment of a year or more).

236. *See* 9 C.F.R. § 381.171 (prescribing certain labeling practices for the product "Turkey Ham"); 21 U.S.C. § 461(a) (providing for up to one year in prison for violations of Turkey Ham labeling requirements).

There are some commentors (Judge Reeves, of *Bullock* fame, amongst them) who resist the dangerousness standard because of the perceived difficulty in applying it, and the corresponding effect on judicial economy.[237] Judge Reeves makes a tongue-in-cheek comparison to application of the Armed Career Criminal Act, infamous for its complexity and the need for individualized consideration and fact finding as to each defendant's history of dangerousness or violence.[238] While these are fair concerns in a vacuum, respectfully, they are woefully insufficient grounds for resisting the necessary change in law. Thousands of Americans currently sit imprisoned for the crime of exercising their Second Amendment rights, millions more sit at home, unprotected. Surely this miscarriage of justice dwarfs concerns about judicial economy? If the Supreme Court is similarly disinterested in making disarming a fact-specific condition of conviction, it could find that § 922(g)(1), or § 922(g) generally, is unconstitutional, and put pressure on Congress to write new legislation that can comport with *Bruen*. But frankly, it shocks the conscience that in the face of thousands deprived of their liberty, and millions more deprived of a fundamental constitutional right, the reaction is that the alternative is just too much work.

There ought to be no more excuses: one way or another, America's most impactful gun regulation must be made to comport with its latest expansion of the right to bear arms. Whatever their method, it is time for the Court to deliver the clarity promised in *Heller* before the standard promulgated by *Bruen* leaves our national firearm regulations full of holes.

237. United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *27 (S.D. Miss. June 28, 2023).

238. *Id.* at *28.