

DREXEL LAW REVIEW

THOMAS R. KLINE SCHOOL OF LAW

VOLUME 16

2024

ISSUE 1

ARTICLE

DISARMING THE DANGEROUS: THE AMERICAN TRADITION OF FIREARM PROHIBITIONS

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ABSTRACT

The Supreme Court elucidated in New York State Rifle & Pistol Association v. Bruen that a modern firearm regulation is constitutional only if the government proves that it is consistent with the nation's historical tradition of firearm regulation. Lower courts are now exploring the historical tradition of firearm regulation to determine who can be barred from possessing firearms. The Third Circuit Court of Appeals became the first federal circuit court to address the issue post-Bruen, when a three-judge panel decided Range v. Attorney General United States. In Range, Bryan Range challenged a federal law that forever banned him from possessing firearms based on a non-violent misdemeanor conviction in 1995. The Range panel upheld the ban, determining that the historical standard is not dangerousness, but whether the person's actions evince a disrespect for the rule of law. The Third Circuit later reheard the case en banc and held the ban unconstitutional, because the government failed to prove that America's tradition of firearm regulation supports disarming Mr. Range. The en

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banc court stopped short, however, of deciding whether dangerousness is the touchstone of disarmament laws.

This Article explains why dangerousness is the touchstone of disarmament laws. In addition to supplementing existing historical evidence proving that only dangerous persons may be disarmed, this Article explains that even the historical evidence provided by the Range three-judge panel supports the dangerousness theory, despite its contrary holding. By providing an overview of traditional firearm regulations, this Article concludes that to be consistent with the Supreme Court's test in Bruen, a modern-day disarmament law may apply only to dangerous persons.

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INTRODUCTION

The Supreme Court set forth the test for all Second Amendment challenges in *New York State Rifle & Pistol Association v. Bruen*: if the Amendment’s text covers the conduct at issue, the government can justify its regulation only by demonstrating that it is consistent with America’s tradition of firearm regulation.¹ The Third Circuit became the first federal circuit court to apply this test in *Range v. Attorney General United States*.² In *Range*, a three-judge panel upheld a lifetime firearms prohibition for Bryan Range, based on a 1995 misdemeanor conviction for making false statements to receive \$2,458 in food stamps.³ The *Range* panel held that the American tradition of firearm regulation allows individuals to be permanently disarmed if their “actions evince a disrespect for the rule of law.”⁴

The en banc Third Circuit later vacated the panel opinion and ruled in favor of Mr. Range, “[b]ecause the Government ha[d] not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms”⁵ But the en banc court did not conduct a detailed historical analysis, and thus stopped short of deciding whether “dangerousness is the touchstone” of disarmament laws.⁶

This Article demonstrates that dangerousness is the touchstone of disarmament laws. The Article addresses the laws cited in the *Range* panel’s analysis—the most extensive historical analysis yet attempting to prove that danger was not the only justification for disarmament—and clarifies that every disarmament law was motivated by danger, even when the text of the

1. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126, 2129–30 (2022).

2. See *Range v. Atty Gen. U.S.*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam), *vacated*, 56 F.4th 992 (3rd Cir. 2023). The author of this Article filed *amicus* briefs supporting Mr. Range at both the three-judge panel and en banc stages and participated in oral argument at the panel stage. See Brief for Firearms Policy Coalition and FPC Action Foundation as Amici Curiae Supporting Petitioner, *Range v. Atty Gen. U.S.*, 53 F.4th 262 (3d Cir. 2022) (No. 21-2835); Oral Argument at 21:55, *Range v. Atty Gen. U.S.*, 53 F.4th 262 (3d Cir. 2022) (No. 21-2835), https://www2.ca3.uscourts.gov/oralargument/audio/21-2835_Rangev.AttyGenUSA.mp3.

3. *Range*, 53 F.4th at 266.

4. *Id.* at 282.

5. *Range v. Atty Gen. U.S.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc).

6. *Id.* at 104 n.9 (quotation marks omitted).

law seemed ambiguous. This Article aims to prevent courts from following the *Range* panel's misreading of history—as some courts continue to do⁷—and to establish that dangerousness must be the standard in Second Amendment challenges by prohibited persons.

Part I of this Article briefly covers the Supreme Court's Second Amendment test and how the Third Circuit applied that test in both the three-judge panel and en banc decisions. Part II explores disarmament orders from 17th-century England. Part III addresses disarmament efforts in colonial America. Part IV surveys orders disarming loyalists during the Revolutionary War. Part V discusses laws that reflect the right of nonviolent criminals to possess arms. Finally, Part VI discusses the relevant proposals from the Constitution ratifying conventions. This Article concludes by emphasizing that danger was always the excuse for disarmament acts in 17th-century England as well as 17th- and 18th-century America.

I. BRUEN AND RANGE

On June 23, 2022, in *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court issued its third major Second Amendment decision of the 21st century.⁸ The Court held unconstitutional a discretionary concealed-carry licensing regime, and in the process, set forth the test for all Second Amendment challenges: “When the Second Amendment’s plain text covers an individual’s conduct,” the government can only “justify its

7. See, e.g., *United States v. Villalobos*, No. 3:19-cr-00040-DCN, 2023 U.S. Dist. LEXIS 71074, at *5 (D. Idaho Apr. 21, 2023) (noting “the [*Range* panel] decision has been vacated,” but “[t]he Court is nevertheless persuaded by the historical analysis outlined in the decision”) (emphasis in original); *In re Appeal of the Denial of M.U.’s Application for a Handgun Purchase Permit*, 291 A.3d 827, 850–52 (N.J. Super. Ct. App. Div. 2023) (duplicating the *Range* panel’s historical analysis and finding “traditions in English and American law of disarming individuals whose non-violent actions demonstrated disrespect for the law”).

8. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022). The other two major Second Amendment decisions are *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."⁹

On November 16, 2022, in *Range v. Attorney General United States*, a three-judge panel of the Third Circuit Court of Appeals issued the first major post-*Bruen* Second Amendment decision by a federal circuit court.¹⁰ The panel upheld 18 U.S.C. § 922(g)(1) as it applied to Bryan Range, whom the statute forever barred from possessing arms based on a 1995 misdemeanor conviction for making false statements to receive \$2,458 in food stamps.¹¹ Analyzing the historical record as required by *Bruen*, the panel concluded that America's historical tradition of firearm regulation supports permanent disarmament for "individuals whose actions evince a disrespect for the rule of law" — including Mr. Range and other nonviolent persons.¹² In so holding, the panel rejected a common reading of the historical record, which interprets America's tradition of firearm regulation as allowing disarmament of only dangerous persons.¹³

9. *Bruen*, 142 S. Ct. at 2129–30 (quotation marks omitted). The Supreme Court conducted the plain text analysis of the Second Amendment in *Heller*. 554 U.S. at 576–77. Analyzing "right of the people" in the Second Amendment's text, the Court concluded with "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581. Thus, an American can be disarmed only if the government proves that such disarmament is consistent with the historical tradition of firearm regulation. *Id.*

10. *Range v. Att'y Gen. U.S.*, 53 F.4th 262, 266 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

11. *Id.*

12. *Id.* at 282.

13. *Id.* at 285. The dangerousness approach was endorsed in *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 357 (3d Cir. 2016) (en banc) (Hardiman, J., joined by Fisher, Chagares, Jordan, Nygaard, JJ., concurring); *Folajtar v. Att'y Gen. U.S.*, 980 F.3d 897, 912–13 (3d Cir. 2020) (Bibas, J., dissenting); *State v. Weber*, 168 N.E.3d 468, 490 (Ohio 2020) (DeWine, J., concurring); *State v. Roundtree*, 952 N.W.2d 765, 791 (Wis. 2021) (Hagedorn, J., dissenting); and Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249 *passim* (2020) [hereinafter Greenlee, *The Historical Justification*]. The dangerousness approach was the minority approach before *Bruen* because most courts took one of two other approaches in prohibited persons cases that have since been discredited. Some courts upheld bans on nonviolent criminals under the theory that the Second Amendment protects only "virtuous" citizens. *See, e.g., Binderup*, 836 F.3d at 348–49; *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010); *Medina v. Whitaker*, 913 F.3d 152, 158–59 (D.C. Cir. 2019). Other courts upheld bans for felons based on *Heller's* dicta that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." 554 U.S. at 626, 627 n.26. *See United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *In re U.S.*, 578 F.3d 1195, 1199–1200 (10th Cir.

On June 6, 2023, after voting to rehear the case en banc and vacating the panel opinion, the en banc Third Circuit ruled in favor of Mr. Range.¹⁴ The court held § 922(g)(1) unconstitutional as applied to Mr. Range “[b]ecause the Government ha[d] not shown that [the] Republic has a longstanding history and tradition of depriving people like Range of their firearms. . . .”¹⁵ The court declined, however, to decide whether “dangerousness is the ‘touchstone’” of disarmament laws.¹⁶

This Article explains why it would have been appropriate for the court to make that determination. In addition to supplementing the existing historical evidence proving that only dangerous persons may be disarmed,¹⁷ this Article explains that even the historical evidence provided by the *Range* three-judge panel supports the dangerousness theory, despite its contrary holding.

II. ENGLISH HISTORY

The Supreme Court began its historical analyses in *Heller* and *Bruen* with English history, explaining that it “consider[s] th[e] history ‘between the Stuart Restoration in 1660 and the Glorious Revolution in 1688’ to be particularly instructive.”¹⁸ Section II.A therefore explores disarmament in 17th-century England. Insurrections and rebellions were constant; therefore, so was disarmament. The authorities issuing disarmament orders and

2009); *Flick v. Att’y Gen., Dep’t of Justice*, 812 F. App’x 974, 975 (11th Cir. 2020). The virtuous citizen theory has been discredited. See *Kanter*, 919 F.3d at 462–64 (Barrett, J., dissenting); *Folajtar v. Att’y Gen. U.S.*, 980 F.3d 897, 915–20 (3d Cir. 2020) (Bibas, J., dissenting). See generally Greenlee, *The Historical Justification*, *supra* at 275–78, 282–83 (discussing the lack of historical evidence in support of the virtuousness theory of disarmament). And *Bruen* made clear that *Heller*’s “presumptively lawful” language has no place in a Second Amendment analysis: “the standard for applying the Second Amendment” requires the government to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct. at 2129–30 (emphasis added). “Only then,” *Bruen* stressed, “may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *Id.* at 2130 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)) (emphasis added).

14. *Range v. Att’y Gen. U.S.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc).

15. *Id.*

16. *Id.* at 104 n.9.

17. See *Range*, 53 F.4th at 283.

18. *Bruen*, 142 S. Ct. at 2140 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

those carrying the orders out repeatedly stated that the purpose was to prevent danger. There was no codified English arms right until 1689, so disarmament laws were vulnerable to abuse, but even the despotic rulers justified their disarmament efforts by pointing to danger. Section II.B discusses the English right codified in 1689. There is no evidence that the right allowed for disarmament for nonviolent offenses, and the restrictions discussed in the treatises all focus on danger. Thus, English tradition supports the dangerousness theory of disarmament.

A. *From the Civil War to the Glorious Revolution*

In its analysis of English history, the *Range* panel found that “the English government repeatedly disarmed individuals whose conduct indicated a disrespect for the sovereign and its dictates.”¹⁹ The concern was not dangerousness, according to the panel, but the fact that “nonconformists refused to participate in the Church of England” or “recogniz[e] the King’s sovereign authority over matters of religion.”²⁰ Thus, “nonconformists as a group were disarmed because their religious status was viewed as a proxy for disobedience to the Crown’s sovereign authority and disrespect for the law, placing them outside the civic community of law-abiding citizens.”²¹

In 17th-century England, disrespect for the sovereign was merely a symptom of the disease, not the disease itself.²² The disease disarmament sought to cure was insurrection.²³ The fact that the insurrectionists disrespected the government they sought to overthrow is inherent to the fact that they were insurrectionists; however, it was not the reason for disarmament.²⁴ In fact, the authorities issuing disarmament orders and those carrying out the orders repeatedly stated that the purpose was

19. *Range*, 53 F.4th at 274.

20. *Id.*

21. *Id.* at 275.

22. *See id.*

23. *See id.* at 275–76.

24. Greenlee, *The Historical Justification*, *supra* note 13, at 258–59.

mitigating danger and preventing insurrections.²⁵ To the extent people were disarmed based on religion, it was because certain religious groups were viewed—sometimes accurately—as subversives seeking to overthrow the government.²⁶ Indeed, if disrespect for the law motivated disarmament, there would be numerous examples of people being disarmed where danger was not a factor—for example, for playing “unlawful Games, [such] as Dice, Coits, Tennis, and such like Games.”²⁷ Conversely, disarmament always followed danger—or at least, danger was offered as the justification.²⁸

Starting with the period following the English Civil War, as the *Range* panel did, sufficiently illustrates that danger motivated disarmament, even when religion was a factor. The English Civil War was the culmination of extreme turmoil and frequent uprisings during the reign of Charles Stuart, King Charles I of England, who was also king of Ireland and Scotland.²⁹ First came the First Bishops’ War in 1639, which began when Charles I attempted to impose the Church of England’s Anglican practices on Presbyterian Scotland, and the Scottish responded with armed resistance.³⁰ The war ended in a stalemate, but once Charles I was able to raise enough funds for

25. See, e.g., AN ACT FOR SETLING OF THE MILITIA OF THE COMMONWEALTH OF ENGLAND 931–32 (London, Edward Husband & John Field 1650).

26. See *Range*, 53 F.4th at 276.

27. 1477, 17 Edw. 4 c. 3.

28. See generally Greenlee, *The Historical Justification*, *supra* note 13, at 258–61 (discussing the English tradition of disarming dangerous persons).

29. Scotland was a separate kingdom with a distinct legal system, independent Parliament, and a Presbyterian Church. Allan I. Macinnes, *The Multiple Kingdoms of Britain and Ireland: The ‘British Problem’*, in A COMPANION TO STUART BRITAIN 3, 17 (Barry Coward, ed. 2003); Toby Barnard, *The Making of Great Britain and Ireland*, in A COMPANION TO STUART BRITAIN, *supra*, at 26, 28. Ireland was also a separate kingdom, but it was treated more like an English colony and the English exerted significant control over the island. Macinnes, *supra*, at 17; Barnard, *supra*, at 41.

30. See GEORGE MACAULAY TREVILYAN, ENGLAND UNDER THE STUARTS 178 (1904). Charles I ordered Scottish Presbyterians to replace their prayer book (John Knox’s *Book of Common Order*) with an Anglican prayer book. *Id.* The Scottish, “a nation in arms,” reacted with widespread riots, prompting Charles I to assemble an army “to conquer Scotland by arms.” *Id.* at 178–79. Charles I soon realized that his forces lacked training and enthusiasm, however, so he “found it necessary to entertain the first overture of a treaty.” C. H. Firth, *Clarendon’s ‘History of the Rebellion.’*, 19 ENG. HIST. REV. 26, 31 (1904).

further fighting, the Second Bishops' War commenced in 1640.³¹ Only a few months after Charles I signed the Treaty of London concluding the war, an Irish rebellion erupted in October 1641, in which Catholics murdered thousands of Protestants—women and children included.³² The massacre sent shockwaves throughout England, and Charles I's opponents used every opportunity "to insinuate into the minds of the people that this rebellion in Ireland was contrived and fomented by the [Crown], for the advancement of Popery."³³ The following year—before the Irish rebellion was suppressed—the English Civil War began, largely over whether Charles I or Parliament

31. Between the two wars, tensions persisted. The Scottish Parliament sanctioned the National Covenant, which rejected Charles I's religious restrictions and proclaimed that its signatories "abhor and detest . . . all kind of papistry." THE SCOTTISH NATIONAL COVENANT (1638), reprinted in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625—1660, at 124, 125 (Samuel Rawson Gardiner, ed., 3d. ed. rev. 1906); see JOHN RUSHWORTH, HISTORICAL COLLECTIONS: THE SECOND PART 734 (London, J.D. 1680) (noting the Covenant began by repeating an anti-Catholic confession of faith issued by Charles I's father, King James (VI of Scotland and I of England)). Meanwhile, Charles I "began to heed his advisers' warnings that the Scots were hell-bent on imposing Presbyterianism on the whole of Britain." TREVOR ROYLE, THE BRITISH CIVIL WAR 100–01 (2004).

32. 1 EDWARD HYDE (1ST EARL OF CLARENDON), THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND 394 (Oxford, Clarendon Press 1826). The Earl reported that "forty or fifty thousand of the English Protestants [were] murdered." *Id.* At the time, rumors spread that 200,000 Protestants were murdered. ROYLE, *supra* note 31, at 139. John Maynard repeated this number in Parliament nearly 50 years later, claiming that when "Ireland filled with massacre and rebellion," roughly "200,000 Protestants [were] slain in a short time." HENRY MADDOCK, AN ACCOUNT OF THE LIFE AND WRITINGS OF LORD CHANCELLOR SOMMERS app. at 7 (London, Clarke & Sons 1812). Nowadays, however, "[m]ost historians are agreed that the figure is much lower"—some estimates suggest closer to 4,000 were killed. ROYLE, *supra* note 31, at 139.

33. 1 HYDE, *supra* note 32, at 396. Terrified that the rebellion would erupt in England, Protestants grew anxious. *Id.* at 397. Rumors spread about Catholics storing large quantities of arms throughout the country. Robin Clifton, *Fear of Popery*, in THE ORIGINS OF THE ENGLISH CIVIL WAR 160 (Conrad Russell ed., 1973). Several mayors alerted the House of Commons about "Papists which were come thither out of Scotland and out of some part of England and had much Arms in their Custody." *Id.* One Catholic was arrested for declaring that "the Protestants should shortly have a blow and the papists should have crosses or the like on their hats so that they thereby might not be killed." *Id.* Protestants fled their homes in vulnerable villages and established "night-long watches in towns." *Id.* Near a potential landing site from Ireland, Protestants in Bristol kept "watch in arms day and night to prevent the surprising of the city by the Irish rebels." *Id.* Protestants made sure to carry guns around town for protection, and some took it upon themselves to conduct house-to-house searches of Catholic homes to confiscate whatever arms they could find. *Id.*

had the superior right to control the military.³⁴ Charles I lost the war and was beheaded.³⁵

On January 4, 1649, the so-called “Rump Parliament” — what remained of the House of Commons after members sympathetic to Charles I were purged — declared itself “the supreme power in this nation.”³⁶ Unsurprisingly, after a decade of rebellions, insurgencies, and civil war, when the Rump Parliament regulated the militia in 1650, it focused on preventing insurrections.³⁷ The militia act’s preamble emphasized its intent to place England “into a posture of Defence” against “all tending to the utter over-throw of the Safety of the Nation.”³⁸ It instructed commissioners to repress “all Conspiracies, Designs, Practises, secret and suspitious Meetings of disaffected persons” by securing those whom “they finde to be especially active and dangerous.”³⁹ Moreover, commissioners were “authorized and required to disarm and secure (by Imprisonment or otherwise) all Papists, and other ill-affected persons” who demonstrate that they were “against this present Parliament or against this present Government.”⁴⁰

In 1653, Oliver Cromwell took control of the unstable government as the “Lord Protector,” maintaining power through military force and disarmament of disrupters.⁴¹ “[T]he very existence of the government was threatened on all sides, and armed conspiracy was at work everywhere.”⁴² The Commission of the Protector reported on February 15 that “[t]he enemies of the

34. See NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* 130 (3d ed. 2022).

35. See *id.* at 227.

36. 3 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 1257 (London, R. Bagshaw 1808).

37. AN ACT FOR SETLING OF THE MILITIA OF THE COMMONWEALTH OF ENGLAND, *supra* note 25.

38. *Id.*

39. *Id.* at 931.

40. *Id.* at 934.

41. See JOHNSON ET AL., *supra* note 34, at 133. See also Sean Kelsey, *Unkningship*, in *A COMPANION TO STUART BRITAIN*, *supra* note 29, at 331, 333 (“Oliver Cromwell, forced the Rump [Parliament] to dissolve in April 1653.”).

42. DAVID WATSON RANNIE, *SCENERY IN SHAKESPEARE’S PLAYS AND OTHER STUDIES* 180 (1926).

peace are still restless” throughout England, “and have raised forces and been in actual rebellion in several parts of the nation.”⁴³ To prevent London from being “exposed to the rage of wicked men” while the army was suppressing rebellions elsewhere in the country, the Commission authorized local London officials to raise a force to “suppress all rebellions, insurrections, tumults, and unlawful assemblies; and to seize, disarm, and slay all who levy forces against Government. Also to disarm all known Popish and dangerous or seditious persons, and such as raise tumults; and to give their arms to the well affected.”⁴⁴ Catholics were disarmed out of concerns they might aid Charles I’s son, who had been exiled in France since the civil war, and just as the Commission worried, would later become King Charles II.⁴⁵

The following month, because “the enemies rais[ed] new troubles, and [were] now robbing and plundering the people,” militia officers were instructed to “enquire into conspiracies” of the disaffected and “disarm all Papists who declare[d] against the present Government, or correspond[ed] with or sen[t] supplies to Charles Stuart, or any other, tending to the disturbance of the peace, or who raise[d] tumults.”⁴⁶ These disarmament efforts were seemingly effective. Several plots were uncovered when would-be insurrectionists were caught smuggling arms that they would not have needed to smuggle had they never been disarmed.⁴⁷

Soon after Cromwell’s death, the head of the Army invited Charles Stuart (Charles I’s son) out of exile in France to assume the throne.⁴⁸ King Charles II’s ascension in 1660 was greeted with “universal joy,” even among most of those who supported

43. 8 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1655, at 43 (London, Longmass & Co. & Trubner & Co. 1881).

44. *Id.* at 43–44.

45. See JOHNSON ET AL., *supra* note 34, at 134; 8 CALENDAR OF STATE PAPERS, *supra* note 43, at 77.

46. 8 CALENDAR OF STATE PAPERS, *supra* note 43, at 77.

47. Charles Ivar McGrath, *Securing the Protestant Interest: The Origins and Purpose of the Penal Laws of 1695*, 30 IRISH HIST. STUD. 25, 27 (1996); see JOHNSON ET AL., *supra* note 34, at 134.

48. See JOHNSON ET AL., *supra* note 34, at 134.

his father's execution 11 years prior.⁴⁹ But the "easy and glorious Reception of the King" soured abruptly,⁵⁰ and Charles II had to worry about uprisings from religious and political opponents just as his predecessors did. Edward Hyde, the first Earl of Clarendon, was astonished "that there could in so short a Time be a new Revolution in the general Affections of the People."⁵¹ Likewise, Samuel Pepys marveled how Charles II had "lost all so soon."⁵² Charles II wisely prepared to prevent uprisings from the start, even when he enjoyed immense popularity.⁵³ Having lived through insurgencies, wars, and his father's dethroning and execution, he knew how quickly his subjects could turn against him and threaten his kingdom and life.⁵⁴ Months after Charles II's accession to the throne, instructions to lords lieutenant called for "disaffected persons [to be] watched and not allowed to assemble, and their arms seized; fortresses to be secured, all risings suppressed."⁵⁵

In 1661, the Privy Council wrote to Lord Newport, explaining that "many Factious and Turbulent Persons do still retain their wicked and Rebellious Principles, and some of them have lately entered into Dangerous Plotts, and Conspiracies" that "endangered his Majesties Sacred Person, and the Happy Settlement of the Government and Peace of the Kingdom."⁵⁶ Because "this wicked Spirit and disposition still continues" among people with "Trayterous designs" who "to that purpose have furnished themselves with quantities of Arms, and Ammunition," the Council authorized Newport and his lieutenants to "disarm

49. See 2 THE CONTINUATION OF THE LIFE OF EDWARD EARL OF CLARENDON, LORD HIGH CHANCELLOR OF ENGLAND, AND CHANCELLOR OF THE UNIVERSITY OF OXFORD 1-2 (1759); JOHNSON ET AL., *supra* note 34, at 134.

50. *Id.* at 1.

51. *Id.*

52. Friday 12 July 1667, in 13 THE DIARY OF SAMUEL PEPYS 17 (New York, George E. Croscup 1667).

53. See 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II 150 (London, Longman, Green, Longman & Roberts 1860).

54. See *id.*

55. *Id.*

56. William Phillips, *The Lords-Lieutenant of Shropshire*, in 4 TRANSACTIONS OF THE SHROPSHIRE ARCHAEOLOGICAL AND NATURAL HISTORY SOCIETY, ser. 3, 141, 156 (1904).

all such persons as are Notoriously known to be of ill Principles," have "shewn any Disaffection," or have "disturbed the public Peace."⁵⁷ Additionally, pointing to "barbarous Bloody and Rebellious Attempts of such Wicked persons in the City of London," the Council requested that Newport's lieutenants and officers "observe the motions and Meetings of dangerous persons, and not only disarm," but imprison them if necessary.⁵⁸

To be sure, "disaffected persons" were considered dangerous.⁵⁹ On July 19, 1660, officials learned of "an intended meeting . . . of disaffected persons . . . which may be of dangerous consequence."⁶⁰ Another official wrote that he expected to "prevent all insurrection" through efforts including "seizing arms and disaffected persons."⁶¹ "Early in December the government claimed to have evidence of a plot by former soldiers whose objective was to seize the King and Tower [of London, a key fortress], kill the Queen-Mother and all Frenchmen in the kingdom, and restore Parliament."⁶² That same month, lords lieutenant were warned that "severall persons of those principles of known disaffection to us your government have furnished themselves with quantities of arms and ammunition as may justly give suspition that it is with design to disturb the peace and tranquillitye of this our kingdome."⁶³ The militia was then ordered to search "in all suspected places for armes and ammunition and where any quantity of either be discovered in the house of any person disaffected to us above what reasonably may be beleevd necessary for his safety and defence," which were confiscated.⁶⁴

57. *Id.*

58. *Id.* at 157–58.

59. 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, *supra* note 53, at 124.

60. *Id.*

61. *Id.* at 473–74.

62. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 42 (1994).

63. *Id.* at 43 (quoting Letter from King Charles II to Lords Lieutenant (Dec. 19, 1660) (Eng.)).

64. *Id.*

Among the disaffected persons were the Fifth Monarchists, an extreme Protestant sect who believed that Charles I's execution concluded the fourth monarchy (the Roman empire) from the Book of Daniel and sought to facilitate the imminent arrival of the fifth monarchy (the Kingdom of God).⁶⁵ Believing that the Stuart Restoration delayed that arrival, the sect grew impatient and increasingly violent.⁶⁶ On January 6, 1661, "above 50" of them, "well armed," attempted to seize London.⁶⁷ "In this Insurrection 20 of the king's men were slain, and as many of the rebels."⁶⁸ When Parliament next convened, Hyde, as the Lord Chancellor, called the Fifth Monarchists' "the most desperate and prodigious Rebellion . . . that hath been heard of in any Age," and insisted that "no Man undervalue the Treason because of the Contemptibleness of the Number engaged in it."⁶⁹ He noted that "[t]here hath not been a Week since that Time, in which there hath not been Combinations and Conspiracies formed against his Person, and against the Peace of the Kingdom."⁷⁰ "If the new License and Corruption of this Time" is unprecedented, he added, then "new Remedies for new Diseases" may be needed to secure "the Peace of the Kingdom from the First Overtures of Sedition."⁷¹

Instead of new remedies, Parliament continued the time-tested remedy of disarming dangerous persons. For example,

[l]etters were . . . rushed to militia officers warning them of the danger of plots 'yett undiscovered' and ordering them to disarm all persons 'notoriously knowne to be of ill principles or [who]

65. See *Fifth Monarchists*, OXFORD DICTIONARY OF THE CHRISTIAN CHURCH (4th ed. 2022). See generally BERNARD CAPP, *THE FIFTH MONARCHY MEN* (2011) (providing context for Fifth Monarchists).

66. Clive Bloom, *Thomas Venner and the Fifth Monarchists*, HIST. PRESS, <https://www.thehistorypress.co.uk/articles/thomas-venner-and-the-fifth-monarchists/> [<https://perma.cc/2A6S-2AFL>].

67. 4 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 36, at 186.

68. *Id.* at 188.

69. MALCOLM, *supra* note 34, at 44.

70. *Id.* at 44.

71. *Id.* at 44–45.

have lately . . . by words or actions shewn any disaffection to his Majestie or his Government, or in any kind disturbed the publique peace.”⁷²

Northamptonshire Lieutenants soon reported that they had disarmed all men of “evill Principles’ . . . so as we have not left them in any ways of power to attempt a breach of the peace.”⁷³

In 1661, the Parliament exonerated officials who assaulted, arrested, or disarmed such dangerous persons.⁷⁴ The act stated that since June 24, 1660, less than one month into Charles’s reign,

there have beene Inserrections by occasion whereof diverse of His Majesties good Subjects have beene murdered and for the securing the Peace of the Nation and preventing further disorders diverse persons suspected to be Fanaticks Sectaries or Disturbers of the Peace have beene assaulted arrested detained or imprisoned and diverse Armes have been seized and Houses searched for Armes or suspected persons.⁷⁵

A petition sought a proclamation from Charles II “forbidding the seizing of persons or searching of houses without warrant, except in time of actual insurrection” and alleged that some searches “ha[d] taken place without lawful authority.”⁷⁶ Still, the government did not relent in its campaign to disarm dangerous persons.⁷⁷

The 1662 Militia Act, “for the better securing the Peace of the Kingdome,” authorized lieutenants to employ others to “search for and seize all Armes in the custody or possession of any

72. *Id.* at 45.

73. *Id.* (quoting Letter from Council to Lords Lieutenant (Jan. 8, 1660/1)).

74. *See id.* at 46–47.

75. An Act Declaring the Sole Right of the Militia to Be in King and for the Present Ordering & Disposing the Same, 13 Car. 2 c. 6.

76. 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, *supra* note 53, at 475.

77. An Act for Ordering the Forces in the Several Counties of this Kingdom, 14 Car. 2. c. 3, § 13.

person or persons whom the said Lieutenants or any two or more of their [d]eputies shall judge dangerous to the [p]eace of the [k]ingdome."⁷⁸ Lieutenants also had "full power and authority" to employ "[c]ompanies [t]roops and [r]egiments . . . in case of [i]nsurrection [r]ebellion or [i]nvasion."⁷⁹ Later that year, Charles II ordered Sir Thomas Peyton and two other deputy lieutenants of Kent "to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits, and such as travel with unusual arms at unseasonable hours."⁸⁰

Examples of people who were searched to be disarmed included: members of a congregation in Lee who "will prove as dangerous to government as any, if not prevented"⁸¹; "disaffected persons" who frequently meet near Deptford and "assemble and walk abroad armed"⁸²; a "fanatic" with "gunpowder, &c., in his possession, and [who] sends provisions to the prisoners for treason in the Tower"⁸³; "suspicious persons" in London likely to create "a general disturbance"⁸⁴; men expected of planning to "burn some houses in Burton-on-Trent, and march while they are burning"⁸⁵; and "officers in the late rebellion . . . who brag that they have escaped the oaths" of allegiance and supremacy.⁸⁶ Deputy lieutenants reported that they seized 1,000 arms while "putting the country in order against insurrection."⁸⁷

78. *Id.*

79. *Id.* §1.

80. 2 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II 538 (Mary Anne Everett Green ed., 1862) (1968). The Lathe of Shepway was one of the administrative country subdivisions of the county of Kent in England. See EDWARD KNOCKER, AN ACCOUNT OF THE GRAND COURT OF SHEPWAY 42 (London, John Russell Smith 1862) (discussing the origin of the name).

81. 2 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, *supra* note 80, at 125.

82. *Id.* at 248.

83. *Id.* at 323.

84. *Id.* at 439.

85. 3 *id.* at 361.

86. 6 *id.* at 91.

87. 3 *id.* at 301.

On May 25, 1670, just after the breaking of “a false report that there was a rising in London; that the factious party had killed a great many people, and that the rebellion was increasing,” the Lord Mayor of London and eleven other Commissioners of Lieutenancy sought permission to “seize and secure all dangerous and suspicious persons, with their arms, weapons. . . .”⁸⁸ With a special warrant to disarm these dangerous “disaffected persons,” they argued, they would be “better enabled to preserve the peace and safety of the City.”⁸⁹ The following day, Charles II ordered them “to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody till our further pleasure.”⁹⁰

Widespread disarmament next occurred during the “Popish Plot” of 1678.⁹¹ Titus Oates took advantage of the nation’s pervasive fear of Catholics and convinced the public of a fictitious Catholic conspiracy to assassinate the king and replace him with his Roman Catholic brother James, all the while slaughtering Protestants.⁹² Thomas Bruce, the Earl of Ailesbury, conveyed the panic felt throughout the country:

The credulous all over the kingdoms were terrified and affrighted with armies landing, of pilgrims, black bills, armies under ground and what not. The Countess of Shaftesbury had always in her muff little pocket pistols, loaden, to defend her from the papists, being instructed by her lord, and most timorous ladies followed her fashion. . . . The old Countess of Southampton . . . died in very few months after her rest being

88. 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 236 (London, Eyre & Spottiswoode 1895).

89. *Id.*

90. *Id.* at 237.

91. See JOHN POLLOCK, THE POPISH PLOT 196 (1903).

92. See generally TITUS OATES, A TRUE NARRATIVE OF THE HORRID PLOT AND CONSPIRACY OF THE POPISH PARTY, AGAINST THE LIFE OF HIS SACRED MAJESTY, THE GOVERNMENT, AND THE PROTESTANT RELIGION (Edinburgh, Heir of Andrew Anderson 1679) (detailing the alleged plot as described by Titus Oates).

disquieted and she in a panic feared that her throat should be cut by the papists⁹³

Militiamen were ordered “to inquire what Armes and Ammunition of papists are either hidden and concealed, or otherwise conveyed and put in the hands of other persons to be kept for their use.”⁹⁴ Anyone found keeping arms for Catholics were “proceeded against as parties and confederates with papists, unlesse they deliver the said armes to be seized on and secured for his Majestie’s use.”⁹⁵ Several Catholics were executed, many were imprisoned, and others were disarmed.⁹⁶

The Rye House Plot of 1683 gave the Crown even greater cause for concern.⁹⁷ Conspirators plotted to assassinate Charles II and his brother James, the Duke of York.⁹⁸ At a meeting on July 10, 1683, Charles II and his advisors ordered officials “to take notice of the certainty of a general rising intended and to give the Lords Lieutenant and deputy lieutenants directions to seize the arms of those justly suspected.”⁹⁹ Disarmament efforts focused on “dangerous and disaffected persons.”¹⁰⁰ The king left it to lords lieutenant to determine who “may be reputed dangerous,” expressing confidence that they “will connive at no man suspected to have the least inclination to disturb the peace.”¹⁰¹ Significantly, lords lieutenants were directed “not to seize fowling pieces nor wearing swords nor any other thing

93. 1 THOMAS BRUCE, MEMOIRS OF THOMAS, EARL OF AILESBUURY 29 (Westminster, Nichols & Sons 1890).

94. MALCOLM, *supra* note 34, at 85 (quoting LETTER BOOK OF THOMAS BELASYSE, VISCOUNT FAUCONBERG, LORD LIEUTENANT OF NORT RIDING OF YORKSHIRE, 1665–1684).

95. *Id.*

96. POLLOCK, *supra* note 91, at 196.

97. *Rye House Plotters*, NAT’L PORTRAIT GALLERY, <https://www.npg.org.uk/collections/search/group/1324> [<https://perma.cc/ED7L-JNFF>].

98. *Id.*

99. 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, at 89 (F. H. Blackburne Daniell & Francis Bickley eds., 1934).

100. 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, *supra* note 88, at 237.

101. 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, *supra* note 99, at 94.

that is trifling and not capable of being employed to do mischief in tumults or insurrections.”¹⁰²

These orders make explicit that the objective was preventing insurrections, not disarmament for the sake of disarmament.¹⁰³ In other words, people were not being disarmed as punishment for disrespecting the sovereign; they were being disarmed to stop violent rebellions.¹⁰⁴ This was further reflected in the way the orders were carried out. Robert West had “two chests of arms seized” and was convicted of high treason for plotting against the king.¹⁰⁵ Colonel Thomas Whitley had fifty muskets seized for aiding the Duke of Monmouth—the illegitimate son of Charles II and a favorite of many to replace his uncle, James II, who had been identified as a conspirator in the Rye House Plot.¹⁰⁶ Contrarily, other threats were merely minimized. When a search of “the house of Mr. Hopkins” revealed “four case of pistols, one blunderbuss and a little gun,” he was left “a case of pistols for his militia horse.”¹⁰⁷ When a search of “Mr. Burdett” revealed “five swords and a fowling piece”; the officer “left him with his riding sword.”¹⁰⁸ “Dr. Cham’s house was very strictly examined, who had only one sword with which he usually rides, which was therefore left with him.”¹⁰⁹ A search of “Mr.

102. *Id.*

103. *See id.*

104. *See, e.g., id.* (describing the taking of arms from dangerous persons because arms are more likely than other weapons to be used in an insurrection).

105. 24 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JANUARY 1 TO JUNE 30, 1683, 374 (F.H. Blackburne Daniell, eds., 1933); 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, *supra* note 108, at 343 (F. H. Blackburne Daniell & Francis Bickley eds., 1934).

106. 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, *supra* note 99, at 294 (F. H. Blackburne Daniell & Francis Bickley eds., 1934); *see His Majesties Declaration to All His Loving Subjects, Concerning the Treasonable Conspiracy Against His Sacred Person and Government, Lately Discovered*, LONDON GAZETTE, July 28, 1683, at 2 (accessible at <https://www.thegazette.co.uk/London/issue/1848/page/2>) (“[D]ivers of the Con[s]pirators, having notice of Warrants I[ss]ued out for their Apprehension, are fled from Justice; Viz. James Duke of Monmouth . . .”).

107. 24 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JANUARY 1 TO JUNE 30, 1683, *supra* note 105, at 374.

108. 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, *supra* note 99, at 152.

109. *Id.* at 316.

Tournay” produced only his “wearing sword,” which he was allowed to keep.¹¹⁰ And when a search of “Mr. Harbord,” known to go “extraordinary armed,” revealed several weapons, he was allowed to keep “all fowling or birding guns and walking swords.”¹¹¹

After Charles II passed away in 1685, his brother James II succeeded him.¹¹² While Charles II was quietly sympathetic to Catholicism, James II was overtly Catholic, and fears that he would move the country towards France-style absolutism were realized.¹¹³ James II replaced leading Protestant militia officers with Catholics, quartered his Catholic soldiers in private homes, and disarmed many Protestants.¹¹⁴ Members of Parliament complained of such abuses, while emphasizing that disarmament acts were intended to disarm dangerous persons.¹¹⁵ During a 1685 debate in Parliament, John Maynard—a lawyer and long-term politician—described the 1662 Militia Act as “a law, that no man shall, on any occasion whatsoever, rise against the king,” and noted that the law was enforced by the provision that granted “lord-lieutenants, and deputy-lieutenants . . . power to disarm the disaffected.”¹¹⁶ He complained, however, that it was being exploited to disarm people whom the government merely disapproved of.¹¹⁷ While the act “was made to disarm all Englishmen, whom the Lieutenant should suspect,”¹¹⁸ he explained, “[i]t upset him that this was being done in Ireland ‘for the sake of putting arms into Irish Hands,’ and because it

110. *Id.* at 152.

111. *Id.* at 299. According to Harbord, he had “six birding guns, a musketoon, 2 or 3 swords and three case pistols” confiscated, which he used “every winter for shooting flying or stalking at the river.” *Id.* at 232. A later report indicated that he also possessed a blunderbuss. *Id.* at 299.

112. See *James VII and II (r.1685-1689)*, ROYAL HOUSEHOLD, <https://www.royal.uk/james-vii-and-ii-r1685-1689> [<https://perma.cc/W5EZ-CHDS>].

113. JOHNSON ET AL., *supra* note 34, at 136.

114. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156 (1840).

115. See *id.* at 156–57.

116. 4 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 36, at 1374–75; *Maynard, John I (1604-90), of Gunnersbury and Lincoln’s Inn Fields, Mdx.*, in THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660-1690 (B.D. Henning, ed., 1983).

117. See *The Somers Papers*, in 2 MISCELLANEOUS STATE PAPERS, FROM 1501 TO 1726, at 407 (London, W. Strahan & T. Cadell 1778).

118. *Id.*

was being done by Catholics without cause.”¹¹⁹ Hugh Boscawen—another long-term politician, whose service started in 1646 and concluded with his death in 1701—echoed this sentiment a few years later.¹²⁰ “The Militia, under pretence of persons disturbing the government, disarmed and imprisoned men without any cause: I myself was so dealt with.”¹²¹ As scholar Patrick Charles explained,

Parliament never had any quarrels with the Militia Act’s provision that disarmed dangerous persons. What Boscawen was upset about was that he was disarmed and imprisoned *without any cause*. He did not think the Lieutenants had any reason to believe that he was “dangerous to the Peace of the Kingdome.”¹²²

Maynard and Boscawen approved of dangerous persons being disarmed but understood that the government’s disarmament of people that it simply disliked was an abuse of the law.¹²³ James II’s abuses involving arms and the army, among others, led to the Glorious Revolution, in which James II was replaced by his Protestant daughter, Mary, and her Protestant husband, William of Orange.¹²⁴

119. Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. STATE L. REV. 351, 372 (2009) (quoting *The Somers Papers*, *supra* note 117).

120. See *Boscawen, Hugh (1625-1701), of Tregothnan, Penkevill, Cornw.*, in THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660-1690, *supra* note 116.

121. 5 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 54 (London, T.C. Hansard 1809).

122. Charles, *supra* note 119, at 372 (quoting 13 & 14 Car. 2, c. 3, § 13 (1662)). Sir Richard Temple also complained that “[t]he Militia Act was made use of to disarm all England.” 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 31 (London, D. Henry, R. Cave & J. Emonson 1763).

123. See Charles, *supra* note 119, at 372–73 (describing how the Militia Act allowed officials “to search and to seize the arms of disaffected persons.”).

124. *Glorious Revolution*, HIST. (Feb. 20, 2018), <https://www.history.com/topics/european-history/glorious-revolution> [<https://perma.cc/7598-QQYX>].

B. *The 1689 Bill of Rights*

William and Mary were offered the crown under the condition that they accept the Bill of Rights—which they did.¹²⁵ The Bill of Rights complained that James II had subverted liberty “[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both Armed and Employed contrary to Law.”¹²⁶ To prevent such abuses from reoccurring, the Bill of Rights ensured, “That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”¹²⁷ Catholics, however, were not protected and—because Protestants were now in power—they were subsequently disarmed.¹²⁸ The *Range* panel—emphasizing the phrase “as allowed by Law”—concluded that the 1689 Bill of Rights proved that the right could be limited by the legislature to those “sufficiently loyal and law-abiding,” and that “disarmament of Catholics in 1689” was based on “not a proclivity for violence, but rather a disregard for the legally binding decrees of the sovereign.”¹²⁹

On the contrary, disarmament of Catholics in 1689 was again intended to prevent insurrections.¹³⁰ Having just forcibly replaced the Catholic James II with the Protestant William and Mary, “[p]revention of a Catholic counter-revolution was of paramount concern.”¹³¹ Indeed, “almost as soon as William of

125. *William III (r. 1689-1702) & Mary II (r. 1689-1694)*, ROYAL HOUSEHOLD, <https://www.royal.uk/william-and-mary> [<https://perma.cc/7JFF-9KKZ>].

126. Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2, sch. 1. (Eng.).

127. *Id.*; see also 6 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 241 (1924). The arms guarantee was the result of James II’s “refusal to allow Protestants the right to carry arms for self-defence.” *Id.* Additionally, James II “allowed Papists to be officers in his army, and refused Protestants the right to carry arms.” *Id.*

128. See *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 275–76 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3rd Cir. 2023) (“Parliament enacted a status-based restriction forbidding Catholics who refused to take an oath renouncing their faith from owning firearms, except as necessary for self-defense.”).

129. See *id.*

130. *Id.* at 276.

131. MALCOLM, *supra* note 34, at 122; see also 30 THE ENGLISH HISTORICAL REVIEW 620 (Reginald L. Poole ed., 1915) (noting that another act, passed “[f]or the securing the Peace of the Kingdome in this Time of Imminent Danger against the Attempts and Trayterous Conspiracies of evill disposed Persons,” allowed suspicious persons to be detained).

Orange landed in England, Jacobite forces in Ireland rose in revolt, to support King James. They took over almost all the island, and were joined by James II himself, along with a French army.¹³² Moreover, like many previous disarmament laws targeting insurrections, the act allowed Catholics to continue possessing weapons for self-defense—just not enough weapons to overthrow the government.¹³³

There is no evidence that any Protestants were excluded from the 1689 arms right for being insufficiently loyal or law-abiding.¹³⁴ Nor did the *Range* panel provide any examples. Instead, the court cited an article by historian Lois Schwoerer.¹³⁵ But Schwoerer merely speculated about what the phrase “as allowed by Law” meant.¹³⁶ She suspected that it “invited recognition of Parliament’s law-making authority,” while “maintain[ing] that” the right “was erected on prejudices: religious, social, and economic.”¹³⁷ This speculation falls far short of establishing any sort of practice in which people were disarmed for nonviolent crimes or, for that matter, any other purpose. It also contradicts statements made during debates in Parliament that suggest all Protestants were protected by the right, regardless of their condition.¹³⁸ For example, when Parliament considered how to disarm Catholics in 1689, William Wogan declared, “If you find not a way to convict them [for being Catholic] you cannot disarm them.”¹³⁹ The Speaker, Henry Powle, agreed: “being not convicted they will say they are not concerned . . . and not one man will . . . deliver their arms.”¹⁴⁰ These

132. JOHNSON ET AL., *supra* note 34, at 140.

133. Papist Act 1688, 1 W. & M. c. 15 (noting the act permitted the possession of “such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace, to their general Quarter sessions, for the Defence of his House or Person.”).

134. *See Range*, 53 F.4th at 275–76.

135. *See id.* at 275 (citing Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 47–48 (2000)).

136. Schwoerer, *supra* note 135, at 47–48.

137. *Id.* at 48.

138. *See* 5 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 121, at 182–83.

139. *Id.*

140. 9 DEBATES OF THE HOUSE OF COMMONS, *supra*, note 122, at 169.

statements would make little sense if Protestants could be disarmed as well.

William Blackstone addressed England's history of disarming and discriminating against Catholics in his famous *Commentaries*.¹⁴¹ "As to papists," he wrote, there would be "a general toleration of them; provided their separation 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 while they acknowledge a foreign power [the Pope], 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 conceded that many restrictions on Catholics—including prohibitions on "keep[ing] arms in their houses"¹⁴⁴—"would be very difficult to excuse" if not considered in the context of "their history, and the urgency of the times which produced them."¹⁴⁵ But, pointing to many of the rebellions discussed above, Blackstone argued that such restrictions were necessary to "counteract" Catholics' "dangerous . . . spirit"—something "foreigners who only judge from our statute-book are not fully apprized of."¹⁴⁶ In other words, Catholics were disarmed because they were viewed as dangerous persons.

Most importantly for a Second Amendment analysis, the Founders rejected English qualifications on the right.¹⁴⁷ As St.

141. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 54–57 (Oxford, The Clarendon Press 1769). Blackstone "exerted considerable influence on the Founders" of the United States. *Reid v. Covert*, 354 U.S. 1, 26 (1957). His "works constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999).

142. 4 BLACKSTONE, *supra* note 141, at 54.

143. *Id.*

144. *Id.* at 55.

145. *Id.* at 57.

146. *See id.* at 56–57.

147. *See, e.g.*, 1 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143, n. 40 (Philadelphia, William Young Birch & Abraham Small 1803). *C.f.* *Bridges v. California*, 314 U.S. 252, 264 (1941) ("[T]o assume that English common law in this [First Amendment] field became ours is to deny the generally accepted historical belief that one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.") (quotations omitted); *id.* ("Madison . . . wrote that 'the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United

George Tucker emphasized in “the most important early American edition of Blackstone’s Commentaries,”¹⁴⁸ the American right was “without any qualification as to their condition or degree, as is the case in the British government.”¹⁴⁹ Indeed, James Madison’s notes reveal that he condemned the limited scope of the “English Decln. of Rts” when he introduced the Second Amendment in Congress, including that it protected only “arms to [Protestants].”¹⁵⁰ Thomas Cooley emphasized that the Second Amendment “was adopted with some modification and enlargement from the English Bill of Rights”¹⁵¹ And William Rawle explained that the English “cautiously described” their right compared to the Americans.¹⁵² The only limitation Rawle found on the Second Amendment was that “[t]his right ought not . . . to be abused to the disturbance of the public peace.”¹⁵³

In sum, no evidence has been produced showing that the phrase “as allowed by law” permitted disarmament based on

States.” (quoting 6 JAMES MADISON, THE WRITINGS 1790-1802, at 387 (1906) (second and third alteration in original)).

148. District of Columbia v. Heller, 554 U.S. 570, 594 (2008).

149. TUCKER, *supra* note 147. Tucker denounced limitations and abuses of the English right enabled by its relatively weak language: “the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to . . . [an] other person not qualified to kill game.” *Id.* app. at 300. But Tucker overstated the severity of the abuses. Edward Christian’s founding-era edition of Blackstone clarified that “every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 n.2 (London, A. Strahan & W. Woodfall 1794); see also JOHNSON ET AL., *supra* note 34, at 114–18, 139–42.

150. See Notes for Speech in Congress, [CA. 8 June] 1789, FOUNDERS ONLINE NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-12-02-0125> [https://perma.cc/J676-SBMX].

151. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270 (Boston, Little, Brown, & Co. 1880).

152. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (1829) (In England, “it is cautiously described to be that of bearing arms for their defence ‘suitable to their conditions, and as allowed by law.’”). The Supreme Court called Rawle’s VIEW OF THE CONSTITUTION an “influential treatise.” *Heller*, 554 U.S. at 607.

153. RAWLE, *supra* note 152, at 126. Rawle added that under the Second Amendment, “[a]n assemblage of persons with arms, for an unlawful purpose, is an indictable offence, and even the carrying of arms abroad by an individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace.” *Id.*

nonviolent crimes, but regardless, the American right deliberately excluded any such qualification.¹⁵⁴

III. COLONIAL AMERICA

After analyzing English history, the *Range* panel looked to colonial America.¹⁵⁵ In discussing the colonial era, however, the panel relied exclusively on discriminatory laws—laws that “prohibited Native Americans, Black people, and indentured servants from owning firearms,” as well as laws disarming “Catholics” and “Antinomians.”¹⁵⁶ The panel called such laws “repugnant,”¹⁵⁷ but nevertheless used them to inform the boundaries of the Second Amendment, finding that they demonstrate that people could be “disarmed due to conduct evincing inadequate faithfulness to the sovereign and its laws.”¹⁵⁸

Bruen makes clear that discriminatory laws cannot form a historical tradition.¹⁵⁹ There were several laws throughout the colonial, founding, and early republic periods requiring Blacks to acquire a discretionary license to carry arms in public, yet *Bruen* did not consider any in its historical analysis of restrictions on the right to bear arms.¹⁶⁰ Indeed, as Justice Kavanaugh recently

154. *See id.*; cf. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (The “liberty of the individual” in America was secured with “regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”).

155. *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 276–77 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

156. *See id.* at 276.

157. *Id.* at 276 n.18.

158. *See id.* at 276.

159. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126, 2129–30 (2022). Admittedly, the author pointed to some of the same discriminatory laws in a pre-*Bruen* article to note that they targeted people deemed too dangerous to possess arms. *See Greenlee, The Historical Justification*, *supra* note 13, at 281. Between the publication of that article and the *Range* decision, however, the Supreme Court issued its *Bruen* decision, demonstrating that such laws are irrelevant to a Second Amendment analysis. *See supra* text accompanying note 9.

160. An *amicus* brief filed in *Bruen* provided several racist licensing laws to demonstrate their discriminatory purpose, and the Court considered none in analyzing the nation’s tradition of carry regulations. *See* Brief for Nat’l African Am. Gun Ass’n, Inc. in Support of Petitioners, at 5–10, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (including laws from 1819 Virginia, 1798 Kentucky, 1806 Maryland, 1833 Alabama, 1741 Tennessee, 1832 Delaware, and 1840 North Carolina). And there were many others that the Court ignored. *See*,

explained, “th[e] Court has emphasized time and again the ‘imperative to purge racial prejudice from the administration of justice.’”¹⁶¹ He thus asked, “[w]hy stick by . . . a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?”¹⁶²

What is more, the discriminatory laws undermine the *Range* panel’s holding because they were all based on danger.¹⁶³ Section III.A notes that Blacks were disarmed over fears of slave revolts. Section III.B explains that laws preventing firearm transfers to American Indians were among the myriad laws designed to prevent attacks against the colonists. Section III.C addresses indentured servants. Section III.D discusses laws disarming Catholics, which were enacted to prevent American Catholics from supporting France in a war against the British. Section III.E describes the disarmament of Antinomians in Massachusetts during the 1630s, which was motivated by a concern that the Antinomians would receive a revelation to violently attack those who opposed them. Section III.F details disarmament of Puritans in Virginia during the 1640s, which resulted from conflicts with the colonial government.

A. Slaves and Free Blacks

Some laws forbade slaves or free Blacks from possessing arms.¹⁶⁴ These laws “rested upon White fears that armed Blacks, especially freemen, might conspire to carry out a slave revolt.”¹⁶⁵ Thus, in addition to disarming Blacks, many colonies

e.g., AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 340–41 (Philadelphia, W. Bradford 1881) (1694 New Jersey law); 1715 Md. Laws 117, chap. 26, § 32; 1740 S.C. Acts 168, § 23; A CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUTES OF FORCE 812 (Augusta, Charles E. Grenville 1843) (1768 Georgia law); 1797 Del. Laws 104, ch. 43, § 6 (1797); 1799 Miss. Laws 113.

161. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) (quoting *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017)).

162. *Id.* at 1419.

163. Brief for Amicus Curiae Nat’l African Am. Gun Ass’n, Inc. in Support of Petitioners, *supra* note 160, at 7 (quoting *Waters v. State*, 1 Gill 302, 309 (Md. 1843)).

164. *See e.g.* JOHNSON ET AL., *supra* note 34, at 440–41.

165. *Id.* at 440.

enacted laws designed to ensure that the surrounding community was sufficiently armed and organized to prevent or suppress slave revolts.¹⁶⁶ Such revolts were a constant, often paralyzing concern throughout early American history. Historian Herbert Aptheker “found records of approximately two hundred and fifty revolts and conspiracies in the history of American [Black] slavery.”¹⁶⁷ These insurrections could have been more deadly had the slaves been armed.¹⁶⁸

Free Blacks could often keep and bear arms if they were found to be peaceable—and thus unlikely to engage in revolt.¹⁶⁹ For example, in 1806 Maryland, it was unlawful for any free Black “to go at large with any gun, or other offensive weapon” without “a certificate from a justice of the peace, that he is an orderly and peaceable person. . . .”¹⁷⁰ Another law, from 1832 Delaware, allowed free Blacks to keep arms if five people certified that they were “a person of fair character.”¹⁷¹ These laws were designed to prevent danger by ensuring that people using arms were peaceable; they were not designed to promote faithfulness to the sovereign.¹⁷²

166. See, e.g., 2 SELECTIVE SERV. SYS., BACKGROUNDS OF SELECTIVE SERVICE: MILITARY OBLIGATION: THE AMERICAN TRADITION pt. 3, at 2 (1947) (Delaware Enactments: 1741); *id.* pt. 4, at 20, 94, 132 (Georgia Enactments: 1755, 1773, and 1778); *id.* pt. 13, at 32, 45–46, 70 (South Carolina Enactments: 1721, 1747, and 1778); *id.* pt. 14, at 84, 89, 94, 107, 115, 156, 216, 300, 327, 435 (Virginia Enactments: 1723, 1727, 1738, 1748, 1755, 1775, 1777, and 1784).

167. HERBERT APTHEKER, *American Negro Slave Revolts*, in STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW, 162 (Fac. of Pol. Sci. of Columbia Univ. eds., 1943).

168. See generally *id.* (“A slave state offered the following definition of the term slave insurrection: ‘By “insurrection of slaves” is meant an assemblage of three or more, with arms, with intent to obtain their liberty by force.’ Were one to follow this definition literally the number of slave insurrections and conspiracies within the present borders of the United States would be huge, certainly reaching several hundreds.”).

169. See e.g., 1806 Md. Laws 46–47; 8 Del. Laws 208 (1832).

170. 1806 Md. Laws 46–47.

171. 8 Del. Laws 208 (1832).

172. See e.g., 1806 Md. Laws (requiring the certificate to demonstrate “that he is an orderly and peaceable person”); 8 Del. Laws 208 (1832) (requiring a written certificate from “five or more respectable and judicious citizens of the neighborhood [to demonstrate the free Black’s] fair character”).

B. American Indians

Laws preventing firearm transfers to American Indians—which were not prohibitions on possession—also focused on mitigating danger.¹⁷³ The brutal history of atrocities and wars between Indians and European settlers is well documented and unnecessary to rehash here.¹⁷⁴ But it is worth emphasizing that numerous firearm laws were enacted in colonial America in response to the dangers Indians presented.¹⁷⁵ Many laws required people to carry arms for protection from Indians.¹⁷⁶ Colonies required arms-carrying to church, court, public assemblies, travel, and fieldwork.¹⁷⁷ Additionally, every colony enacted militia laws with the stated purpose of preventing or resisting Indian attacks.¹⁷⁸ The Dutch Colony of New Netherland, which long

173. See, e.g., Report of the Proceeding in the General Assembly of 1619, *reprinted in* 1 JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 3, 13 (H. R. McIlwaine, ed., Richmond, 1915) (“That no man do fell or give any Indians any piece shott, or poulder [sic], or any other armes offensive or defensive, upon paine of being held a Traytor to the Colony, & of being hanged, as soon as the fact is proved, without all redemption.”).

174. See generally MICHAEL L. NUNNALLY, AMERICAN INDIAN WARS: A CHRONOLOGY OF CONFRONTATIONS BETWEEN NATIVE PEOPLES AND SETTLERS AND THE UNITED STATES MILITARY, 1500s – 1901, at 1 (2007) (detailing “the day to-day, year-to-year violent struggles in America between Native Americans . . . and white Europeans The basic conflict between these adversaries was the continuous encroachment of European settlers and a totally oppositional land-use philosophy.”).

175. See District of Columbia v. Heller, 554 U.S. 570, 715 (2008) (Stevens, J., dissenting) (discussing “self-defense” and stating “any self-defense interest at the time of the framing could not have focused exclusively upon urbancrime-related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays’ Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways.”).

176. See *id.* at 601 (“Many colonial statutes required individual arms-bearing for public-safety reasons . . .”).

177. JOHNSON ET AL., *supra* note 34, at 189–91.

178. See, e.g., 2 SELECTIVE SERV. SYS., *supra* note 166, 07 pt. 2, at 5–7, 13, 32, 37, 63, 96, 108, 109, 111, 112, 113, 127, 136, 154 (Connecticut Enactments: 1638, 1650, 1673, 1675, 1702, 1715, 1723, 1723, 1725, 1725, 1726, 1741, 1741, and 1754, respectively); *id.* pt. 3, at 10, 16 (Delaware Enactments: 1756 and 1757, respectively); *id.* pt. 4, at 20, 62, 94 (Georgia Enactments: 1755, 1756, and 1773, respectively); *id.* pt. 5, at 11, 18, 26, 33, 44, 54, 67, 116 (Maryland Enactments: 1676, 1678, 1681, 1692, 1699, 1704, 1715, and 1758, respectively); *id.* pt. 6, at 23, 31, 33, 116, 147–48 (Massachusetts Enactments: 1643, 1692, 1645, 1675, and 1697, respectively); *id.* pt. 7, at 3, 5, 7, 8, 24, 26, 27, 43 (New Hampshire Enactments: 1679, 1682, 1682, 1685, 1689, and 1703, respectively); *id.* pt. 8, at 13, 17, 21 (New Jersey Enactments: 1713, 1722, and 1730, respectively); *id.* pt. 9, at 209 (New York Enactments: 1756); *id.* pt. 10, at 8, 23, 37 (North Carolina Enactments: 1715, 1759, and 1764, respectively); *id.* pt. 11, at 25, 57, 60, 87, 107 (Pennsylvania Enactments: 1776, 1777, 1777, 1780, and 1780, respectively); *id.* pt. 12, at 7, 75 (Rhode Island Enactments: 1663 and 1757,

struggled to enforce bans on firearm sales to Indians, forbade “the admission of any Indians with a gun . . . into any Houses” in 1656 for the express purpose “to prevent such dangers of isolated murders and assassinations.”¹⁷⁹ American Indians were perceived as an imminent danger throughout the history of colonial America. Laws designed to prevent them from acquiring arms were unquestionably intended to limit the potential harm they could inflict.¹⁸⁰

C. *Indentured Servants*

Indentured servants were not free under the law.¹⁸¹ Some voluntarily entered servitude on terms agreed upon by both parties, some were captives of war, and others were convicts sent to America from Britain.¹⁸² Some laws throughout colonial America either exempted indentured servants from militia duty¹⁸³ or required their masters’ permission for them to serve

respectively); *id.* pt. 13, at 45, 73 (South Carolina Enactments: 1747 and 1778, respectively); *id.* pt. 14, at 4, 8, 13, 17, 23, 34, 50, 115, 158, 165, 185, 338–9 (Virginia Enactments: 1629, 1632, 1644–45, 1661–62, 1675, 1676, 1684, 1748, 1755, 1755, 1756, and 1777, respectively).

179. E.B. O’CALLAGHAN, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (1868).

180. See, e.g., 2 SELECTIVE SERV. SYS., *supra* note 166, pt. 4, at 94 (Georgia Enactments: 1947) (“And Whereas several parts of the province . . . are in danger of Incursions from Indians . . . it shall and may be lawful for every commission officer in the Militia when occasion requires to assemble any number of men . . . to distress disperse and kill destroy apprehend take or subdue, any . . . Indian . . . who shall in a hostile manner Invade or attempt to Invade this Province or hurt any of his Majesty’s Subjects . . .”).

181. JOHNSON ET AL., *supra* note 34, at 192.

182. *Id.* at 191–92.

Many . . . Americans were at first indentured servants. Because they could not afford to pay for passage to America, they signed contracts by which they would receive a free voyage, and when they arrived, the sailing company would sell a contract for the person to be a servant for a term of years. Additionally, persons who were captured in warfare—such as Indians, Africans, or Irish—might be sold as indentured servants

Id. at 191.

183. See, e.g., BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 166, pt. 3, at 27 (Delaware Enactments: 1785); *id.* pt. 5, at 108 (Maryland Enactments: 1756); *id.* pt. 6, at 21 (Massachusetts Enactments: 1643); *id.* pt. 8, at 33 (New Jersey Enactments: 1757); *id.* pt. 9, at 257 (New York Enactments: 1775); *id.* pt. 11, at 77 (Pennsylvania Enactments: 1780); *id.* pt. 14, at 362 (Virginia Enactments: 1778).

in the militia,¹⁸⁴ but *none* of these laws affected their ability to possess arms.¹⁸⁵ Moreover, scores of militia laws required or encouraged servants to keep and bear arms as part of the militia.¹⁸⁶ Several militia laws required masters to arm their servants or held them responsible if the servants failed to fulfil their militia duties, including keeping the required militia arms.¹⁸⁷ Additionally, indentured servants were regularly required to keep arms once their servitude concluded.¹⁸⁸

184. See, e.g., *id.* pt. 2, at 157 (Connecticut Enactments: 1754); *id.* pt. 6, at 160 (Massachusetts Enactments: 1721); *id.* pt. 8, at 81 (New Jersey Enactments: 1781); *id.* pt. 11, at 20 (Pennsylvania Enactments: 1755).

185. The *Range* panel did not provide examples of indentured servants being disarmed. Instead, the court cited an article by the discredited historian, Michael Bellesiles. *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 276 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023) (citing Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 578–79 (1998)); see Scott McLemee, *Amazing Disgrace*, INSIDE HIGHER ED. (May 18, 2010), <https://www.insidehighered.com/views/2010/05/19/amazing-disgrace> [https://perma.cc/XZD4-AWQV] (discussing why Michael Bellesiles is discredited). In the article, Bellesiles provided five laws allegedly involving indentured servants. *Bellesiles, supra*, at 579 n.30. The first law prohibited “any servant running away” from leaving his arms “with the Indians.” 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 255 (New York, R. & W. & G. Bartow 1823). The other four laws allegedly prove that “indentured servants were not allowed to serve in the militia,” *Bellesiles, supra*, at 579, but this is inaccurate. The first law exempted only “servant[s] by importation” from militia duty. 3 HENING, *supra*, at 335–36. Under the second and third laws, servants could serve as substitutes in the militia. 4 *id.* at 118–19 (1723 Virginia militia law); 5 *id.* at 16–17 (1738 Virginia militia law). The fourth law seemingly does not exist. See 6 *id.* at 93–106.

186. See, e.g., 2 SELECTIVE SERV. SYS., *supra* note 166, pt. 2, at 101 (Connecticut Enactments: 1715); *id.* pt. 4, at 111 (Georgia Enactments: 1773); *id.* pt. 5, at 8 (Maryland Enactments: 1654); *id.* pt. 6, at 47 (Massachusetts Enactments: 1647); *id.* pt. 7, at 38 (New Hampshire Enactments: 1697); *id.* pt. 8, at 51 (New Jersey Enactments: 1777); *id.* pt. 10, at 48 (North Carolina Enactments: 1774); *id.* pt. 11, at 10 (Pennsylvania Enactments: 1676); *id.* pt. 13, at 75 (South Carolina Enactments: 1778); *id.* pt. 14, at 14 329 (Virginia Enactments: 1777).

187. See, e.g., *id.* pt. 2, at 59–60 (Connecticut Enactments: 1702); *id.* pt. 4, at 149 (Georgia Enactments: 1784); *id.* pt. 5, at 10 (Maryland Enactments: 1661); *id.* pt. 7, at 14 (New Hampshire Enactments: 1688); *id.* pt. 8, at 76 (New Jersey Enactments: 1781); *id.* pt. 9, at 247 (New York Enactments: 1772); *id.* pt. 10, at 107 (North Carolina Enactments: 1781); *id.* pt. 12, at 211 (Rhode Island Enactments: 1793); *id.* pt. 13, at 70–71 (South Carolina Enactments: 1778); *id.* pt. 14, at 325 (Virginia Enactments: 1777).

188. See, e.g., *id.* pt. 4, at 14 (Georgia Enactments: 1755) (requiring “every Servant in this province, who Shall be Freed or discharged from his Service shall be allowed Six Months time after such discharge to provide himself with the Arms and Furniture”); *id.* pt. 6, at 138 (Massachusetts Enactments) (requiring “three months’ time . . . after his time is out”); *id.* pt. 7, at 51 (New Hampshire Enactments: 1718) (requiring “[t]hree Months time . . . after his time is out”); *id.* pt. 13, at 10 (South Carolina Enactments: 1703) (requiring “within the time and space of twelve months after he or they shall be free and discharged”).

In any event, many indentured servants were dangerous, as Britain transported violent criminals to the colonies to work as indentured servants rather than execute them.¹⁸⁹ An estimated “4,500 convicts were sent to the colonies by 1700,” despite resistance from the colonies themselves.¹⁹⁰ Virginia complained in 1670 about the “great danger and disrepute [that] is brought . . . by the frequent sending thither of felons and other Condemned Persons,” but Charles II simply ordered “that they be sent to any other of his Majestys Plantations in America” for a while.¹⁹¹ Maryland also attempted to ban the import of convicts soon after, but was unsuccessful.¹⁹² In 1717, Parliament passed a law expressly allowing convicts to be transported to America.¹⁹³ Then in 1722, blaming convict servants for “many Cruel murders and frequent thefts and Robberies . . . whereby the Lives and Estates of his Majesties good Subjects are in great danger,” Virginia passed a law to more closely monitor and more strictly punish convict servants.¹⁹⁴ But Parliament continued to disregard the colonies’ concerns, forbidding the colonial governments in 1731 from imposing duties on such importation.¹⁹⁵ In 1748, a Virginia act stated that “most of the felonies, and other capital offences committed in this colony, are perpetrated and done by persons who have been convicted of felony, or other crimes in Great Britain, or Ireland.”¹⁹⁶ In 1751, several Maryland counties followed Baltimore County in ordering that a “good Security of Fifty Pounds should be given for every Convict imported into that County.”¹⁹⁷

189. See GWENDA MORGAN & PETER RUSHTON, EIGHTEENTH-CENTURY CRIMINAL TRANSPORTATION: THE FORMATION OF THE CRIMINAL ATLANTIC 12 (2004).

190. *Id.*

191. 1 ACTS OF PRIVY COUNCIL OF ENGLAND 553 (W.L. Grant & James Munro eds., 1908).

192. MORGAN & RUSHTON, *supra* note 190.

193. The Transportation Act 1717, 4 Geo. 1 c. 11 (Eng.).

194. See WAVERLY K. WINFREE, THE LAWS OF VIRGINIA BEING A SUPPLEMENT TO HENING’S THE STATUTES AT LARGE, 1700-1750, at 217 (1971).

195. See 2 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 674-75 (Leonard Woods Labaree ed., 1935).

196. 5 HENING, *supra* note 186, at 545.

197. MD. GAZETTE, Aug. 21, 1751, at 2.

The complaint that garnered the most attention was published by Benjamin Franklin in the *Pennsylvania Gazette* in 1751.¹⁹⁸ Franklin started by reporting several crimes committed by convict servants.¹⁹⁹ “[S]ix Convicts” being “transported for fourteen Years . . . rose at Sea, shot the Captain, overcame and confin’d the Seamen . . . drove a Spike up thro’ [a boy’s] under and upper Jaws,” and escaped into Virginia before being tracked down by the hue and cry.²⁰⁰ In Maryland, “a Convict Servant . . . went into his Master’s House, with an Ax in his Hand, determin’d to kill his Mistress,” but instead “laid his Left-hand on a Block, cut it off, and threw it at her, saying, *Now make me work, if you can.*”²⁰¹ In Pennsylvania, “a Convict Servant . . . broke open and robb’d several Houses,” and another, Samuel Saunders, killed Simon Girtie and was convicted of manslaughter.²⁰² Franklin then questioned why the “mother country” would treat the colonies with such disdain: “what good mother ever sent thieves and villains to accompany her children; to corrupt some with their infectious vices, and murder the rest?”²⁰³ The next month, again lamenting the “horrid Crimes” committed by convict servants, Franklin proposed that the colonies return the favor by sending rattlesnakes to Britain.²⁰⁴ “Franklin’s sentiments were widely reproduced in the northern and mid-Atlantic colonies, appearing in the *New York Evening Post*, *Maryland Gazette*, *Boston Gazette*, *Boston Evening Post* and *Virginia Gazette.*”²⁰⁵

Convict servant crime was especially topical that year, as convict servants had committed a series of heinous murders. Jeremiah Swift in Maryland killed his master’s son and daughter,

198. See Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestick*, PA. GAZETTE, Apr. 11, 1751, at No. 1165.

199. *Id.*

200. *Id.*

201. *Id.*

202. See *id.*

203. *Id.*

204. Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestick*, PA. GAZETTE, May 9, 1751, No. 1169.

205. MORGAN & RUSHTON, *supra* note 190, at 141–42.

and tried to murder a second son.²⁰⁶ Daniel Sullivan murdered an overseer who retrieved him when he ran away and left “his naked body half-buried in clay and muddy water” to be “gnawed by dogs.”²⁰⁷ Jacob Windsor was executed for murder.²⁰⁸ Demonstrating how little tolerance England itself had for such convicts, William Parsons was executed in London for sneaking back to England before his sentence in America was complete.²⁰⁹

Of course, many indentured servants were peaceable—especially those who voluntarily entered servitude.²¹⁰ Possibly half of all European migrants to America were indentured servants.²¹¹ Frequently, people who could not afford transportation to America entered into contracts with the shipmaster, in which they “were given transportation by the shipmaster with the understanding that on arrival they were to have a few days to indenture themselves to someone to pay for their passage. Failing this, the shipmaster could sell them himself.”²¹² Far from being prohibited from possessing arms, these individuals were traditionally gifted “freedom dues”—i.e., necessities that enabled them to live independently—upon completing their service, which typically included a firearm.²¹³ Such dues—including a firearm—were often required by law.²¹⁴ And as free people,

206. Caleb D’Anvers, of Gray’s-Inn, Elq, *London*, THE COUNTRY JOURNAL, OR THE CRAFTSMAN (Md.), Mar. 27, 1751, at No. 1155.

207. MORGAN & RUSHTON, *supra* note 190, at 139.

208. *See id.*

209. *See id.* at 140.

210. *See* JOHNSON ET AL., *supra* note 34, at 191 (“A free servant could leave employment at any time, although they were often employed on one-year contracts and would not be paid if they left before the end of the year.”).

211. *See* Christopher Tomlins, *Reconsidering Indentured Servitude: European Migration and the Early American Labor Force, 1600-1775*, 42 LAB. HIST. 5, 9 (2001).

212. MARCUS WILSON JERNEGAN, *LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA, 1607-1783*, at 47 (1931).

213. JOHN MACK FARAGHER, MARI JO BUHLE, DANIEL CZITROM, & SUSAN H. ARMITAGE, *OUT OF MANY: A HISTORY OF THE AMERICAN PEOPLE* 69 (Prentice Hall 6th ed., 2011).

214. *See* 3 HENING, *supra* note 186, at 451 (1705 Virginia law requiring that “every male servant” be provided with “one well fixed musket or fuzee, of the value of twenty shillings, at least”); 2 SELECTIVE SERV. SYS., *supra* note 166, pt. 13, at 25 (South Carolina Enactments: 1721) (South Carolina law requiring “every free white male servant” to be provided with the required militia “arms, ammunition and accoutrements.”); 23 THE STATE RECORDS OF NORTH CAROLINA

former servants were held to the same standards as everyone else whenever a statute required arms-keeping for militiamen or heads of households. Thus, to the extent that some servants received unfavorable treatment regarding firearms, it should be attributed to the dangers many—particularly, convict servants—posed.

D. Catholics

The *Range* panel overlooked concerns over the “repugnant” status-based regulations because “colonial history furnishes numerous examples in which full-fledged members of the political community as it then existed—*i.e.*, free, Christian, white men—were disarmed due to conduct evincing inadequate faithfulness to the sovereign and its laws.”²¹⁵ Specifically, “Maryland—as well as Virginia and Pennsylvania—confiscated firearms from their Catholic residents during the [French and Indian] War.”²¹⁶ “That decision was not in response to violence,” the panel assured, “but rather because the Protestant majorities in those colonies viewed Catholics as defying sovereign authority and communal values.”²¹⁷

In fact, Protestants at the time expressly stated that they disarmed Catholics to prevent violence.²¹⁸ The French and Indian War was a “global war” between the United Kingdom and France that “pitted Protestant versus Catholic.”²¹⁹ American Protestants worried that their Catholic neighbors were plotting

63 (Walter Clark ed., 1904) (North Carolina law from 1715 to 1741 requiring that “every Christian Servant” be provided with “a good well-fixed Gun, if he be a Manservant.”). Moreover, the freed servant could sometimes be fined for selling his freedom-dues firearm. See 26 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, SEPTEMBER 5, 1704 – APRIL 19, 1706, at 256 (William Hand Browne ed., 1906) (instituting a “penalty of five hundred pounds of Tobacco” for “selling or disposing” of a freedom-dues firearm “within the Space of twelve months” after receiving it).

215. *Range v. Att’y Gen.*, 53 F.4th 262, 276 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

216. *Id.* at 277.

217. *Id.*

218. See, e.g., PA. GAZETTE, June 13, 1754, at No. 1329 (reporting Lieutenant Colonel Thomas James’ statements, urging the militia to disarm Catholics); 7 HENING, *supra* note 186, at 35.

219. JOHNSON, *supra* note 34, at 197.

with Catholic France to impose Catholic rule throughout America.²²⁰ Indeed, the English in America had long viewed French Catholicism as part of France's goal of establishing a "*Universal Empire*, or, in other [w]ords, *Universal Slavery*."²²¹ These sentiments were especially held in Maryland, Pennsylvania, and Virginia, as discussed below.²²²

Pennsylvanians worried about a Catholic "massacre."²²³ In 1748, Lieutenant Colonel Thomas James urged the militia to uphold "the Glory, Props and Strength of a Protestant Government" and prevent it from being "trodden under Foot by the bloody and tyrannical Power of Popery."²²⁴ He continued: "We have numerous, or rather numberless, Enemies amongst us . . .

220. See Martin I. J. Griffin, *Catholicity in Pennsylvania*, I.C.B.U. J., June 15, 1886, at 1, <https://digital.library.villanova.edu/Item/vudl:433193> ("Now as the French were Catholics it was believed, of course, that the Catholics of Pennsylvania and Maryland would aid the French."). Concerns over American Catholics assisting France in a war against the British long pervaded colonial life. After England's Glorious Revolution, rumors circulated "that the French in Canada were making preparations to invade New York, hoping, with the assistance of the Catholics in the province, to wrest it from the English." Berthold Fernow, *The Middle Colonies*, in 5 NARRATIVE AND CRITICAL HISTORY OF AMERICA, pt. I, at 189 (Justin Winsor ed., Boston & New York, Houghton, Mifflin & Co. 1887). Specifically, New Yorkers were concerned "that the papists within and without the government had concerted to seize Fort James, in New York, and to surrender that post and the province to a French fleet." *Id.* at 189–90. Jacob Leisler "seized the fort" so the Catholics could not, and soon took control of the province from appointees of James II, "rising to such prominence" on "a 'No Popery' cry." *Id.* at 190. While Leisler's rule was short-lived, fears over Catholic uprisings remained. After an assassination attempt on King William in 1696, "reputed papists in New York" were "disarmed and bound to give bond for good behaviour or be confined in prison." Letter from Governor Fletcher to Lords of Trade and Plantations, June 10, 1696, in 15 CALENDAR OF STATE PAPERS, COLONIAL SERIES, at 12 (J. W. Fortescue ed., 1904).

221. See Philo-Musus, Letter to the Publisher, MARYLAND GAZETTE, Jan. 14, 1746, at 1.

222. Concerns about Catholic violence were not limited to these states. In 1744, New Jersey's governor expressed his apprehension to New York's governor that "should the French appear and 1500 to 2000 men, they would in [Pennsylvania] soon get ten or twelve thousands together, which would in that case, be not a little dangerous to these and neighboring colonies." JOSEPH L. J. KIRLIN CATHOLICITY IN PHILADELPHIA, 54–55 (Phila., John Jos. McVey 1909). In 1754, North Carolina's governor warned about "the Grand Plan of France, to ruin and distress all the *British Colonies*." A Message from His excellency Arthur Dobbs, Esq., Captain-General and Governor in Chief, in and over his Majesty's Province of North-Carolina to the General Assembly, held at Newbern (Dec. 12, 1754). "[T]heir wicked and enslaving scheme," the governor alleged, involved "inspir[ing] an enthusiastick Fury into [Catholics] against Protestants, whom they call Hereticks, making it meritorious in them to massacre and destroy them." *Id.*

223. KIRLIN, *supra* note 222, at 78.

224. Reported in Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestic*, PA. GAZETTE, June 13, 1754, No. 1329.

who are Ill-wishers to the Protestant Interest, and may, if they have an Opportunity, rise to such a Height in Rebellion that neither Church-Discipline nor civil Law can quash them.”²²⁵

“Philanthropos,” writing in the *Pennsylvania Gazette* in 1754, asked whether his fellow Pennsylvanians could “endure the Thought” of,

having our Children enslaved by the Church of Rome, and forced . . . either to comply with all its idolatrous Superstitions or fall a Sacrifice to the cruel and bloody Zeal of bigotted Priests, and their blinded Followers, who think they do God a good Service by cutting off such as they call Hereticks from the Face of the Earth, and such, in their Esteem, are all those who are not of their Community.²²⁶

He proceeded to refer to Catholics as “inhuman Butchers” who commit “intolerable Evils.”²²⁷ The following year, the *Pennsylvania Gazette* printed a warning that “Britain must not expect to be free from . . . Attacks on her . . . Settlements Abroad, so long as she suffers such a Number of Romish Priests to be imported.”²²⁸

On July 17, 1755, the *Pennsylvania Gazette* reprinted from an English paper an article entitled, “Some Thoughts upon America, and upon the Danger from Roman Catholicks there.”²²⁹ According to the author, “no surer Ground-work could be laid for the Loss and Destruction of our Colonies, than to encourage the Resort of Roman Catholicks thither.”²³⁰ For “many Romans Catholics to resort thither . . . might be of the utmost Danger to our Settlements,” because “they believe it their Duty to cut our

225. *Id.*

226. Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestic*, PA. GAZETTE, Sept. 5, 1754, No. 1341.

227. *Id.*

228. Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestic*, PA. GAZETTE, June 12, 1755, No. 1381.

229. Benjamin Franklin, *Containing the Freshest Advices, Foreign and Domestic*, PA. GAZETTE, July 17, 1755, No. 1386.

230. *Id.*

[Protestants'] Throats."²³¹ Thus, laws forbidding Catholics to keep Horses and Arms in America were necessary.²³²

Reverend William Smith also focused on the dangerous possibility of Catholic rebellions in *A Brief State of the Province of Pennsylvania*.²³³ Smith believed that France's plan was "to persuade" the "extremely ignorant" Germans "over to the Popish Religion," then "lead them in a Body against us."²³⁴ This was "plainly a Scheme laid by the *French* many Years ago," he wrote in 1755, and "now is the Time they propose to put their grand Scheme in Execution."²³⁵ At least one Roman Catholic, Dr. Thomas Graeme of Philadelphia, agreed. "*The Present State of Pennsylvania*," according to Graeme, "how much so ever it irritated friends here, in most, if not all, is literally true."²³⁶

On June 22, 1755, Reverend Philip Reading gave a sermon at Philadelphia's Christ Church about the "Protestant's Danger and the Protestant's Duty."²³⁷ "What course shall we pursue in defence of our native rights and privileges," Reading asked, "when these dogs of Hell, Popish superstition and French tyranny dare to erect their heads and triumph within our borders[?]"²³⁸ "Indignation swells our breasts, Love of Freedom inflames us, while we behold the Slaves of France and the Inquisitors of Rome approaching to crush us."²³⁹ As for the "dogs of Hell" that seemingly lived "quiet and peaceful" lives among them?²⁴⁰ It was only because "a Cardinal, a person of great Note and Authority," declared to his fellow Catholics: "We are not obliged . . . to destroy heretics, when we are not armed with power, sufficient to accomplish it."²⁴¹ As other alarmists

231. *Id.*

232. *See id.*

233. WILLIAM SMITH, *A BRIEF STATE OF THE PROVINCE OF PENNSYLVANIA* (2d ed. 1755).

234. *Id.* at 30.

235. *Id.* (emphasis in original).

236. KIRLIN, *supra* note 223, at 79.

237. *Id.* at 76.

238. *Id.*

239. *Id.*

240. *Id.* at 77.

241. *Id.*

had, Reading painted a horrifying picture of things to come if the French and Catholics were not stopped:

Who yonder Virgin shrieking in the arms of a lustful Ravisher? Who is yonder matron weeping over the breathless corpse of her slaughtered husband, grieving for her Sons, hurried into slavery and banishment and uttering fruitless complaints to the ears of insulting enemies—Defend me Heaven! . . . Let not our eyes behold this ghastly scene of Desolation, Mourning and Woe.²⁴²

Reading concluded by pleading, “Arise O Lord, and let Thine enemies be scattered and by good providence grant that neither the Gates of Hell, the Gates of Rome, nor the Gates of France, shall ever prevail against us.”²⁴³

In August 1755, Pennsylvania’s governor wrote Virginia’s governor about the possibility of Pennsylvania Catholics joining the French: “the French might march in and be strengthened by the German and Irish Catholics who are numerous here.”²⁴⁴

After Braddock’s Defeat—a failed attempt to capture the French stronghold at Fort Duquesne—five justices of the peace for Berks County, Pennsylvania, petitioned the governor for authority to disarm Catholics to alleviate their “dangerous situation” and prevent a “massacre”:

As all our Protestant inhabitants are very uneasy at the behavior of the Roman Catholics, who are very numerous in this county, some of whom show great joy at the bad news lately come from the army, we have thought it our duty to inform your honor of our dangerous situation, and to beg your honor to enable us by some legal authority to disarm or otherwise disable the Papists from doing any injury to other people who are not of their vile principles. . . . [W]e have reason to fear,

242. *Fear of Catholics in Colonial Pennsylvania, 1755–6*, 2 AM. CATH. HIST. SOC’Y 74, 76 (1900).

243. KIRLIN, *supra* note 223, at 77.

244. *Id.* at 79.

just at this time that the Roman Catholics in Casahoppen . . . have bad designs. . . . [S]ome imagine they have gone to Consult with our enemies at DuQuesne. It is a great unhappiness at this time to the other people of the province that the Papists should keep arms in their houses, against which the Protestants are not prepared, who therefore are subject to a massacre whenever the Papists are ready.²⁴⁵

The colonial assembly found “little foundation for” the allegations, but the fear of Catholic violence was undeniable.²⁴⁶

On November 1756, several Catholics were “charged with being disaffected and treasonable.”²⁴⁷ When treasonous papers were intercepted while rumors abound of Catholic plots, New York’s governor wrote to Pennsylvania’s governor that he was “rather Inclined to think, the Treasonable Correspondence must have been carried on by some Roman Catholics.”²⁴⁸ Meanwhile, newspaper articles warned of “the danger of having such a stronghold of popery in the very heart of the colonies.”²⁴⁹ When Pennsylvania’s 1759 militia act disarmed Catholics, it expressed that it was “absolutely necessary” to address a Catholic insurrection:

[I]n this time of actual war with the French King and his subjects and his savage Indian Allies, it is absolutely necessary . . . that the province be put into a proper posture of defense. . . to defend their lives and fortunes against the hostile invasions of His Majesty’s perfidious enemies, to quell and

245. *Id.* at 78; see also DAVID LEE PRESTON, BRADDOCK’S DEFEAT: THE BATTLE OF THE MONONGAHELA AND THE ROAD TO REVOLUTION 1 (2015).

246. KIRLIN, *supra* note 223, at 79.

247. *Id.* at 80.

248. Letter from Governor Charles Hardy, New York, to Governor Morris, Pennsylvania, (July 9, 1756), in 2 PENNSYLVANIA ARCHIVES 694 (Samuel Hazard ed., 1852).

249. Joseph J. Casino, *Anti-Popery in Colonial Pennsylvania*, 105 PA. MAG. HIST. & BIOGRAPHY 279, 303 (1981).

suppress any intestine commotions, rebellions or insurrections.²⁵⁰

Virginia also disarmed Catholics. A historical analysis to uncover the motive is unnecessary, however, because the legislature expressly stated the reason.²⁵¹ Its disarmament law began by declaring, “*it is dangerous at this time to permit Papists to be armed.*”²⁵² Thus, like Pennsylvania, Virginia disarmed Catholics to prevent danger.

Leading up to the French and Indian war, Marylanders frequently warned that the Catholics in the colony were aiding France or plotting a rebellion. In 1751, Maryland’s Committee of Grievances & Courts of Justice warned the legislature that the “Growth of Popery within this Province may if not timely checked . . . become dangerous to his Maj Dominions & his Lordships Govermt.”²⁵³ Because there “are Divers Papists Jesuits or Priests” in the backcountry who have access to “numbers of Germans French & other Foreigners” who settle there, “if not timely Prevented,” they could “become a Dangerous intestine Enemy to Join French or Indians.”²⁵⁴ The House “concurred in the report.”²⁵⁵

On April 2, 1752, the Maryland Gazette’s front-page article exclaimed: “We live at a Time when bold Rebellion rages in the Land. . . . Rebellion! supported by the Tyranny of *France*, our Mortal Foe; instigated by the Bigottry and blind Superstition of *Rome*”²⁵⁶ In October 1753, Maryland’s lower house considered sworn testimony that Maryland’s Catholics committed treason by supporting Catholic James Stuart’s recent failed

250. JAMES T. MITCHELL, & HENRY FLANDERS, 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 609 (Harrisburg, WM Stanley Ray 1898).

251. See 7 HENING, *supra* note 186, at 35.

252. *Id.*

253. Wm. Wilkins Clk., *Report Against “Papists” of Maryland “Sending Children to Foreign Seminaries to be Trained in the Papists’ Religion, Many of Which Return Priests,”* 1751, in 4 THE AMERICAN CATHOLIC HISTORICAL RESEARCHES 37, 37 (1908).

254. *Id.*

255. ELIHU S. RILEY, A HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND, 1635–1904, at 203 (1905).

256. Juro, *From the Museum. An Apology for Swearing*, MARYLAND GAZETTE, Apr. 2, 1752, at 1.

attempt to overthrow Protestant King George II, and to that end, that the Catholics were eager to massacre Protestants in the colony.²⁵⁷ The deponent stated,

the Roman Catholics, in Maryland, did raise Money for the Use of the Pretender [Charles Stuart] . . . towards carrying on the [Forty-Five] Rebellion against King George. That . . . the Papists, in Saint Mary's County, judged themselves so numerous, that they said they were sure that they were Man to Man against the Protestants, and that the Papists very frequently said, they would wash their Hands in the Blood of Protestants, and that they would soon preach in Chaptico Church, which is a Parish Protestant Church, in the said County, and that all the Protestants would be damned²⁵⁸

Additionally, Maryland's Catholics were alleged to be conspiring with the French about how to conduct their own rebellion.²⁵⁹

In May 1754, Maryland's Committee of Grievances and Courts of Justice alerted the legislature that Catholics were supporting France by using force and intimidation to prevent colonists from joining the local militia.²⁶⁰ "[S]everal Papists . . . have made great Opposition to the enlisting Men for his Majesty's Service . . . to repel the Invasion of the French and Indians in Alliance with them" ²⁶¹ The "[c]onduct and [b]ehaviour of

257. 50 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, 1752-1754, at 201 (J. Hall Pleasants ed., 1933).

258. *Id.*; see also Madsen Pirie, *The Failure of the Forty-Five*, ADAM SMITH INST. (Nov. 8, 2019), <https://www.adamsmith.org/blog/the-failure-of-the-forty-five> [https://perma.cc/QU9J-7VJE]. Charles Edward Stuart, the "Young Pretender," led a Jacobite rising in 1745 in the hopes of claiming the British throne for his father. KIRLIN, *supra* note 223, at 56. The rebellion led the "Covenanted Presbyterians in America" to assemble in Pennsylvania and resolve that, "we being threatened with trouble by a Popish Pretender and with the Indians going with the French we judge our indispensable duty immediately to draw up ourselves in companies to exercise, in order to prepare for war." *Id.* at 57.

259. See 50 ARCHIVES OF MARYLAND, *supra* note 258.

260. *Id.* at 487-88.

261. *Id.* at 487.

the Papists . . . join'd with their known [d]isaffection to his Majesty's Government," the Committee asserted, required action "to secure this [p]art of his Majesty's Dominion, against our domestic as well as foreign [e]nemies. . . ." ²⁶² In one incident reported by the Committee, a band of Catholics "seized" a recruiting officer "by the [t]hroat and took his [c]utlass from him," forcing him to discharge his recruits. ²⁶³ Additionally, Catholics "sung several disloyal [s]ongs" and "damned King George's [s]oldiers," claiming "they had no [b]usiness to fight for him." ²⁶⁴ The Catholics then barricaded the recruiting officers in a house for an entire afternoon and "beset the House with [c]lubs and [s]tones." ²⁶⁵

A report to the governor from Cecil County was even more alarming, as "the French in the Ohio country supposedly enticed Maryland Jesuits to rebel by supplying them with arms." ²⁶⁶ "[T]he People in our Neighbourhood of late are very uneasy with Respect to the Jesuits and Roman Catholicks about us," the report stated, because "they now have in their Possessions large Quantities of Arms &c." ²⁶⁷ One witness "observed the Muzzles of a Parcell of very bright fire Arms at the Bottom of the Waggon" heading to a Catholic gathering. ²⁶⁸ Another Catholic sent off "a great Quantity of Fire Arms, Cutlasses, Cartouch Boxes Horns &c," perhaps to Philadelphia. ²⁶⁹ This concerned Maryland's government enough to act: an order was issued on September 5, 1754, to "endeavour to get the best Information you can and in the privatest Manner where there are any such Quantities of Arms lodged, and if any such are found together in a house supposed to be suspected, then to

262. *Id.*

263. *Id.* at 488.

264. *Id.*

265. *Id.*

266. Timothy W. Bosworth, *Anti-Catholicism as a Political Tool in Mid-Eighteenth-Century Maryland*, 61 CATH. HIST. REV. 539, 551 (1975).

267. 31 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND, AUGUST 10, 1753–MARCH 20, 1761, at 47–48 (William Hand Browne ed., 1911).

268. *Id.* at 48.

269. *Id.*

cause them to be seized. . . ."²⁷⁰ The following spring, based on the same claim that "a quantity of Arms are some where concealed in Cecil County," additional orders were issued allowing officials "to make Search for [the arms] & Seize or Cause them to be seized."²⁷¹

The *Maryland Gazette's* front-page article on October 10, 1754 warned about the horrors of Catholicism, "the Religion . . . of our Enemies the French."²⁷² "Their national Religion is Popery," the article explained, "a persecuting, blood shedding Religion . . . Chiefly calculated to support . . . tyrannical power."²⁷³ The French King's followers are "blindly obedient . . . as well in America as in Europe," it cautioned.²⁷⁴ And "the Popish Missionaries['] . . . Influence upon the Continent over the *Indians*" was an especially important "Reason[] we have to dread and guard against *these* our Enemies."²⁷⁵ The article proceeded to warn that an attack by Catholic France would result in "Our streets streaming with Blood! Our Houses in a Blaze! Our Aged trampled under Foot! Our Wives a Prey to Lust! Our Virgins ravished! Our Infants tore from their fond Mother's Breasts, and inhumanly dashed against the Walls!"²⁷⁶

Another front-page warning about the dangers of Catholicism was published in the following paper,²⁷⁷ which advocated for a law that disarmed Catholics.²⁷⁸ The author, declaring that "Popery is the Foundation of all our present Distractions, Divisions and Dangers," cited "Self-Preservation" as he emphasized the need "for such Laws as will put it out of the Power of the Jesuits; and their deluded Votaries, to endanger the Peace of

270. *Id.*

271. *Id.* at 47, 49.

272. *A Summary View of the Present State of this Continent in General, and of this Province in Particular, with Regard to Our Neighboring Enemies the French*, MD. GAZETTE, Oct. 10, 1754, at 1.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

this Province, and the Repose of all the British Colonies upon this Continent."²⁷⁹

The Maryland Gazette remained fixated on the perceived dangers facing Maryland's Protestants in 1755.²⁸⁰ The front page exclaimed on October 30, "'Tis our Duty to fight . . . in Defence of our holy Religion [Protestantism]."²⁸¹ The "Ruthless Savages [French Catholics]" will not relent, it argued, because "The blood of all Protestant Christendom, is incapable of glutting their Ambition."²⁸² Readers again were warned about what a French victory would look like: "*Garments roll'd in blood,*" "Infants slain at the Mothers Breast," and "Families butchered in their Beds."²⁸³ Elsewhere in the paper, King William III was praised for having delivered "the British Nation from those two monstrous Furies—Popery and Slavery."²⁸⁴

The preamble of a 1755 bill to prohibit "the Importation of German and French Papists, and Popish Priests and Jesuits," expressed a concern that "they will not only give his Majesty's Enemies constant secret Intelligence of the Situation of Affairs within this Province, and privately assist them all in their Power, but in Case of an Attack upon this Part of his Majesty's Dominions, would doubtless turn their Force, in Conjunction with the French and their savage Allies, against his loyal Protestant Subjects."²⁸⁵ The Maryland General Assembly soon passed a militia act "to quell and Suppress any intestine Comotions Rebellions or Insurrections" that required the confiscation of "all Arms Gunpowder and Ammunition of . . . any

279. *Id.* The law was entitled, "The Bill to prevent the Growth of Popery, within this Province." *Id.*

280. See, e.g., *Quit Yourselves like Men, and Fight*, MD. GAZETTE, Oct. 30, 1755, at 1 ("We fight for the Cities of our God; and against an Enemy, polluted with innocent Blood; guilty of the Violation of Treaties; and instead of worshipping the Lord of the Universe; paying their Homage to graven Images.").

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. 52 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, 1755-1756, at 89 (J. Hall Pleasants ed., 1935).

Papist or reputed Papist.”²⁸⁶ Although it appears that the governor never signed the bill,²⁸⁷ Maryland’s history—like Pennsylvania’s and Virginia’s—proves that Catholics were viewed as dangerous persons.²⁸⁸

E. Antinomians

Another group disarmed based on the perceived dangerousness of their religious beliefs was Anne Hutchinson, John Wheelwright,²⁸⁹ and their antinomian supporters.²⁹⁰ Anne Hutchinson was convicted of sedition in 1637 Massachusetts for criticizing the Puritan government’s legalistic interpretation of the Bible.²⁹¹ At her trial, Hutchinson warned the court to “take heed how you proceed against me; for I know that for this you goe about to doe to me, God will ruine you and your posterity, and this whole State.”²⁹² Hutchinson and some of her antinomian supporters were banished from the colony.²⁹³ Of those permitted to remain, seventy-five were disarmed, while others who confessed their sins were allowed to keep their arms.²⁹⁴ The disarmament order explained that the authorities were concerned that her supporters might receive a revelation that

286. *Id.* at 450, 454.

287. *See id.* at 474–75, 640–41. The author of this article mistakenly asserted that this bill became law in a previous article. *See* Greenlee, *The Historical Justification*, *supra* note 13, at 263.

288. “By the end of the 1750’s, the conviction became confirmed that Catholics in the colony, aided by the French and sympathetic Maryland officials, were just about ready to topple the government, force Protestants to become Catholics or perish by refusing, erect the slavery of arbitrary government, and destroy British rights and liberties.” Bosworth, *supra* note 267, at 552.

289. Wheelwright was Hutchinson’s brother-in-law. Sargent Bush, Jr., “*Revising What We Have Done Amisse*”: *John Catton and John Wheelwright, 1640*, 45 WM. & MARY Q. 733 (1988).

290. *See* BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, at 103–04 (1983).

291. *See id.* 102–04.

292. *ANTINOMIANISM IN THE COLONY OF MASSACHUSETTS BAY, 1636-1638*, at 176 (Charles Francis Adams ed., Boston, The Prince Society 1894).

293. *See id.* at 217; *Wonder-Working Providence of Sions Saviour*, in 7 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 1, 6 (Boston, John Eliot 1818).

294. An early source lists seventy-six disarmed supporters, *Wonder-Working Providence*, *supra* note 294, but the disarmament order lists seventy-five, 1 *RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628-1641*, at 211–12 (Shurtleff ed., Boston, William White 1853).

inspired them to commit violence against those who opposed them:

Whereas the opinions and revelations of Mr Wheeleright and Mrs Hutchinson have seduced and led into dangerous errors many of the people heare in Newe England, insomuch as there is just cause of suspition that they, as others in Germany, in former times, may, upon some revelation, make some suddaine irruption upon those that differ from them in judgment: for p[re]vention whereof it is ordered, that all those whose names are underwritten shall (upon warning given or left at their dwelling houses) before the 30th day of this month of November, deliver in at Mr Canes house, at Boston, all such guns, pistols, swords, powder, shot, & match as they shalbee owners of, or have in their custody, upon paine of ten pounds for evry default to bee made therof; which armes are to bee kept by Mr Cane till this Court shall take further order therein. Also, it is ordered, upon like penulty of x', that no man who is to render his armes by this order shall buy or borrow any guns, swords, pistols, powder, shot, or match, untill this Court shall take further order therein.²⁹⁵

The reference to “Germany, in former times,” was likely a reference to the Peasants’ War of 1524–25, in which some leaders of the revolt claimed to be inspired by divine revelations.²⁹⁶ Thus, as a contemporary source reported, Hutchinson’s

295. 1 JOHN WINTHROP, WINTHROP’S JOURNAL “HISTORY OF NEW ENGLAND” 1630–1649, at 241 (James Kendall Hosmer ed. 1908) (quoting 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND (Nathaniel B. Shurtleff ed., Boston, William White 1853).

296. *See, e.g.*, NORMAN COHN, THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLINNARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES 248 (Oxford Univ. Press rev. ed. 1970) (1957) (“[W]hen the Peasants’ War broke out he [Thomas Müntzer, who instigated the revolt] was claiming to have received a promise from on high to the effect that within four years he would be able to oust the present godless rulers, to rule over the whole world and to bestow the kingdoms of the earth upon his followers.”).

supporters were disarmed because the “new erected government . . . feared breach of peace.”²⁹⁷

F. Puritans

Puritans were another religious group disarmed in colonial America because of dangerousness. As the English Civil War raged in part over differences between the Anglican Church and dissenting Puritans, Virginia discriminated against Puritans in the 1640s under the governorship of Charles I’s close ally William Berkeley.²⁹⁸ “[H]aving come from the royal court in 1642,” Berkeley “knew that Puritans posed a serious threat to the church and to the royal government.”²⁹⁹ The royal instructions for Berkeley as governor directed him to ensure that “the Form of Religion established in the church of England” was observed throughout the colony and to expel anyone who refused the “Oaths of Allegiance and Supremacy.”³⁰⁰ After “most refused to take” the oaths,³⁰¹ Massachusetts Puritan leader John Winthrop predicted that Virginia “was like to rise in parties, some for the king, and others for the parliament.”³⁰² Ultimately, “an armed conflict between the Puritans and the Berkeley camp” was averted by an Indian attack that killed hundreds of Virginians and deterred the survivors from warring among themselves.³⁰³ As a London newspaper reported:

if the Indians had but forborne for a month longer,
they had found us in such a combustion among
our selves that they might with ease have cut of[f]

297. *Wonder-Working Providence of Sions Saviour*, *supra* note 294, at 6.

298. See Kevin Butterfield, *Puritans and Religious Strife in the Early Chesapeake*, 109 VA. MAG. OF HIST. & BIOGRAPHY, 17, 22 (2001).

299. *Id.* at 5, 21.

300. EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 219 (New York, Longmans, Green & Co. 1898).

301. Joseph Frank, *News from Virginny, 1644*, 65 VA. MAG. OF HIST. & BIOGRAPHY 84, 85 (1957) (quoting May 15–22, 1645 newspaper).

302. 2 JOHN WINTHROP, *THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649*, at 160 (Savage ed., Boston, Thomas B. Wait & Son 1826).

303. Butterfield, *supra* note 298, at 20.

every man . . . once we had spent that little powder and shot that we had among our selves.³⁰⁴

Nevertheless, the conflict in Virginia remained perilous. A Puritan leader and preacher William Durand was arrested, and his supporters were deemed “Abettors to much sedition and Munity.”³⁰⁵ Many Puritans were soon disarmed and banished from the colony.³⁰⁶

Concerns over the danger of certain groups possessing arms continued past the colonial era into the Revolutionary War period, discussed in the following Part.

IV. REVOLUTIONARY WAR

The patriots faced two crippling threats during the Revolutionary War. First, many of their fellow colonists remained loyal to the British and were constantly taking up arms against the patriots. Second, the patriots lacked the arms needed to supply their severely outmanned army. To address both threats, the patriots disarmed the loyalists and provided their arms to the patriot army.

The *Range* panel rejected the contention that loyalist disarmament was motivated by danger, because presumably not *everyone* disarmed for refusing to swear loyalty to the patriots was actually dangerous.³⁰⁷ Instead, the court determined, loyalists were disarmed because “their actions evinced an unwillingness to comply with the legal norms of the nascent social compact.”³⁰⁸ But the court failed to appreciate the context in which Revolutionary War disarmament occurred.³⁰⁹ The Americans battled tens-of-thousands of loyalist insurrectionists, while

304. Frank, *supra* note 301, at 86 (quoting May 15–22, 1645 newspaper).

305. 2 THE LOWER NORFOLK COUNTY VIRGINIA ANTIQUARY pt. 1, at 15 (Baltimore, Friedenwald Co. 1899) (statement made in court in May 1648).

306. See CHARLES CAMPBELL, HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA 212 (Philadelphia, J.B. Lippincott & Co. 1860).

307. *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 278–79 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

308. *Id.* at 277.

309. See *id.*

simultaneously combatting an invasion by “the best-trained, best-equipped, most formidable military force on earth.”³¹⁰ The disarmament laws were wartime measures enacted by desperate governments on the brink of destruction and facing a perilous arms shortage.³¹¹ The focus was preventing danger, and to the extent that some laws swept too broadly, they served the purpose of placing arms in the hands of soldiers who badly needed them.³¹²

Indeed, as wartime measures enacted when defeat seemed imminent, these disarmament acts were never models for constitutional rights—certainly, the Bill of Rights was never represented as securing only the freedoms that the Americans afforded their enemies during the war. Individual rights are not always prioritized in war.³¹³ In fact, one argument against disarmament was that kidnapping the loyalists’ children would more effectively pacify them.³¹⁴ Meanwhile, the “epidemic of rape” that the British inflicted on American women³¹⁵—ranging from “little girls not ten years old” to seventy-year-old women³¹⁶—left patriot soldiers afraid to leave their families in the same neighborhoods as loyalists while they went off to battle.³¹⁷ Thus, while the reason for Revolutionary War

310. DAVID MCCULLOUGH, 1776, at 50 (2005).

311. See Greenlee, *The Historical Justification*, *supra* note 13, at 263–64.

312. *Id.* at 264.

313. Geoffrey R. Stone, *Civil Liberties in Wartime*, SHAREAMERICA (Apr. 6, 2015), <https://share.america.gov/civil-liberties-wartime/> [<https://perma.cc/6627-FS5Q>].

314. See discussion *infra* Section IV.C.

315. DAVID HACKETT FISCHER, WASHINGTON’S CROSSING 179 (David Hackett Fischer & James M. McPherson eds., 2004).

316. Letter from General Nathanael Greene to Governor Cooke, (Jan. 10, 1777), in 1 GEORGE WASHINGTON GREENE, THE LIFE OF NATHANAEL GREENE 290 (Boston & New York, Houghton, Mifflin & Co. 1890) (reporting “men slaughtered, women ravished, and . . . mothers and daughters ravished in the presence of the husbands and sons who were obliged to be spectators in their brutal conduct.”); see also PENNSYLVANIA EVENING POST, Apr. 24, 1777, in 1 ARCHIVES OF THE STATE OF NEW JERSEY: DOCUMENTS RELATING TO THE REVOLUTIONARY HISTORY OF THE STATE OF NEW JERSEY, 1776–1777, at 351 (William S. Stryker ed., 2d ser., 1901); FISCHER, *supra* note 316, at 179 (providing additional examples).

317. See Letter from Lewis Ogden, Chairman, Essex County (New-Jersey) Comm. to General Washington (July 4, 1776), in 6 AMERICAN ARCHIVES, ser. 4 1262–63 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1846). (The Essex County Committee of New Jersey alerted General Washington that because “the main body of the Militia, of this and the neighboring Counties are gone to New-York . . . we cannot behold our alarming situation without

disarmament—i.e., dangerousness—is informative because it continues the common justification for disarmament laws from 17th-century England through 20th-century America, the breadth of the wartime laws is less relevant.³¹⁸ A better measure of the scope the Founders intended for the Second Amendment is New Hampshire’s proposed amendment to the Constitution in 1788, which was presented when individual rights were top of mind: “Congress shall never disarm any citizen, unless such as are or have been in actual Rebellion.”³¹⁹

Moreover, the patriot governments ensured that the loyalists’ confiscated arms were appraised and marked to be either returned or paid for once the war concluded.³²⁰ After the war, loyalists could possess arms again because they would no longer be dangerous, not because they were suddenly “commit[ted] to the incipient social compact.”³²¹ In fact, many were prevented from becoming equal members of society.³²²

Section IV.A addresses the danger of loyalists as enemy combatants. Section IV.B provides several examples of authorities stating that they disarmed loyalists because they were dangerous. Section IV.C adds that the patriots faced a perilous arms shortage throughout the war, so to the extent disarmament laws swept too broadly, they were accepted because they served the purpose of arming soldiers who did not possess weapons.

anticipating the most cruel distress, our country destitute of inhabitants, our wives and children unprotected either from the enemy without or the Tories . . . in the midst of us”).

318. See Greenlee, *The Historical Justification*, *supra* note 13, at 258–65 (discussing the English and American history behind firearm prohibitions).

319. 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378 (John P. Kaminski, Charles H. Schoenleber, Jonathan M. Reid, Gaspare J. Saladino, Margaret R. Flamingo, Timothy D. Moore & David P. Fields eds., 2017).

320. 14 ALEXANDER CLARENCE FLICK, *War Against the Loyalists, in LOYALISM IN NEW YORK DURING THE AMERICAN REVOLUTION* 58, 62 (Fac. of Pol. Sci. of Columbia Univ. ed., 1901).

321. See *Range v. Att’y Gen.* U.S., 53 F.4th 262, 278 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

322. For example, Virginia disqualified certain loyalists “who held militia commissions at any time during the war” from “being elected Governor, Lieutenant Governor, Member of the Privy Council, or of either branch of the Legislature, or of holding any office or place of trust within, or under the authority of this state, for and during the term of seven years.” 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 844 (John C. Fitzpatrick ed., 1934).

A. Loyalists as Enemy Combatants

Throughout the Revolutionary War, “we may safely say that 50,000 soldiers, either regular or militia, were drawn into the service of Great Britain from her American sympathizers.”³²³ “Loyalist militancy . . . took several forms,” including “uprisings, guerrilla units, brigands, refugees, militia units and formal regiments.”³²⁴ Indeed, “over one hundred different Loyalist regiments, battalions, independent companies or troops were formed to fight alongside the British Army against their rebellious countrymen.”³²⁵ Loyalists were thus commonly treated as enemy combatants.³²⁶ Writing to General George Washington about the extent of his authority, John Adams—at the time, a delegate to the Continental Congress—assured Washington that he could treat loyalists—even those simply providing supplies to the British—as redcoats themselves:

[I]f upon *Long-Island* there is a body of people who have arms in their hands, and are intrenching themselves, professedly to oppose the *American* system of defence; who are supplying our enemies . . . no man can hesitate to say that this is an hostile invasion of *American* liberty. . . . Nay, those people are guilty of the very invasion in *Boston*, as they are constantly aiding, abetting, comforting, and assisting the army there. . . .³²⁷

On October 1, 1776, the Committee of Secret Correspondence—consisting of Benjamin Franklin, Benjamin Harrison,

323. H.E. EGERTON, *THE CAUSES AND CHARACTER OF THE AMERICAN REVOLUTION* 178 (1923).

324. Stuart Salmon, *The Loyalist Regiments of the American Revolutionary War 1775-1783*, at 21 (2009) (Ph.D. dissertation, University of Stirling) (available at <https://dspace.stir.ac.uk/bitstream/1893/2514/4/The-Loyalist-Regiments-of-the-American-Revolution-Final.pdf>).

325. *A History of the King's American Regiment - Part 1 of 8*, THE ON-LINE INST. FOR ADVANCED LOYALIST STUD. (Dec. 15, 1999), <http://www.royalprovincial.com/military/rhist/kar/kar1hist.htm> [<https://perma.cc/S8U5-RPDR>].

326. *See id.*

327. Letter from John Adams to Gen. Washington (Jan. 8, 1776), in 4 *AMERICAN ARCHIVES*, ser. 4, at 604 (Peter Force ed., Washington, D.C., M. St. Clair & Peter Force 1843).

Thomas Johnson, John Dickinson, and John Jay³²⁸—writing about the status of the war admitted: “The only source of uneasiness amongst us arises from the number of Tories we find in every State,” and “if America falls, it will be owing to such divisions [between the loyalists and patriots] more than the force of our enemies.”³²⁹

A state-by-state analysis of loyalist uprisings throughout the war proved too extensive for the purposes of this Article. Instead, this subsection will summarize loyalist turmoil in the particularly troublesome state of New York to provide a general idea of the threat loyalists posed, then highlight how regularly disarmament orders were issued for the express purpose of preventing danger.

New York was a hotbed of loyalism throughout the war.³³⁰ “[T]here must have been at least 15,000 New York loyalists in the British army and navy, and at least 8,500 loyalist militia, making a total in that state of 23,500 loyalist troops.”³³¹ By comparison, the number of patriot troops from New York—regulars and militia combined—totaled 41,633.³³² “New York loyalists fought in every battle on New York soil, and in most of the other battles of the war, and were repeatedly commended for their gallantry.”³³³ “So numerous and so dangerous were the loyalists,” historian Alexander Flick noted, “that regulations must be adopted to control them, or the whole cause might be lost.”³³⁴ Thus, New York’s Provincial Congress, citing “the immutable laws of self-defense,” first disarmed loyalists on September 1, 1775:

328. *Secret Committee of Correspondence/Committee for Foreign Affairs, 1775-1777*, U.S. DEP’T OF STATE, <https://2001-2009.state.gov/r/pa/ho/time/ar/91718.htm> [<https://perma.cc/P2R5-ZBMW>].

329. Letter from Comm. of Secret Correspondence to Silas Deane (Oct. 1, 1776), in 2 AMERICAN ARCHIVES ser. 5, at 821 (Peter Force ed., Washington, D.C., M. St. Clair & Peter Force 1851).

330. See Letter from B.P. to the Earl of Dartmouth (Dec. 20, 1775), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 328, at 358–59.

331. FLICK, *supra* note 320, at 112.

332. *Id.* at 113.

333. *Id.*

334. *Id.* at 60.

Whereas attempts have been made to promote discord among the inhabitants of this Colony, and to assist and aid the Ministerial Army and Navy . . . and as the immutable laws of self-defence and preservation justify every reasonable measure entered into to counteract or frustrate such attempts:

. . . .

Resolved, That if any person or persons shall be found guilty, before the Committee of any City or County in this Colony, of having furnished the Ministerial Army or Navy (after the date of this Resolution) with Provisions or other necessaries, contrary to any Resolution of the Continental or of this Congress, such person or persons, so found guilty thereof, upon due proof thereof, shall be disarmed, and forfeit double the value of the provisions or other necessaries so furnished. . . . And that every such person or persons, so found guilty of a second offence of the same kind, shall be banished from this Colony for the term of seven years from the time of such second conviction.³³⁵

A few weeks later, both “[t]o take from the loyalists their means of defense and to secure a supply of arms for the troops,” New York’s Committee of Safety decided “to seize all arms found in the possession of ‘non-associators.’”³³⁶ The arms were to be appraised and recorded so the arms or their value could be returned to their loyalist owners after hostilities ceased.³³⁷

Disarmament was especially pressing in early 1776, as the British arrived in New York.³³⁸ The governor welcomed the British with open arms and reported that “‘a numerous body’ of loyalists was ready to join the army to prove their ‘loyalty and

335. 3 AMERICAN ARCHIVES, ser. 4, at 573 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1840).

336. FLICK, *supra* note 320, at 62.

337. *Id.*

338. *See id.* at 95.

zeal.”³³⁹ “From the region along the Hudson loyalist officials and others were constantly fleeing to the British.”³⁴⁰ And, “[w]hen the county committee asked Robert Van Rensselaer to quell a tory insurrection at Ballstown, his regiment was so disaffected that he was forced to refuse.”³⁴¹ On January 21, 1776, James Deane sent a speech to the Six Nations to keep them informed about the war.³⁴² He explained that

our great Council at *Philadelphia* have been informed that many wicked men, in the County of *Tryon* [New York], were preparing themselves for war against us—that they had procured arms, and would attack us with the first favourable opportunity. They ordered me to inquire into the matter, and told me . . . to secure some of the head men amongst them, and disarm the others.³⁴³

Off the battlefield, New York loyalists served by forming armed police forces³⁴⁴ and supplying the British with necessities.³⁴⁵

On May 11, the Provincial Congress amended its militia act to require disarmed militia-aged loyalists to pay five shillings each day the militia mustered, which would be used to arm militiamen who could not afford arms.³⁴⁶ The act also deemed it “absolutely necessary, not only for the safety of the . . . Province, but of the United Colonies in general, to take away the arms and accoutrements of the most dangerous among them

339. *Id.*

340. *Id.* at 97–98.

341. *Id.* at 102. Additionally, four-fifths of the 1,500 Queen’s County militia were loyal, Suffolk County’s militia provided 800 fighting men, and the Marine Society raised an artillery company to defend New York City. *Id.* at 98, 114.

342. See Speech to the Six Nations Sent by Mr. Deane (Jan. 21, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 855.

343. *Id.*

344. FLICK, *supra* note 320, at 114.

345. See *id.* at 113–14 (describing the necessities supplied to the British, including money, clothing, and livestock).

346. Regulations respecting persons who are disarmed on account of their inimical principles (May 11, 1776), in 5 AMERICAN ARCHIVES, ser. 4, at 1504 (Washington, M. St. Clair Clarke & Peter Force 1844).

[the loyalists]."³⁴⁷ Indeed, the previous day, militia officials warned that loyalists "probably retain arms to be used against the Colonists,"³⁴⁸ and days later the congress received word that "the few friends of liberty in that part of the country [Long Island] are afraid on account of the openness and threats of the disaffected."³⁴⁹ On May 19, the King's District chairman informed George Washington of a plan by "the disaffected" to "massacre[] the inhabitants who are friends to liberty" in the district.³⁵⁰ Clearly alarmed, the chairman referred to "this most dark and dreadful scheme" of mass-murder as "dark as hell" and "a plot as has seldom appeared in the world since the fall of *Adam*, by the grand deceiver and supplanter of truth."³⁵¹ The following day Jonathan Sturges informed Washington of "a horrid plot" to unite Long Island and Connecticut loyalists "to destroy the people of the country."³⁵² Only days later, Washington informed New York's Provincial Congress (through a messenger) that "strangers, have been observed taking notice of and fixing on proper places for a landing on the south side of *Long-Island*," and further, "the people of *Hempstead* keep up a constant communication with the ships of war."³⁵³ On May 20, two

347. *Id.*

348. City Committee inform the Congress that John L. C. Rome has refused to take the oath that he has delivered up all his arms, and that others have followed his example (May 9, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1497. Because the loyalty oath caused some confusion, a similar order disarming loyalists was issued on June 20, 1776. New York Provincial Congress (June 20, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1420–21.

349. Examination of John Hendrickson by the New York Committee (May 19, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1321, 1381.

350. *Id.* at 1318–19.

351. Letter from Matthew Adgate Chairman of the Committee of King's District, New-York, to General Washington, with Information Respecting a Plot Which They Have in Part Detected (May 13, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 438.

352. Letter from Jonathan Sturges to General Washington (May 14, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 455; *see also* Letter from Jonathan Sturges to Governour Trumbull: Referring to the declaration of Samuel Hawley, for a minute account of a plot formed by the Tories to co-operate with our enemies and destroy the country, and requesting his situation may be favorably considered (May 15, 1776) in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 471; Letter from General Washington to Jonathan Sturges, Chairman of the Committee of Suffolk (May 16, 1776) in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 477 (acknowledging the threat and requesting further information).

353. *See* Papers brought by the Committee from General Washington, yesterday, read and considered (May 19, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1318–19.

men came forth and revealed to the congress “schemes and plans . . . so horrible, that through compunction of conscience” they felt compelled to disclose them.³⁵⁴ At the end of the month, the chairman of New-Windsor’s Committee emphasized the prudence of “put[ting] it out of their [loyalists’] power to injure us by leaving them possessed of arms which we much want, and they may use against us when most needed.”³⁵⁵ The threats continued in June, when the congress learned that “sundry persons on *Nassau-Island*, disaffected and inimical to the *American* cause, are now in arms in opposition to the civil authority of this Colony.”³⁵⁶ Besieged, the congress resolved that “his Excellency General *Washington* be, and he is hereby, requested to take the most speedy and effectual measures to disarm and secure all such persons.”³⁵⁷

New York’s Provincial Congress continued to arm its own people with the arms of disarmed loyalists. On May 21, it ordered that “for such good Arms, fit for Soldiers’ use, as they may have collected by disarming disaffected persons,” local committees shall “take care that all such Arms be appraised, and an account of the value of each kept.”³⁵⁸

Despite the patriots’ disarmament efforts, the threats continued. On June 22, Orange County’s Committee of Safety discovered a plot on foot for a number of men to join the Ministerial Army.³⁵⁹ Each man was incentivized with full pay, a five guinea

354. Examination of Martin Bebee, the messenger who brought the despatches from King’s District to General Washington, in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1321–22.

355. Letter from the Committee for New-Windsor to the New-York Congress: Case of Mrs. Lawrence who sells tea in violation of the Resolve of Congress (May 31, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 638. The congress responded by clarifying that such people can be disarmed on June 14, 1776. See Letter from General Greene to the New-York Congress (June 14, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1405.

356. Letter to the Honourable John Hancock (June 24, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1118.

357. General Washington requested to disarm and secure the persons disaffected and inimical to the American cause, on Long-Island (June 24, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1427.

358. Deposition of Martin Beebe (May 20, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1324.

359. See Minutes of Committee for Cornwall, Orange County, New-York (June 22, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 317, at 1032.

bounty, and two hundred acres of land.³⁶⁰ In July, “a plot was discovered” in which Dutchess County “was to be set on fire in different places, and the Magazine blown up.”³⁶¹ In mid-July, “between two and three hundred men went out with their arms to take up those scoundrels [loyalists], who, by information, were skulking in the woods,” and because “there are no soldiers in town, the inhabitants watch twenty-four hours round.”³⁶² On October 2, General Heath learned that “several companies are formed and forming in this State to join General *Howe’s* army.”³⁶³ Concern grew that “the disaffected begin to be rather more troublesome and daring than formerly.”³⁶⁴ Albany’s disaffected persons were accused of creating a “great danger” to the troops by cutting off their supply lines on October 20, 1776.³⁶⁵ Colonel Whiting, writing to the Albany Committee on October 21, explained that the patriots have “determined at once to enroll ourselves, and keep in large companies, without intermission, until we can be better satisfied that we are in some degree secure from that abandoned set of persons that have and still are unwearied in their wicked machinations to complete our ruin.”³⁶⁶ He further explained that they were “in a constant danger of having our arms taken from us,” and “cannot conceive that we are safe among internal enemies unless constantly under arms.”³⁶⁷ On October 26, Albany Committee Chairman Robert Yates, relying on “undoubted information that a number of disaffected persons are collected in different parties in and

360. *Id.*

361. Extract of a Letter from Albany: Discovery of a Tory Plot (July 15, 1776), in 1 AMERICAN ARCHIVES, ser. 5, at 357 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1848).

362. *Id.*

363. Letter from General Heath to Major Backus: Information having been received that several companies are forming to join General Howe (Oct. 2, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 845.

364. Letter from Samuel Ten Broeck to Colonel Peter R. Livingston (Oct. 9, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 963.

365. Letter from James Yancey to the Committee at Bennington (Oct. 20, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 1143.

366. Letter from Colonel Whiting to the Albany Committee, (Oct. 21, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 1169.

367. *Id.*

about the *Hellebergh, Norman's Kill, Nestadher, and Beaver-Dam*, with an evident design by force of arms to oppose the measures pursued for the preservation of the liberties of America," ordered a force "to take and disperse the disaffected who have been or are now assembled in arms."³⁶⁸ Two days later, Yates presented intelligence of "the desertion of some of the inhabitants [of Tryon County] to the enemy, and the probability that the County will soon be invaded."³⁶⁹ Three days after that, Yates "received intelligence that a party of Tories of *King's District* and the southeast part of *Rensselaerwyck*, were collecting together to join the enemy," and "to take possession of [Fort George] and keep it for the enemy."³⁷⁰ In July, General Schuyler informed Washington of a foiled loyalist plot in Albany that revealed the "desperate designs of the Tories."³⁷¹ Meanwhile, Egbert Benson warned against calling out the Dutchess County militia because the patriots "cannot command the Militia throughout the County" since the sentiment was overwhelmingly loyalist.³⁷²

On August 10, 1776, a convention of New York's representatives established a committee to confirm reports that "the inhabitants of *King's County* have determined not to oppose the enemy" and "to disarm and secure the disaffected inhabitants . . . and, if necessary, to lay the whole country waste."³⁷³ The next month, New York's Committee of Safety decided not to call out the militias of Westchester, Orange, Dutchess, or Ulster

368. Instructions to Major Ford (Oct. 26, 1776), in 3 AMERICAN ARCHIVES, ser. 5, at 574 (Peter Force ed., Washington, D.C. 1853); see also Letter from the Committee to Captain John Bradt (Oct. 26, 1776), in 3 AMERICAN ARCHIVES, ser. 5, *supra* (seeking a force to confront "about ninety Tories having collected at the *Hellebergh* and its neighbourhood").

369. 3 AMERICAN ARCHIVES, ser. 5, *supra* note 368, at 563–64.

370. Letter from the Committee to General Schuyler (Oct. 31, 1776), in 3 AMERICAN ARCHIVES, ser. 5, *supra* note 368, at 585.

371. Letter from General Schuyler to General Washington (July 14, 1776), in 1 AMERICAN ARCHIVES, ser. 5, *supra* note 361, at 338; see also Letter from General Washington to the President of Congress (July 22, 1776), in 1 AMERICAN ARCHIVES, ser. 5, *supra* note 361, at 500 (discussing the plot).

372. Letter from Egbert Benson to the New-York Convention (July 15, 1776), in 1 AMERICAN ARCHIVES, ser. 5, *supra* note 361, at 357.

373. In Convention of the Representatives of the State of New-York, at Harlem, August 10, 1776, in 1 AMERICAN ARCHIVES, ser. 5, *supra* note 361, at 911.

counties because “the number of disaffected persons in the said Counties” who “only wait an opportunity of rising” could “be extremely hazardous” and jeopardize “the safety of this State.”³⁷⁴ Due to the “alarming situation, owing to the number of disaffected, together with the little confidence that can be placed on the Militia,” General Washington “order[ed] a part of the *New-Hampshire* troops to their assistance.”³⁷⁵

In October, the Committee of Safety warned Washington that “[w]e are daily getting the most authentick intelligence of bodies of men inlisted and armed,”³⁷⁶ while Washington warned the Continental Congress that the British were recruiting loyalists “with uncommon industry.”³⁷⁷ Insurrections continued with regularity throughout 1777. “In May, 1777, uprisings were reported in the counties of Albany, Tryon, Charlotte, Ulster, Cumberland, Gloucester and Orange.”³⁷⁸ “General Schuyler feared that ‘so much toryism’ in the New Hampshire Grants would greatly aid Burgoyne.”³⁷⁹ And on July 18, 1777, the Tryon County Committee complained to New York’s Committee of Safety that “[m]ore than half of our inhabitants are resolved not to lift up arms in defense of this county’ against the invasion of ‘British troops, tories and savages.’”³⁸⁰ Over in Orange County, General Heath complained that “the tories are joining the enemy and insulting and disarming the whigs.”³⁸¹

One of the most threatening loyalist plots was the 1776 plot to assassinate George Washington.³⁸² Flick described it as,

374. 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 659–61. The Provincial Congress had to establish an armed police force to maintain order in Westchester County. FLICK, *supra* note 320, at 88.

375. Letter from General Washington to Colonel Tash (Oct. 13, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 1026.

376. Letter from General Washington to the President of Congress (Oct. 10, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 991.

377. *Id.* at 841.

378. FLICK, *supra* note 320, at 110.

379. *Id.*

380. *Id.*

381. *Id.*

382. *See id.* at 103–04.

a “barbarous and infernal” conspiracy of the loyalists to murder all of Washington’s staff-officers, seize him, blow up the magazines, arm all loyalists and capture the city upon the arrival of the British. All loyalists of southern New York were believed to be in this plot, and [New York] Governor Tryon was thought to be its instigator. The committee on conspiracies arrested and tried the mayor of New York and thirty-five other loyalists. One of Washington’s guards, Thomas Hickey, was hanged for treason, and with that the matter dropped.³⁸³

These loyalist plots and insurrections prove that the loyalists were a danger to the revolutionaries, and their disarmament was focused on the danger they posed.

B. *Disarmament Orders Focused on Danger*

Just nineteen days after the Battles of Lexington and Concord, on May 8, 1775, Massachusetts’s Provincial Congress disarmed loyalists so they could not “join with the open and avowed enemies of *America*” and inflict “ruin and destruction . . . against these Colonies.”³⁸⁴ A couple weeks later, the Worcester County Committee in Massachusetts deemed it “highly expedient” that everyone who “has been aiding or abetting to the cursed plans of a tyrannical ruler and an abandoned Ministry, should be disarmed, and rendered as incapable as possible of doing further material mischief to this distressed Province.”³⁸⁵ On January 2,

383. *Id.* (citations omitted).

384. Committees of Correspondence of the Several Towns to Inquire into the Principles and Conduct of Suspected Persons, and to Cause All to be Disarmed Who Are Found Unfriendly to the Rights and Liberties of America (May 8, 1775), in 2 AMERICAN ARCHIVES, ser. 4, at 793 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1839).

385. Worcester County (Massachusetts) Committee (May 24, 1775), in 2 AMERICAN ARCHIVES, ser. 4, *supra* note 384, at 700–01. When the Worcester County Committee repealed the disarmament act and returned the confiscated arms in November 1776, the committee reiterated that the act had been passed “expressly to prevent their [the loyalists] joining our avowed enemies, and to deprive them of the means of obstructing measures adopted for the common defence.” Worcester County (Massachusetts) Committee (Nov. 18, 1776), in 3 AMERICAN

1776, the Continental Congress recommended widespread loyalist disarmament.³⁸⁶ “[T]o frustrate the mischievous machinations, and restrain the wicked practices of these men” who “have taken part with our oppressors,” the Congress “recommended to the different Assemblies, Conventions, and Committees or Councils of Safety in the *United Colonies*” that “they ought to be disarmed.”³⁸⁷

Disarmament orders were immediately carried out to frustrate mischievous machinations.³⁸⁸ Within weeks, Patriot interpreter James Deane informed the Six Nations that because “our great Council at Philadelphia have been informed that many wicked men, in the County of Tryon, were preparing themselves for war against us—that they had procured arms, and would attack us with the first favourable opportunity,” they were disarmed.³⁸⁹ On January 30, General George Washington issued orders for General Charles Lee to disarm loyalists: “The Tories should be disarmed immediately, though it is probable that they may have secured their arms . . . until called upon to use them against us.”³⁹⁰ The next day, Connecticut’s Governor expressed gratitude for General Philip Schuyler’s disarmament of New York loyalists, because Connecticut troops were heading to New York and roughly half of them were expected to be unarmed (due to the arms shortage) and thus vulnerable to attack: “I do sincerely congratulate you on your success in disarming the Tories in *Tryon* County. Suppressing such enemies to American Liberty is of very great importance.”³⁹¹

ARCHIVES, ser. 5, *supra* note 354, at 756. County (Massachusetts) Committee (Nov. 18, 1776), in 3 AMERICAN ARCHIVES, ser. 5, *supra* note 354, at 756.

386. Resolutions respecting the Tories, and the barbarities of the enemy (Jan. 2, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 1628–29.

387. *Id.* at 1629.

388. See Speech to the Six Nations Sent by Mr. Deane (Jan. 21, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 855.

389. *Id.*

390. Letter from General Washington to General Lee (Jan. 30, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 895.

391. Letter from Governor Trumbull to General Schuyler (Jan. 31, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 898–99.

In May, New York's Congress further responded to the imminent danger presented by loyalists within the colony, deeming it "absolutely necessary, not only for the safety of the said Province, but of the United Colonies in general, to take away the arms and accoutrements of the most dangerous among [the loyalists]." ³⁹² Two months later, New Jersey's Congress, because "a number of disaffected persons have assembled . . . preparing, by force of arms . . . to join the *British* Troops for the destruction of this country," disarmed "these dangerous Insurgents." ³⁹³ In September, Pennsylvania noted "the folly and danger of leaving arms in the hands of Non-Associators" when it disarmed them. ³⁹⁴

New Jersey and Pennsylvania continued to act—for the express purpose of preventing danger—as the war went on. ³⁹⁵ In September 1777, New Jersey empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." ³⁹⁶ And Pennsylvania, in April 1779, determined that "it is very improper and dangerous that persons disaffected to the liberty and independence of this state should possess or have in their own keeping, or elsewhere, any fire arms," so it "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state." ³⁹⁷

392. Regulations respecting persons who are disarmed on account of their inimical principles (May 11, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1504.

393. Letter from Essex County (New-Jersey) Committee to General Washington (July 3, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 1636.

394. Address of Pennsylvania Convention to the Freemen of the Commonwealth (Sept. 28, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 582–83.

395. See THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (Philadelphia, Francis Bailey 1782); 1777 N.J. Laws 90.

396. 1777 N.J. Laws 90.

397. THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 395, at 193. The *Range* panel argued that danger could not have motivated "Pennsylvania's loyalty oath law . . . because oath-taking violated the religious convictions of Quakers, Mennonites, Moravians, and other groups," and therefore the law must have "deprived sizable numbers of pacifists of that right" as well. *Range v. Att'y Gen. U.S.*, 53 F.4th 262, 278 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023). But the court failed to appreciate that Pennsylvania's law

C. Confiscated Arms Used to Supply Unarmed Patriots

Disarmament during the war served the express purpose of neutralizing potential enemy combatants. It also served the express purpose of supplying arms to unarmed patriot troops.

The Americans faced a perilous arms shortage during the war that rendered many soldiers defenseless.³⁹⁸ For decades leading up to the war, “the British . . . had prohibited any large-scale manufacturing facility for guns in the colonies.”³⁹⁹ Then before the war broke out, Britain forbade any arms to be imported into the colonies.⁴⁰⁰ While Benjamin Franklin led the American effort to circumvent the arms embargo by smuggling shipments from the Spanish, French, and Dutch,⁴⁰¹ the new governments had to depend on domestic manufacture.⁴⁰²

allowed people to swear loyalty *on affirmation*, to accommodate anyone opposed to oath-taking. See THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 395, at 193. In other words, pacifists were not disarmed merely because their religion prevented them from swearing loyalty oaths.

398. See Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 SAINT MARY’S L.J. 35, 48–62 (2023) [hereinafter Greenlee, *The American Tradition*].

399. DAVID HARSANYI, *FIRST FREEDOM: A RIDE THROUGH AMERICA’S ENDURING HISTORY WITH THE GUN* 68 (2018).

400. 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1766–1783, at 401 (2005) (James Munro & Almeric W. Fitzroy eds., 1912). King George III issued a “[c]ommand that [the governors of America] do take the most effectual measures for arresting, detaining and securing any Gunpowder, or any sort of arms or ammunition, which may be attempted to be imported into the Province under your Government. . . .” Letter from Earl of Dartmouth to the Governors in America (Oct. 19, 1774), in 8 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 509 (Albany, Weed, Parsons & Co. 1857). Additionally, Britain deployed “several capital ships of war, and six cutters” in the Atlantic “to obstruct the American trade, and prevent all European goods from going there, particularly arms and ammunition.” 1 FRANK MOORE, *DIARY OF THE AMERICAN REVOLUTION* 61 (New York, Frank Moore 1865) (entry of Apr. 4, 1775); see also *Providence Gazette*, Saturday, January 14, 1775, reprinted in 1 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 62 (William Bell Clark ed., 1964) (“Orders have been given for the seizing every Ship, of what Nation soever, employed in conveying Arms or Ammunition to the Americans.”).

401. See Greenlee, *The American Tradition*, *supra* note 398, at 51 n.94.

402. See Letter from President of Congress to General Washington (Mar. 6, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 83. John Hancock wrote to General Washington, “[w]ith regard to arms, I am afraid we shall, for a time, be under some difficulty. The importation is now more precarious and dangerous. To remedy this, a Committee is appointed to contract for the making arms; and, as there is a great number of gunsmiths in this and the neighbouring Colonies, I flatter myself we shall soon be able to provide ourselves without risk or danger.”

Id.

The new state governments pleaded for any colonists with the ability to build firearms to make them and sell them to the governments.⁴⁰³ Pennsylvania even hired three gunmakers “for making publick the art of boring and grinding Gun-barrels, and instructing such persons as they shall require to be taught that art.”⁴⁰⁴ At the request of Generals George Washington and Charles Lee, the governments also ensured that arms confiscated from loyalists were provided to unarmed soldiers.

General Lee suggested that confiscated arms be used “to supply our troops with arms” in a letter to the Continental Congress on January 22, 1776.⁴⁰⁵ He argued that disarmament would be ineffective for “putting [the loyalists] into a state of impotence” because “[t]hey can, and will, always be supplied with fresh arms by the enemy.”⁴⁰⁶ But he emphasized the necessity “to supply our troops with arms, of which they stand in too great need.”⁴⁰⁷

On February 10, 1776, George Washington wrote to New York’s Committee of Safety lamenting the desperate arms shortage and requesting arms confiscated from loyalists:

Being in the greatest want of arms at this alarming and important crisis . . . [and] without the most distant prospect or hope of getting more from these Governments than what I already have, I beg leave to solicit the favour of your Committee of Safety in this instance, and earnestly request that they will use their exertions to get and send to me, in the most expeditious manner, all they can possibly procure. I imagine that there are several belonging to the Colony, and have been informed of many Tories being disarmed, and,

403. See Greenlee, *The American Tradition*, *supra* note 398, at 55–60.

404. Report of the Pennsylvania Committee of Safety (Apr. 2, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 734.

405. Letter from General Lee to President of Congress (Jan. 22, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 806.

406. *Id.* He added that disarming the loyalists “will only imbitter their minds, and add *virus* to their venom.” *Id.*

407. *Id.*

therefore, expect that it will be in their power to obtain me a considerable supply.⁴⁰⁸

General Lee continued to plead for arms the following month:

When our troops are obliged to remain inactive from want of arms; when, from this deficiency, the *Canada* expedition is at a stand, and *New-York* and *Long-Island* left open to the invasions of the enemy, is it not a most dangerous neglect and omission, or rather unaccountable infatuation, to suffer considerable bodies of avowed foes to be possessed of arms for your destruction? What possible advantage can result from such a false delicacy? I would therefore humbly propose that the inhabitants of *Staten-Island* should, without loss of time, be disarmed, and their arms delivered to some regiment already raised, but unfurnished with muskets.⁴⁰⁹

Lee reiterated his skepticism that “disarming the Tories will incapacitate them from acting against us, as they can easily be supplied by the ships.”⁴¹⁰ Then, as a stark reminder that war-time measures are not models for constitutional rights, Lee added, “I should, therefore, think it prudent to secure their children as hostages. If a measure of this kind (hard as it may appear) is not adopted, the children’s children of *America* may see the fatal omission.”⁴¹¹

The Continental Congress apparently ignored Lee’s plea to take children hostages, but it did recognize the prudence of supplying unarmed troops with confiscated loyalist arms.⁴¹² The

408. Letter from George Washington to New York Committee of Safety (Feb. 10, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 994–95.

409. Report of the Committee Appointed to Confer with General Lee (Mar. 14, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 215.

410. *Id.*

411. *Id.*

412. See In Comm. of Safety, New-York (Mar. 19, 1776), in 5 AMERICAN ARCHIVES, Ser. 4, *supra* note 346, at 1381, 1385.

same day it received Lee's second letter, the Congress recommended that the colonies

apply the Arms taken from [disaffected] persons in each respective Colony, in the first place to the arming the Continental Troops raised in said Colony; in the next place, to the arming such Troops as are raised by the Colony for its own defence; and the residue to be applied to the arming the Association.⁴¹³

Many governments followed the Congress's recommendations, and confiscated arms became a critical source of weapons for the patriots.⁴¹⁴ Notably, loyalists' arms were often paid for or returned once they were no longer dangerous.⁴¹⁵ It would

413. *Id.*

414. *See e.g.*, N.Y. Provincial Cong. (May 21, 1776) (May 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 1324 (the New York Provincial Congress, in May 1776, sent an officer to Westchester County "for such good Arms, fit for Soldiers' use, as they have collected by disarming disaffected persons"); Balt. Cnty. Comm. (Mar. 8, 1776), in 4 AMERICAN ARCHIVES, ser. 4, *supra* note 327, at 1744 (the Baltimore County Committee recording the value of confiscated arms that were provided to a patriot militia); Letter from N.Y. Comm. of Safety to Gen. Washington (Apr. 25, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1075–76 (the New York Committee of Safety explained to General Washington that an officer would be collecting "the arms that have been taken from the disaffected inhabitants" and that they "hope for some supply from that source"); N.Y. Comm. of Safety (Mar. 27, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1409–10 (the New York Committee of Safety established a process to distribute confiscated arms to patriot troops); N.Y. Comm. of Safety (Apr. 29, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1480 (the New York Committee of Safety resolved not to disband troops for want of arms at General Washington's request, and directed Washington to apply to the Committee for confiscated arms from disaffected persons); Address of Pa. Convention to the Freemen of the Commonwealth (Sept. 28, 1776), in 2 AMERICAN ARCHIVES, ser. 5, *supra* note 329, at 583 (explaining that arms were confiscated from non-associators in response to "the great demand for the best arms we could procure to put into the hands of the Militia from the country, who were ready and willing to march to the camp, but had no arms to take with them" and reporting that "the good effects of [disarming non-associators] were suddenly perceived, for the Militia were furnished with several hundred stand of good arms in consequence thereof"); Berks Cnty. (Pennsylvania) Comm. (June 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 906–07 ("[T]hree freemen shall be chosen by the inhabitants of every Township . . . to collect the Arms from the disaffected persons and non-Associators . . . and . . . each County shall take care that the said recommendation of Congress be effectually put in execution.").

415. *See e.g.*, Cont'l Cong. (Mar. 20, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 1646 (noting that the Continental Congress resolved that only arms fit for service should be paid for; deficient arms would be stored until it was safe to return them to their owners); Pa. Assembly (Apr. 6, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra* note 346, at 713–14 (Pennsylvania Assembly); N.Y. Comm. of Safety (Mar. 27, 1776), in 5 AMERICAN ARCHIVES, ser. 4, *supra*

make no sense to return their arms if, as the *Range* panel claimed, they had been disarmed for refusing “to comply with the legal norms of the nascent social compact.”⁴¹⁶ In fact, disaffected persons who were not potentially dangerous sometimes were not disarmed. For example, the Pennsylvania Assembly merely “recommended” that “well-affected Non-Associators” submit their arms.⁴¹⁷

After the war, as America’s first Secretary of State, Thomas Jefferson defended America’s confiscation of loyalists’ property—including arms—during the war:

It cannot be denied that the state of war strictly permits a nation to seize the property of it’s enemies found within it’s own limits, or taken in war, and in whatever form it exists, whether in action or possession. This is so perspicuously laid down by one of the most respectable writers on subjects of this kind, that I shall use his words.

note 346, at 1410 (New York Committee of Safety); Chester Cnty. (Pennsylvania) Committee, in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 888–89 (Pennsylvania Assembly); Berks Cnty. (Pa.) Comm., in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 907 (Berks County, Pennsylvania); N.Y. Provincial Cong., in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 1324 (NY Provincial Congress May 21, 1776). Under a recommendation from a New York committee appointed “to prevent the dangers to which this Colony is exposed by its intestine enemies,” loyalists who “shall voluntarily deliver up any arms” would “receive a generous price for the arms,” while “those who shall not so surrender them shall be taken away without paying for them.” N.Y. Provincial Cong. (May 22, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 1326–27. After a June 1776 insurrection in Sussex County, Delaware, the loyalists “Tories [were] ordered to bring in their arms and ammunition.” The Revolutionary War Diary of William Adair, in 13 DELAWARE HISTORY 154, 156 (Harold B. Hancock ed., 1968). But the arms were soon returned. Declaring that “we are . . . heartily sorry for having been concerned in an Insurrection in this County” and “now being convinced that it was an open Violation of the Rules and Regulations of the Honorable Continental Congress and the Assembly of this Government,” the insurrectionists “sincerely promise[d], that for the future we will use our utmost Endeavor to support and enforce the Resolutions of those Honorable Bodies.” PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776, at 35 (The Star Publishing Co. 1927) (1776). On September 20, 1776, the Delaware Convention, “being informed that the aforesaid [insurrectionists] have since conducted themselves in an orderly and peaceable Manner,” resolved that “they be again restored to the Favour of their Country, and that their Arms be re-delivered to them, and that such of them as were Officers in the Militia, and were suspended, be permitted to resume their former Commands.” *Id.* at 36.

416. *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 277 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

417. Chester Cnty. (Pa.) Comm. (June 14, 1776), in 6 AMERICAN ARCHIVES, ser. 4, *supra* note 316, at 889.

‘Cum ea sit belli conditio, ut hostes sint omni jure spoliati, rationis est, quascunque res hostium apud hostes inventas dominum mutare, et fisco cedere. Solet præterea in singulis fere belli indictionibus constitui, ut bona hostium, tam *apud nos reperta*, quam capta bello publicentur. Si merum jus belli sequamur, etiam *immobilia* possent vendi, et eorum pretium in fiscum redigi, ut in mobilibus obtinet. Sed in omni fere Europa sola fit annotatio, ut eorum fructus, durante bello, percipiat fiscus, finito autem bello, ipsa *immobilia* ex pactis restituuntur pristinis dominis.’ Bynkersh. Quest. Jur. Pub. L. 1.c.7.⁴¹⁸
 [E]xcluded from all commerce, even with Neutral Nations, without arms, money, or the means of getting them abroad, we were obliged to avail ourselves of such resources as we found at home.⁴¹⁹

Jefferson confirmed what authorities during the war repeatedly stated: loyalists were disarmed because they were considered enemy combatants and Britain’s arms embargo required Americans to take desperate measures to acquire arms.

418. Letter from Thomas Jefferson, Sec’y of State, to George Hammond, (May 29, 1792), in 3 THE WORKS OF THOMAS JEFFERSON 365, 369 (H. A. Washington ed., New York, Townsend Mac Coun 1884). Jefferson was quoting Dutch legal theorist Cornelius van Bynkershoek. The English translation reads:

Since it is a condition of war, that enemies may be deprived of all their rights, it is reasonable that everything of an enemy’s, found among his enemies, should change its owner, and go to the treasury. It is, moreover, usually directed, in all declarations of war, that the goods of enemies, as well those found among us, as those taken in war, shall be confiscated. If we follow the mere right of war, even immovable property may be sold, and its price carried into the treasury, as is the custom with movable property. But in almost all Europe, it is only notified that their profits, during the war, shall be received by the treasury; and the war being ended, the immovable property itself is restored, by agreement, to the former owner.

Id. at 369 n.10.

419. *Id.*

V. LAWS REFLECTING THE RIGHT OF NONVIOLENT CRIMINALS TO POSSESS ARMS

The *Range* panel determined that laws allowing for the confiscation of arms used in illegal hunting and laws protecting arms from suits and recoveries “underscore legislatures’ power and discretion to determine when disarmament is warranted.”⁴²⁰ But these laws never prohibited anyone from possessing arms. They are therefore consistent with the tradition that allowed only dangerous persons to be prohibited from possessing arms.

Several laws during the colonial, founding, and early republic periods forbade hunting in particular times or places—most often, at night or on private land without the owner’s permission.⁴²¹ As a penalty, the illegal hunters had to forfeit money,⁴²² tobacco,⁴²³ or the firearm they used to hunt illegally.⁴²⁴ According to the *Range* panel, these laws “support the notion that legislatures’ power to strip citizens of their arms was not limited to cases involving violent persons or offenses.”⁴²⁵ But as the court conceded, “these laws involved the isolated disarmament

420. *Range*, 53 F.4th at 281, 283–84.

421. *See id.* at 281.

422. 1 HENING, *supra* note 185, at 228 (1639-40 Virginia); *see, e.g.*, 1 LAWS OF THE STATE OF NORTH CAROLINA 169–70 (Henry Potter, J.L. Taylor & Bart. Yancey eds., Raleigh, J. Gales 1821); 1652 N.Y. Laws 138; 1768 N.C. Sess. Laws 168; JOHN HAYWOOD, A MANUAL OF THE LAWS OF NORTH-CAROLINA, ARRANGED UNDER DISTINCT HEADS IN ALPHABETICAL ORDER 235 (2023); 1790 Ga. Laws 428; A CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUTES OF FORCE 763 (William A. Hotchkiss ed., 2d ed., Augusta, Charles E. Grenville 1848); DIGEST OF THE LAWS OF THE STATE OF ALABAMA 201 (John G. Aikin ed., Philadelphia, Alexander Towar 1833); An Act Relating to Crimes and Misdemeanors, § 106, 1828 Fla. Laws 75; 1834 Ky. Acts 788; An Act for the Preservation of Wild Fowl in the Waters of Smith’s Island and its Vicinity, in Somerset County, § 2, 1837 Md. Acts 108; An Act for the Better Regulation of Fowling, 1717 Mass. Acts 336.

423. 1 HENING, *supra* note 185, at 248; An Act for the speedy trial of criminals, and ascertaining their punishment in the county courts when prosecuted there, and for payments of fees due from criminal persons, ch. 26, § 7, 1715 Md. Laws 90.

424. 1652 N.Y. Laws 138; 1768 N.C. Sess. Laws 168; 23 THE STATE RECORDS OF NORTH CAROLINA 219 (Walter Clark ed., 1904) (1745 North Carolina); ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 344 (Samuel Allinson ed., Burlington, Isaac Collins 1776) (1771 New Jersey) (Requiring only nonresidents to forfeit the arms used to hunt illegally); 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 259 (Boston, Manning & Loring 1805) (1790 Massachusetts).

425. *Range*, 53 F.4th at 281 n. 25.

of the firearm involved in the offense, not a ban on possession."⁴²⁶ Therefore, offenders could continue possessing or acquiring any arm other than the one used to hunt illegally.

Many laws expressly prevented arms from being included in estate sales resulting from convictions for crimes or civil action recoveries—including the federal Uniform Militia Act of 1792.⁴²⁷ According to the *Range* panel, these laws prove little because “[t]he fact that legislatures did not *always* exercise their authority to seize the arms of individuals who violated the law does not show that legislatures *never* could do so.”⁴²⁸ But legislatures *never* did so. Therefore, laws expressly protecting the arms rights of nonviolent criminals and other irresponsible persons further support the tradition allowing only dangerous persons to be disarmed.

This tradition is further reflected in militia laws. Every colony and state in the colonial and founding eras had numerous laws requiring all able-bodied males to acquire and possess the arms required for militia duty.⁴²⁹ Certain members of the community were sometimes exempted from militia mandates, but these

426. *Id.*

427. *See, e.g.*, THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY 1665, at 537 (Trumbull ed., Hartford, Brown & Parsons 1850); 13 ARCHIVES OF MARYLAND, at 557 (1692 Maryland); 30 *id.* at 280 (1715 Maryland); 3 Hening, STATUTES, *supra* note 185, at 339 (1705 Virginia); 1 Stat. 271, §1 (1792). Notably, even when arms could be included in recovery actions, no law forbade the individual whose estate was sold from immediately acquiring new arms. *See Range*, 53 F.4th at 283.

428. *Range*, 53 F.4th at 284.

429. *See generally* 2 SELECTIVE SERV. SYS., *supra* note 165 (compiling militia acts).

exemptions were based on one's profession,⁴³⁰ religion,⁴³¹ incapacity,⁴³² race,⁴³³ or status as a free person.⁴³⁴ No exemption in any colony was based on prior incarceration or crimes committed.⁴³⁵ So freemen previously convicted of crimes were not only free to acquire and possess arms; they were *required* to acquire and possess arms.

430. See, e.g., *id.* pt. 2, at 209 (Connecticut Enactments) (1776 Connecticut law "excepting members of the Council, of the House of Representatives and American Congress, for the time being, the Treasurer and Secretary of the State, ministers of the gospel, the president, tutors and students of Yale College"); *id.* pt. 3, at 27 (Delaware Enactments) (noting a 1785 Delaware law exempting "clergymen and preachers of the gospel of every denomination, justices of the supreme court, keepers of the public gaols, school-masters teaching a Latin-school, or having at least twenty English scholars"). The federal Uniform Militia Act of 1792 applied to "each and every free able-bodied white male" and exempted:

the Vice-President of the United States, the officers judicial and executives, of the government of the United States; the members of both Houses of Congress, and their respective officers; all custom-house officers with the clerks; all post-officers, and stage drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen employed at any ferry on the post road; all inspectors of exports; all pilots; all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states.

Uniform Militia Act, ch. 33, 1 Stat. 272 (1792).

431. See, e.g., 2 SELECTIVE SERV. SYS., *supra* note 165, pt. 3, at 7 (Delaware Enactments) (1741: "Quakers"); *id.* pt. 5, at 101 (Maryland Enactments) (1756: "the People Called Quakers or any of the Congregation called, Unitas Fratrum, or United Bretheren"); *id.* pt. 6, at 230 (Massachusetts Enactments) (1776-77: "Quakers"); *id.* pt. 7, at 102 (New Hampshire Enactments) (1780: "Quakers"); *id.* pt. 9, at 318 (New York Enactments) (1782: "Quakers"); *id.* pt. 10, at 68 (North Carolina Enactments) (1779: "Quakers, Menonists, Dunkards, and Moravians").

432. See, e.g., *id.* pt. 2, at 251 (Connecticut Enactments) (1784: "Persons disabled through Lameness or other bodily Infirmary"); *id.* pt. 4, at 139 (Georgia Enactments) (1788: "Lunaticks, Idiots and Madmen"); *id.* pt. 6, at 140 (Massachusetts Enactments) (1693: "lame persons or otherwise disabled in body"); *id.* pt. 7, at 53-54 (New Hampshire Enactments) (1718: "Lame Persons, or otherwise disabled in body").

433. See, e.g., *id.* pt. 2, at 209 (Connecticut Enactments) (1776); *id.* pt. 3, at 9 (Delaware Enactments) (1741); *id.* pt. 4, at 85 (Georgia Enactments) (1773); *id.* pt. 10, at 104 (North Carolina Enactments) (1781). All the provisions cited specify which races were exempted from militia mandates.

434. See, e.g., *id.* pt. 3, at 27 (Delaware Enactments) (1785: "indentured servants bona fide purchased"); *id.* pt. 6, at 160 (Massachusetts Enactments) (1721: "servants . . . without leave from their . . . masters"); *id.* pt. 8, at 81 (New Jersey Enactments) (1781: "Apprentice, or Servant . . . without the Consent of those under whose Government, Care or Direction, such . . . Apprentice or Servant may be").

435. To be sure, persons exempted under some statutes—including slaves and Indians—were not always exempted. Some of the people listed in the exemptions provided in this article were required to serve in the majority of militia statutes. See *generally* 2 SELECTIVE SERV. SYS., *supra* note 165 (compiling militia acts).

In sum, the laws from the colonial and founding eras addressing the possession of arms by nonviolent offenders never forbade arms possession and often expressly protected or even required arms possession. Rather than “underscor[ing] legislatures’ power and discretion to determine when disarmament [wa]s warranted” for nonviolent offenders,⁴³⁶ these laws demonstrate that legislatures lacked such power and discretion altogether.

VI. RATIFICATION DEBATES

The *Range* panel proceeded to consider the “ensuing deliberations over whether to ratify the Constitution.”⁴³⁷ There were three proposals from state ratifying conventions addressing who can be barred from possessing arms,⁴³⁸ but the court curiously considered only one proposal—the only proposal that could possibly be interpreted to support its holding.⁴³⁹ As for the two proposals that undermine its holding, the panel ignored them entirely.⁴⁴⁰ This is especially problematic considering the Supreme Court’s emphasis on founding era history. In *Bruen*, the Court declared that “not all history is created equal,” because “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.”⁴⁴¹ Founding era history is paramount.⁴⁴² Indeed, the purpose of the historical inquiry is to ascertain “the understandings of those who ratified [the Second Amendment].”⁴⁴³ Therefore, the

436. *Range v. Att’y Gen. U.S.*, 53 F.4th 262, 281, 284 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

437. *Id.* at 279.

438. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623–24 (Merrill Jensen et al. eds., 1976); 5 *id.* at 1453; 28 *id.* at 378.

439. See *Range*, 53 F.4th at 279–80.

440. See *id.* at 280.

441. *N.Y. State Rifle & Pistol Ass’n, v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (emphasis in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

442. See Brief of Amici Curiae Firearms Policy Coalition & FPC Action Foundation in Support of Appellants & Reversal, at 17, *Cooper v. Att’y Gen. U.S.*, No. 4:22-cv-00164-AW-MAF (11th Cir. Filed Feb. 6, 2023).

443. See *Bruen*, 142 S. Ct. at 2132.

Range panel should have addressed *all* proposals from state ratifying conventions, as this Part proceeds to do.

The *Range* panel considered only the proposal from Pennsylvania's "Dissent of the Minority."⁴⁴⁴ On December 12, 1787, Pennsylvania ratified the Constitution by a 46–23 vote.⁴⁴⁵ Of the twenty-three members who voted against ratification, twenty-one signed the Dissent of the Minority of the Convention, which summarized their arguments opposing the Constitution and proposed amendments to it.⁴⁴⁶ One such amendment read:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals. . . .⁴⁴⁷

The Dissent of the Minority was published on December 18, 1787—six days after Pennsylvania ratified the Constitution—and while it was not debated at Pennsylvania's convention, it quickly spread throughout the other states and influenced their ratification debates.⁴⁴⁸

According to the *Range* panel, "the Dissent of the Minority's proposal makes clear" that "members of the Founding generation viewed crimes committed—violent or not—as an independent ground for exclusion from the right to keep and bear

444. *Range v. Att'y Gen. U.S.*, 69 F.4th 96, 126 (3d Cir. 2023) (en banc).

445. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 438, at 600.

446. *Id.* The amendments had been submitted at the Convention on December 12 by leading antifederalist Robert Whitehill. But a majority of the Convention refused to consider them or even allow them to be included in the Convention Journals. *Id.* As for the Dissent of the Minority itself, Samuel Bryan (perhaps best known by his pseudonym "Centinel") claimed to be its author when he applied for a position in Thomas Jefferson's administration in 1807. *Id.*

447. *Id.* at 623–24.

448. *See id.* at 617. Pennsylvania became the second state to ratify the Constitution on December 12, 1787, trailing Delaware by five days. *Id.* at 11. The Pennsylvania debates before, during, and after its convention were followed across the country. *Id.* at 5.

arms.”⁴⁴⁹ After all, “the Dissent of the Minority’s use of the disjunctive ‘or’” proves that “[t]he dissenters distinguished between criminal convictions and dangerousness, and provided that *either* could support disarmament.”⁴⁵⁰ There is no evidence, however, suggesting “crimes committed” included nonviolent crimes; the only discussion of what conduct the proposal covered noted that it would apply to insurrectionists.⁴⁵¹ Since disarmament had traditionally been based on dangerousness to that point, it is more reasonable to read “crimes committed” as covering violent crimes, and “real danger of public injury” as providing a catchall that covers violent acts not covered by the criminal law — which at the time was not nearly as expansive as today’s laws.⁴⁵² To provide an especially heinous example, three men who repeatedly raped a young girl from the ages of six to nine (and sometimes violated her younger sister) confessed to the crime but avoided the death penalty because Massachusetts

449. *Range v. Att’y Gen.*, U.S., 53 F.4th 262, 280 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023) (internal alterations omitted). (internal alterations omitted).

450. *Id.*

451. The only mention of the arms proposal came from Pennsylvania reverend Nicholas Collin, a Swedish immigrant, writing under the pseudonym Foreign Spectator. Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 149–50 (1991) (citing Foreign Spectator, No. XI, FED. GAZETTE, Nov. 28, 1788). Criticizing a proposal that the privilege of habeas corpus should not be suspended for more than six months, he discussed Pennsylvania and New Hampshire’s arms proposals:

What is said on this matter, is a sufficient reply to the 12th amend[ment] of the New-Hampshire convention, *that congress shall never disarm any citizen, unless such as are or have been in actual rebellion . . .* The minority of Pennsylvania seems to have been desirous of limiting the federal power in these cases; but their conviction of its necessity appears by those very parts of the 3rd and 7th amendments framed in this view, to wit, *that no man be deprived of his liberty except by the law of the land, or the judgment of his peers—and that no law shall be passed for disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals.* The occasional suspension of the above privilege [of habeas corpus] becomes pro tempore the law of the land, and by virtue of it dangerous persons are secured. Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both.

Id. Nothing in Collins’s article suggests that peaceable persons could be disarmed under either proposal. *See id.*

452. *Kanter v. Barr*, 919 F.3d 437, 456 (7th Cir. 2019).

law in 1641 did not expressly proscribe such conduct.⁴⁵³ Indeed, contrary to the *Range* panel's assertion, the disjunctive "or" is precisely what allows "real danger of public injury" to serve as a catchall.⁴⁵⁴ If "and" was used instead of "or," the proposal would apply *only* to dangerous behavior that constituted a crime.

The Dissent of the Minority was published on December 18, 1787, the day New Jersey became the third state to ratify the Constitution.⁴⁵⁵ None of the ten states that would subsequently ratify the Constitution proposed an amendment allowing for the disarming of nonviolent persons.⁴⁵⁶ Therefore, either the arms provision was noninfluential or the Founders interpreted it differently than the *Range* panel.⁴⁵⁷ The latter seems most likely.

Prominent Virginia Federalist Alexander White responded to the Dissent by arguing that "the rights of bearing arms for defence, or for killing game" are "clearly out of the power of

453. 2 JOHN WINTHROP, *THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649*, at 45–48 (James Savage ed., Boston, Thomas B. Wait & Son 1826). By contrast, today, there are over 300,000 federal crimes—so many, in fact, that the Department of Justice is unable to count them. John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991); see also Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052702304319804576389601079728920> [<https://perma.cc/J78Y-4RME>] (describing the difficulty of counting federal criminal laws).

454. See *Range*, 53 F.4th at 280.

455. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 437, at 21, 49.

456. It would have been uncharacteristic of Pennsylvania's antifederalists (who formed the Minority) to propose a historically weak arms provision. During the debates over the Constitution's ratification, Pennsylvania's government ordered the publicly owned arms throughout the state to be collected for cleaning and repairs. The order caused an uproar, as many Pennsylvanians—especially antifederalists—interpreted the order as an attempt to prevent resistance to the new federal government and refused to comply. See *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787–1792*, at 176, 191, 194, 200–01, 221, 226, 251, 286, 298, 334, 340 (David E. Young ed., 2d ed. 2001) (reproducing letters and articles addressing the controversy).

457. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 438, at 617 (explaining how the Dissent "circulated throughout the country in newspaper, broadside, and pamphlet form"); *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (referring to "the *highly influential* minority proposal in Pennsylvania" (emphasis added)).

Congress.”⁴⁵⁸ He suggested that “[t]hese things seem to have been inserted among their [the Minority’s] objections, merely to induce the ignorant to believe that Congress would have a power over such objects and to infer from their being refused a place in the Constitution, their intention to exercise that power to the oppression of the people.”⁴⁵⁹ Surely White—who understood Congress as having no ability to regulate arms⁴⁶⁰—would have noted if his Antifederalist adversaries proposed the unprecedented measure of disarming nonviolent criminals, instead of protecting rights as they claimed.⁴⁶¹

Further evidence that the Dissent of the Minority was not understood as applying to nonviolent persons is Samuel Adams’s proposal at Massachusetts’s convention.⁴⁶² Adams proposed amendments on the day the convention was scheduled to vote on ratification.⁴⁶³ Because his last-minute proposals “alarmed” both federalists and antifederalists, Adams “perceived the mischief he had made [and] withdrew his motion.”⁴⁶⁴ Some antifederalists resubmitted his amendments, but recognizing that the commotion jeopardized ratification, even Adams voted against

458. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 404 (John P. Kaminski et al. eds., 1988).

459. *Id.*

460. White’s understanding echoed Thomas Jefferson’s proposal for Virginia’s 1776 constitution (which arrived too late for consideration): “No freeman shall be debarred the use of arms [within his own lands or tenements].” Third Draft by Jefferson (June 13, 1776), in Thomas Jefferson, 1 THE PAPERS OF THOMAS JEFFERSON 356, 363 (Julian Boyd et al eds., 1950) (brackets in Jefferson’s proposal). In his VIEW OF THE CONSTITUTION, William Rawle expressed the same understanding as White: “No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people.” RAWLE, *supra* note 152, at 122.

461. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 437, at 625 (the Dissent of the Minority asserting that the dissenters were “contending for the preservation of those invaluable rights you have thought proper to commit to our charge”).

462. Letter from Jeremy Belknap to Ebenezer Hazard (Feb. 10, 1788), in 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1583, 1583 (John P. Kaminski et al. eds. 2001). Belknap explained that the federalists were alarmed “because they saw the fatal Tendency of creating such apprehensions as immediately appeared in the [antifederalists], Some of whom said that such a Man as Mr A[dams] would not have guarded against these Evils if he had not seen a foundation for them in ye Constitution.” *Id.* at 1583.

463. *Id.*

464. *Id.* at 1584.

them.⁴⁶⁵ Nevertheless, Adams's maneuvering successfully created an understanding that amendments protecting individual rights would follow ratification.⁴⁶⁶ As the convention's president John Hancock declared, "I give my assent to the Constitution in full confidence that the amendments proposed will soon become a part of the system."⁴⁶⁷

Some believed that Adams's proposed amendments were based on the Pennsylvania Dissent of the Minority.⁴⁶⁸ According to Bostonian Jeremy Belknap, it is supposed that Adams had a copy of the Dissent of the Minority because his amendments "proposed to guard against" the "very things" the Minority "objected to."⁴⁶⁹ Adams's proposed arms amendment did not allow for the disarmament of nonviolent offenders.⁴⁷⁰ Instead, he proposed that "the said constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."⁴⁷¹ If Adams based his proposal on the Dissent of the Minority as Belknap believed, he must have read the "crimes committed" language as covering only *violent* crimes—after all, the law can be broken nonviolently.⁴⁷² On the other hand, if Adams did not base his proposal

465. *Id.*

466. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1475 (John P. Kaminski et al. eds., 2000).

467. *Id.* at 1476.

468. 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 820 (John P. Kaminski et al. eds., 1998).

469. *Id.*

470. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 466, at 1453.

471. *Id.* Adams's full proposal provided:

[T]hat the said Constitution be never construed to authorize Congress, to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.

Id.

472. *See, e.g.,* Folajtar v. Att'y Gen. U.S., 980 F.3d 897, 921 (3d Cir. 2020) (Bibas, J., dissenting). In dissent, Judge Bibas stated:

We often see little rhyme or reason in which crimes are labeled felonies. For instance, a radio talk show host can become a felon for uttering 'any obscene, indecent,

on the Dissent of the Minority *and* the Dissent intended to allow disarmament for any conceivable crime, then Adams disagreed.⁴⁷³

Adams's supporters understood the Second Amendment as protecting the same peaceable persons that Adams intended to protect.⁴⁷⁴ Once the Bill of Rights was proposed, two antifederalists wrote to the Independent Chronicle's editors suggesting that they republish Adams's proposals to demonstrate that they had been approved:

It may well be remembered that the following 'Amendments' to the new Constitution for these United States, were introduced to the Convention of this Commonwealth by its present Lieutenant Governour, that venerable patriot, SAMUEL ADAMS.—It was his misfortune to have been misconceived, at the time, and the proposition was accordingly withdrawn—lest the business of the convention, (the session of which was then drawing to a period) might be unexpectedly protracted. His enemies triumphed exceedingly, and affected to represent his proposal as not only an artful attempt to prevent the Constitution being adopted in this State, but as an unnecessary and improper alteration of a system, which did not admit of improvements. To the honour of this gentlemen's penetration, and of his just way of

or profane language by means of radio communication.' In New Jersey, opening a bottle of ketchup at the supermarket and putting it back on the shelf is a third-degree felony, punishable by up to five years' imprisonment. And in Pennsylvania, reading another person's email without permission is a third-degree felony, punishable by up to seven years."

Id. (citations omitted); see also Greenlee, *The Historical Justification*, *supra* note 13, at 269 ("[I]n West Virginia, someone who shoplifts three times in seven years, 'regardless of the value of the merchandise,' is [guilty of a felony]. In Utah, someone who twice operates a recording device in a movie theater is [guilty of a felony]. And in Florida, a man committed a felony when he released a dozen heart-shaped balloons in a romantic gesture.") (citations omitted).

473. See 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 465, at 1453.

474. *Id.* at 1453 n.1, 1453–54.

thinking on this important subject, every one of his intended alterations, but one [proscription of standing armies], have been already reported by the Committee of the House of Representatives in Congress, and most probably will be adopted by the Federal Legislature. In justice therefore to that *long tried* Republican, and his numerous friends; you, gentlemen, are requested to re-publish his intended alterations, in the same paper, that exhibits to the public, the Amendments which the committee have adopted, in order that they may be compared together.⁴⁷⁵

The final proposal expressly addressing who can be excluded from the right to keep and bear arms came from New Hampshire.⁴⁷⁶ On June 21, 1788, New Hampshire became the ninth and final state necessary to ratify the Constitution, making it the law of the land.⁴⁷⁷ New Hampshire's Form of Ratification included twelve proposed amendments.⁴⁷⁸ It stated that "these amendments were adopted in order to 'remove the fears and quiet the apprehensions of many of the good People of this State, and more effectually guard against an undue Administration of the federal Government.'"⁴⁷⁹ The twelfth amendment proposed by New Hampshire was the only such amendment that received approval from a majority of the convention.⁴⁸⁰ It provided that "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion."⁴⁸¹

New Hampshire's proposal is especially relevant in light of the *Range* panel's interpretation of the history.⁴⁸² The panel

475. See 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 318, at 378.

476. See *id.* at 378.

477. *Id.* at 380, 403.

478. *Id.* at 367.

479. *Id.*

480. *Id.* at 376–78.

481. *Id.* at 378.

482. *Range v. Att'y Gen. U.S.*, 53 F.4th 262, 283 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023).

placed great emphasis on nonthreatening people who were incidentally covered by the overbroad scope of dangerousness laws and used those individuals to define the Second Amendment's scope.⁴⁸³ New Hampshire guarded against such abuses by producing a narrow rule that prevented peaceable persons from being unjustly disarmed.⁴⁸⁴ The *Range* panel, by contrast, eliminated such people from the scope of the right altogether.⁴⁸⁵ As the only proposal that received approval by a convention majority, New Hampshire's proposal is critical to understanding the original understanding of the right to keep and bear arms.⁴⁸⁶

CONCLUSION

In 17th-century England, as well as 17th- and 18th-century America, dangerousness was always the touchstone of disarmament laws. In England, even the tyrannical Charles I and Charles II felt compelled to offer danger as a justification for disarmament rather than the divine right of kings, which they firmly believed in. In colonial- and founding-era America, although most restrictions on arms possession were discriminatory, every restriction was designed to disarm people who were perceived as posing a danger to the community. Conversely, peaceable persons—including nonviolent criminals and other irresponsible persons—were always permitted, and often required, to keep and bear arms. This tradition was reflected during the debates over the ratification of the U.S. Constitution, where America's Founders made their understanding clear that only dangerous persons could be disarmed. Thus, to be consistent with the historical tradition of firearm regulation as required by *Bruen*, a modern-day disarmament law may apply only to dangerous persons. By contrast, courts that restrict the

483. *Id.*

484. See 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 318, at 378.

485. See *Range*, 53 F.4th at 284.

486. See 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 318, at 376–78.

Second Amendment's scope further—such as the *Range* panel, by excluding anyone whose “actions evince a disrespect for the rule of law”⁴⁸⁷—unjustly deny countless Americans of a fundamental right.

487. *Range*, 53 F.4th at 282.